

Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce:

An Information Kit

Edited by Lucy Carroll and Harsh Kapoor

Published by Women Living Under Muslim Laws in 1996

In March 1990 WLUML had published a document in French titled: "Le kit d'information sur le droit de délégation du droit au divorce par contrat ou *Talaq ba Tafouiz*, and this present volume is based on that original idea.

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Foreword

In March 1990 the network Women Living Under Muslim Laws (WLUML) published a small booklet entitled: 'Information Kit on the delegated right to divorce / *talaq ba Tafouiz*'. For all these years we have felt the need to expand this small publication into a full fledged volume, in order to inform women all over Muslim countries and communities of the existence of this option.

In many of our countries, Family codes and Personal Status laws are discriminatory towards women. These laws are in most instances in contradiction with Constitutions which guarantee equal rights to all citizens. In several countries, women have taken legal action to force the States to clarify such contradictions.

According to these discriminatory laws, women are, amongst other things, deprived of the right to initiate divorce; this exposes women to repudiation, unilateral extra judicial divorce by the husband, legal insecurity and total absence of control over their matrimonial situation. They have had to fight for their autonomy and have developed various strategies for doing so - from a secular stand for women's human rights and abolition of all discriminatory laws against women, to reform of existing Muslim Personal Laws.

The network WLUML does not give preference to one strategy above the others. We try to circulate information on all forms of struggle that women are waging to enhance their rights. We are fully aware that the choice of a strategy does not exclusively, and often not even primarily, depend on ideological choices, but rather on place, time and circumstances. Political situation, local priorities, stages of women's organisations, all determine what is possible and suitable at a given moment in a given place. Women locally are best placed to evaluate the situation and determine what is the best strategy for themselves. We want to stress that different strategies are not necessarily mutually exclusive, and short term ameliorations can be sought through some strategies, while long term profound changes are still demanded. In this context, we feel it is very important for women to know of the Islamic practice of delegation of the right of divorce (*talaq*) or *Talaq-i-Tafwid*.

Marie-Aimée Helie-Lucas

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Introduction

Muslim women frequently face two distinct difficulties in their on-going struggle to achieve what the Lahore High Court referred to more than six decades ago as “treatment such as emancipated Indian women [sic; read ‘women in general’] naturally consider they have a right to insist upon”¹ : -- (i) lack of information concerning the rights which Muslim law confers upon them; and/or (ii) corruption of the original message, both by accretions derived from less sacred sources and by interpretations of the Quran and the law which tend to emphasize male privileges at the cost of female rights.

With the objective of making a small contribution toward countering the first of these difficulties this publication primarily focuses upon a procedure recognized by Islam -- *talaq-i-tafwid* or the contractual delegation to the wife of the right to pronounce talaq on behalf of her husband in regard to her own marriage. Exploitation of this strategy can effectively equalize the access of the spouses to divorce.

Talaq-i-tafwid has a long and well documented history in South Asia, although even there the practice is largely confined to better placed families and is not as widely appreciated by women (and men) in general as it perhaps should be.

The South Asian experience may suggest a useful strategy capable of being adapted by women elsewhere in the Muslim world.

Secondly, in a special “Stop Press” section of this publication there is reproduced a dramatic 1995 decision of the Dhaka High Court on *mataa* and maintenance for the divorced woman. This decision from Bangladesh illustrates a situation where reinterpretation of a Quranic verse (II:241) arguably secured to women the protection intended to be conferred upon them fifteen centuries ago -- protection which had (particularly in Hanafi law) been obscured and negated by a reading which, intentionally or otherwise, sacrificed female security to male ease and convenience.

Mst. Sadiqa Begum v. Ata Ullah, All India Reporter 1933 Lahore 885.

Since the divorced woman will often face economic destitution, reasonable provision (*mataa*) for the post-*iddah* period is necessary, not only for the woman talaq-ed against her wishes by her husband, but for the exercise of *talaq-i-tafwid* (whereby the woman talaqs herself on behalf of her husband) to constitute a viable option in many circumstances.

Talaq-i-Tafwid in the Quran

Sūrah 33: <i>Al Aḥzāb</i>	سُورَةُ الْأَحْزَابِ
<p>28. ﴿٢٨﴾ Prophet! say To thy Consorts: "If it be that ye desire The life of this world, And its glitter,—then come! I will provide for your Enjoyment and set you free In a handsome manner."</p>	<p>﴿٢٨﴾ يَا أَيُّهَا النَّبِيُّ قُلْ لِّأَزْوَاجِكَ إِنْ كُنْتُمْ تُحِبُّونَ الْحَيَاةَ الدُّنْيَا فَإِنَّي مُؤْتِيهَا بِمَا تَرْضَوْنَ أَمْتِعْكُمْ وَأَسْرِخْكُمْ سَرَاحًا جَمِيلًا</p>
<p>29. But if ye seek Allah And His Messenger, and The Home of the Hereafter, Verily Allah has prepared For the well-doers amongst you A great reward.</p>	<p>﴿٢٩﴾ وَلَئِنْ كُنْتُمْ تُحِبُّونَ اللَّهَ وَرَسُولَهُ وَالْأَرْضَ وَالْآخِرَةَ فَإِنَّ اللَّهَ أَعَدَّ لِ الْمُحْسِنِينَ مِنْكُمْ أَجْرًا عَظِيمًا</p>

[Q-33:28-29]

[Yusuf Ali's translation of the Quran.]

"The doctrine of the delegation of the power of divorce is based on an incident mentioned in the Quran wherein the Prophet (peace be upon him) told his wives that they were at liberty to live with him or to get separated from him as they choose. Thus it is stated... [as above].

"It is explained by the Muslim jurists that the Prophet (peace be on him) had in obedience to the above injunction of the Quran, empowered his wives to choose either him or a separation, that is, they might either get their marriages dissolved or prefer to choose their continuation. Aishah has explained that [']We (the wives) chose the Prophet (peace be on him), that is, we preferred the continuation of the marriages, and so we were not divorced and the marriages were not dissolved.['] It is inferred from this Tradition that a husband can lawfully delegate to his wife the power to dissolve the marriage if she so wants."

K.N. Ahmed, *The Muslim Law of Divorce* (Islamabad: Islamic Research Institute, 1972), pp. 184-185:

Talaq-i-Tafwid in Texts and Textbooks

Talaq-i-Tafwid in Texts and Textbooks

"It is very desirable that greater attention be paid to the drawing up of the marriage contract, than the subject has, save in exceptional circumstances, so far received... Every contract of marriage ought to provide for matters likely to arise -- keeping . . . in mind . . . the special circumstances and requirements of the parties: in particular (i) the time and place when and where the parties shall reside together; (ii) the husband's control over the wife's movements; (iii) the parents and relations visiting the wife; (iv) maintenance; (v) the husband's marrying another wife and the effects of a subsequent marriage upon the earlier marriage; (vi) the rights of the (first) wife to obtain or bring about a dissolution of her marriage; (vii) *mahr*: whether any part shall become exigible on the husband marrying another wife; (viii) if she has any property of her own, it is desirable to make special arrangements; (ix) the religion, education, and custody of the children; (x) arrangements ensuring kind treatment; provisions for special allowances in cases of illtreatment; (xi) stipulations of maintenance for life even after divorce; (xii) should the wife be competent to remit or reduce the *mahr* without the consent of specified persons, e.g. her (named) relatives? (xiii) it should be clearly stated what special effects will follow on a breach of each stipulation; (xiv) provisions for appointing arbitrators or umpires or mediators, and for . . . [delegated right of talaq or suspended talaq on failure of reconciliation efforts]; (xv) desertion, cruelty, adultery, failure of affection, existence of previous (concealed) wife, and similar contingencies may be provided for."

Faiz Badruddin Tyabji, *Muslim Law: The Personal Law of Muslims in India and Pakistan* (Bombay: M.N. Tripathi, 1968), p. 65.

"The husband in Muhammadan law has the power to delegate his own right of pronouncing divorce to some third person or to the wife herself..."

(Continued on next page)

"This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court and is now beginning to be fairly common in India."

A.A.A. Fyzee, *Outlines of Muhammadan Law* (Delhi: Oxford University Press, 1974), pp. 158-159.

"In the reported cases the stipulations entitling the wife to divorce herself have been conditional mostly on the husband taking a second wife. Such a conditional option is obviously different from an agreement prohibiting the husband to marry another wife, which latter would, in accordance, at any rate with the Sharaiul Islam [Ithna Ashari text], be void, in which such a prohibition is expressly stated to be 'contrary to the (Shiite) law.'"

Faiz Badruddin Tyabji, *Muslim Law: The Personal Law of Muslims in India and Pakistan* (Bombay: M.N. Tripathi, 1968), p. 157.

"Delegated divorce, *talaq-i-tafwiz*. This is a curious survival of the old property rights of the husband over his wife. He may appoint an attorney to divorce her on his behalf just as he might appoint an attorney to deal with his property. At a date sufficiently early for the practice to be common to all schools this fact was seized upon by the lawyers as a means of protecting the wife. The husband on marriage was induced to constitute the wife or some one who would protect her interests (e.g. her father or brother) his irrevocable attorney to exercise the marital right of repudiation in certain events, e.g. on his entering into a second marriage or keeping a concubine. Khalil [Maliki jurist] even gives an instance where the wife is given the right on her husband's second marriage to repudiate at her option herself or the second wife."

Seymour Vesey-Fitzgerald, *Muhammadan Law: An Abridgement According to its Various Schools* (Oxford: Oxford University Press, 1931), p. 77.

"[A] stipulation favourable to the wife in a marriage contract which the husband can dissolve at will, but by which the wife is bound down for all time, may be considered to be clothed with something like sancity."

Faiz Badruddin Tyabji, *Muslim Law: The Personal Law of Muslims in India and Pakistan* (Bombay: M.N. Tripathi, 1968), p. 62.

"And if a man says to his wife, 'The authority to divorce thyself is in thy hand as often as thou pleasest:' the authority shall be in her hands to divorce herself as often as she pleases until the number three is completed."

Imam Fakhruddin Hassan Bin Mansur al-Uzjandi al Farghani, *Fatawa-i-Kazee Khan* (trans. by Moulvi Mahomed Yusoof & Moulvi Wilayat Hussain; reprinted Law Publishing Co., Lahore, 1977), vol. II, p. 258.

"A person says (to another) 'Give thy daughter to me in marriage, on the condition that the right of repudiation will remain in thy hand.' [And the girl's father accepts.] The right will not vest in the father, because the power is delegated before the nikah."

Muhammad Ala-ud-Din Haskafi, *Durr-ul-Mukhtar* (trans. by B.M. Dayal; 1913 edn. reprinted Law Publishing Co. Lahore, n.d.), p. 11.

"Delegation of divorce is the assignment of a power . . . ; it is not agency, and therefore the husband can not retract from it; so much so that if he gives her . . . [such authority], and then swears that he will not repudiate her, but she divorces herself, according to the most approved opinion, the husband shall not be treated as guilty of breaking his oath."

Muhammad Ala-ud-Din Haskafi, *Durr-ul-Mukhtar* (trans. by B.M. Dayal; 1913 edn. reprinted Law Publishing Co. Lahore, n.d.), p. 172

"If 'on her business being placed in her hand' a wife were to say 'I divorced myself once' or 'I chose myself with one divorce,' one absolute [irrevocable] divorce will take effect for the reason mentioned above, viz ([when the delegation has been made by means of this ambiguous expression] in determining what kind of divorce is effected) regard is had to the terms used by the husband in delegating the power and not to terms used by the wife in effecting the divorce."

Muhammad Ala-ud-Din Haskafi, *Durr-ul-Mukhtar* (trans. by B.M. Dayal; 1913 edn. reprinted Law Publishing Co. Lahore, n.d.), p. 182.

"Every word which may properly be used by husband for effecting divorce, can be rightly used by wife in reply... Thus if a wife (in whose hand her business is placed) says 'I am divorced' or 'I divorced myself' it will take effect, contrary to the effect of her saying 'I divorced thee' (whereby it will not take effect) because it is a wife that can be divorced and not a husband."

Muhammad Ala-ud-Din Haskafi, *Durr-ul-Mukhtar* (trans. by B.M. Dayal; 1913 edn. reprinted Law Publishing Co. Lahore, n.d.), p. 181.

"...A man, intending to be absent from his wife . . . , is asked by her for maintenance, whereupon he says... If the words were 'if maintenance does not reach you in ten days your business is in your hands; and she is rebellious by going to her father's house without his permission within the time, repudiation [pronounced by the wife] does not take effect though he should fail to send her the maintenance [because a disobedient wife is not entitled to maintenance; a simple promise to maintain the wife only encompasses maintenance which she is legally entitled to claim].

"When a man has put his wife's business into her hand to repudiate herself if he should strike her without a fault, and he beats her, whereupon a dispute arises as to the fact of her having committed any fault; upon this point his words is preferred. But suppose she has gone out without his permission and he beats her, does that put the business into her hand? It has been said that it does not if he has paid up so much of her dower as is prompt, but if he has not done so, she may go to her father's house without his permission [because the husband who has not paid his wife's prompt *mahr* has no authority to restrain her movements] and refuse herself to his embraces, and her going out is therefore no fault..."

Neil B.E. Baillie, *Digest of Moohummudan Law*, vol. I, (2nd edn., London, 1875), p. 252 (translation and paraphrase of *Fatawa-i-Alamgiri*).

"This one-sided liberty of divorce, as well as the one-sided permission of polygamy, . . . are the natural results of complete freedom of contract, and the rigid enforcement of contracts between parties so unequally matched, as were men and women... But where the woman is by any chance in a position to make a better bargain for herself, the same principle of free contract tells in her favour. She, or those negotiating on her behalf, can make it an express term in the marriage contract that the husband shall not take a second wife, or that, if he does, she shall have the option of divorce, or even that he shall divorce her at any time on her demand. And, though an absolute stipulation that she shall never be divorced will be void in law, she can make herself practically secure by stipulating for a dower so large, that it will be inconvenient or impossible for him to pay it, on the understanding that it will not be exacted unless he divorces her, or takes a second wife, or otherwise misbehaves."

Roland Knyvet Wilson, *An Introduction to the Study of Anglo-Muhammadan Law* (London: W. Thacker, 1894), pp. 138-139.

Talaq-i-Tafwid in South Asia

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
سَنَدُ زِيَادَاتِ

آبائے

(۱) یہ کہ اس نکاح کے بعد طلاق کا حق مفوض زوجہ کو حاصل رہے گا اور زوج اس کا اقرار کرتا ہے کہ وہ اس تفویض حق کو کبھی اور کسی بھی صورت میں منسوخ نہ کرے گا۔ زوج بھی اس حق کے استعمال میں اس دستور کی پابند ہوگی جو قرآن حکیم نے سورۃ نسا (پارہ ۵ رکوع ۴ آیت ۲۵) میں بیان کیا ہے اور جو درج ذیل ہے:-
وَأَنذِرْهُمْ أَنَّهُمْ لَا يَسْمِعُونَ أَهْلَهُمْ وَلَا يَتْلُونَ آيَاتِ اللَّهِ وَلَا يَذْكُرُونَ أُمَّةً وَلَا نَبِيًّا وَلَا يَتَّقُونَ
وَأَنذِرْهُمْ أَنَّهُمْ لَا يَسْمِعُونَ أَهْلَهُمْ وَلَا يَتْلُونَ آيَاتِ اللَّهِ وَلَا يَذْكُرُونَ أُمَّةً وَلَا نَبِيًّا وَلَا يَتَّقُونَ
وَأَنذِرْهُمْ أَنَّهُمْ لَا يَسْمِعُونَ أَهْلَهُمْ وَلَا يَتْلُونَ آيَاتِ اللَّهِ وَلَا يَذْكُرُونَ أُمَّةً وَلَا نَبِيًّا وَلَا يَتَّقُونَ

(۲) آنکرم تم ہر سال خیریت سے ہزار روپے ہوگی جس کا نصف یعنی ستر ہزار پانچ سو روپے فی سال (محل) اور ترقیہ نصف محل ہوں گے۔

(۳) یہ کہ اس عقد نکاح کے قائم رہتے ہوئے اور اپنی اس زودہ کی موجودگی میں شوہر نہ کہ کوئی دوسری شادی نہیں کرے گا۔

- ۱- تاریخ - دن - وقت ۲۸ ربیع الثانی ۱۹۴۳ء بروز جمعہ ۱۰ صبح ۱۰ بجے شام -
۲- مقام نکاح - آفتاب نین مل کوٹہ
۳- دولہا کا نام اور پرانیہ علیہ السلام دودھ جڑوہ علیہ الرحمہ سکن راولپور
۴- دولہن کا نام اور پرانیہ شہباز علیہ السلام سکن راولپور
۵- نام و کسیل سہ پست خایہ میرزا ناصر علیہ السلام سکن راولپور
۶- نام گواہ ۱- سہ پست خایہ میرزا ناصر علیہ السلام سکن راولپور
۷- نام گواہ ۲- سہ پست خایہ میرزا ناصر علیہ السلام سکن راولپور

دستخط شوہر .. عبدالحلیم خٹک

دستخط تاضی

دستخط زورم شیراز طلعت محمود



English Text of the Sheherzad's *Nikahnama*¹

IT IS CERTIFIED that marriage of the Spouses below named was duly solemnized under the law of Islam by proposal and acceptance at a public gathering as enjoined by the Prophet on the Conditions hereunder written:

1. THAT after marriage a delegated right of divorce (haq talaq ba tafweez) shall vest in the Wife and the Husband undertakes never and in no circumstances to revoke this right. Before exercising this right the Wife shall be bound by the provisions of the Holy Quran, IV-35, namely: "And if ye fear a breach between man and wife, appoint an arbiter from his folk and one from her folk; if they incline to reconciliation God will unite them. He is aware of all things."

It is further stipulated that the Husband's right of talaq shall also be subject to the same condition.

2. THAT the amount of dower (mahr) has been fixed at Rs. 35,000, whereof half is payable immediately on demand and half is deferred.

3. THAT during this marriage in the Wife's lifetime the Husband will not contract any other marriage.

Date: 26th April 1973, Time 6 p.m.

Place: Aftab Manzil, Aligarh, India.

Name of Groom: Abdul Alim Khan s/o Late Abdul Aziz Khan.

Name of Bride: Scheherazade Tilat Masood d/o Syed Anwar Masood, Aftab Manzil, Aligarh.

Name of Attorney: Khwaja Saeeduddin s/o Khwaja Maslahuddin, Frash Khana, Delhi.

Name of Witness 1: Shahzada Aman Ahmed Khan, Panchshil Park, New Delhi.

Name of Witness 2: Colonel Sahebzada Mohammed Yunus Khan s/o Late Sahebzada Abdus Samad Khan.

Signature of Husband: Sd./ Abdul Alim Khan.

Signature of Wife: Ds./Scheherazade Tilat Masood.

Seal & Signature of the Qazi of Aligarh.

1. Marriage contract of great-great-granddaughter of Sir Syed Ahmed Khan.

Danial Latifi on Sheherzad's Marriage Contract¹

The declaration by the political leadership of the country to make no change in Muslim Personal Law pending initiative from the Muslims themselves vests prime importance in developments within the community. In this context attention may be drawn to the *Sanad-e-Nikah* (marriage certificate) issued by the Chief Kazi of Aligarh of the recent marriage there of Khan Abdul Alim Khan with Scheherazade, great-great-granddaughter of Sir Syed Ahmad Khan, whose family has been traditionally a trend-setter among the enlightened Muslims of this country.

It is well known that Muslim marriage is a civil contract and therefore it is permissible to stipulate therein terms not inconsistent with Muslim law. When an illegal condition is annexed to the marriage, the contract is not cancelled by it, but the condition itself is void, leaving the marriage unaffected. So says the *Fatawa-e-Alamgiri* (Baillie's *Digest of Moohummudan Law*, 2nd Edition, Volume I page 19.).

Writing is not essential to a marriage contract but the Quran itself enjoins that all transactions should be reduced to writing because so to do is "juster in the sight of God, better as evidence and conducive to prevent disputes" (Quran Chapter II verse 282). Written marriage contracts (*Nikah Namas*, *Kabin Namas* and *Sanad-a-Nikah*) have been in vogue among sections of the Muslim upper classes in India since Mughal times. The practice of making such writings has become more general since the movement launched by the late Sharifa Hamid Ali four decades ago².

1. (Reprinted from The Hindustan Times Weekly, New Delhi, Sunday, September 23, 1973.)

2. "Agreement for Dissolution of Marriage", in: A.A.A. Fyzee, *Outlines of Muhammadan Law* (Delhi: Oxford University Press, 4th edn., 1974; 1993 reprint also available), Appendix C, pp. 474-476.) See pp. 95 to 98 in this volume.

The conventional marriage contract in vogue ordinarily does not more than mention the essentials, namely, names of parties, witnesses and amount of Mahr. No doubt this is important because "*Mahr* (Dower) is one of the fundamental conditions of every marriage contract. It is a capital sum provided by the husband and placed at the disposal of the wife which constitutes for her benefit a guarantee of independence during marriage and a security for the future in case of divorce or widowhood." Clavel "*Droit Musulman*" (Paris) 1895 Volume I p. 49.

However, although essential, the Mahr need not be the only stipulation in a marriage contract.

Since Mughal times a provision known as *haq talaq ba tafweez* or *tafweez-e-talaq* has been recognized by Muslim law. This means a delegated right of divorce vested in the wife which the wife can exercise herself to end the marriage without reference to the husband's wishes. To a large extent, in substance, it places the wife on an equality with the husband in the matter of talaq. Thus either party can at will end an unwanted union. A whole chapter is devoted to this subject in the *Fatawa-e-Alamgiri* prepared in the time of Aurangzeb and promulgated by Imperial authority. Such a term has been traditional in some aristocratic Muslim families.

Editorial Comment:

It was undoubtedly the newspaper report (reproduced above) containing a translation of the marriage contract of Sir Syed's descendant which led an Indian women to refer in her book on Muslim women to the action of "an enterprising lady" who in 1973 drew up her own marriage contract, the terms of which authorized her to dissolve the marriage by *talaq-i-tafwid* if her husband married another wife¹. The author (herself a Muslim woman) regarded such an idea as a novel innovation, and doubted the legal validity of such a stipulation: "the fact of polygamy is no ground for a Muslim divorce and it is doubtful that such a divorce can be considered legal especially if the husband is determined to dispute it."²

In an attempt to ascertain the legal position, the author consulted an (anonymous) lawyer, who reportedly discussed the question with "certain [anonymous] eminent judges." The (anonymous) latter assured the (anonymous) former that were a "test case" to come before them, they would uphold a Muslim marriage contract containing a delegation of the authority to pronounce *talaq* should the husband contract an additional (polygamous) marriage. "However," the author continued,

he [the anonymous lawyer] had to admit that there was no guarantee of a favourable judgment. Judges did change and they did have individual views on different subjects and whether such a case would be decided in one way or another was certainly not easy to predict³.

Given that the extant South Asian case-law concerning the validity and effectiveness of anti-polygamy stipulations enforced by *tafwid-i-*

1 Jamila Brijbhushan, *Muslim Women in Purdah and Out of It* (New Delhi: Vikas, 1980). Assuming that, as clearly appears to be the case, it was the contract in the newspaper article above to which reference was made, it must be pointed out that the right to pronounce *talaq* conferred upon the bride was quite unrestricted; it did not arise merely in the event that her husband should marry another wife.

2 Ibid., p. 64.

3 Ibid., pp. 64-65.

talaq goes back well over a century, there was certainly no occasion for a "test case" as late as 1980! One hopes that if the anonymous judges -- who, however eminent, were certainly not experts on Muslim law as received in their own country and applied by the very Courts on whose benches they sat -- were to find themselves faced with a case involving *talaq-i-tafwid*, they would have the benefit of counsel more qualified to discuss the law and to bring to their attention crucially important precedents than was the (anonymous) lawyer consulted by the author.

The immediate point is again the need for publicity reaching not only Muslim women in general, but even educated Muslim women in South Asia.



EXTRAORDINARY
PUBLISHED BY AUTHORITY

Karachi, Wednesday, June 20, 1956

Government of Pakistan

Ministry of Law

Notification

Karachi, the 11th June, 1956

No. F. 9 (4) 56 - Leg - The Report of the Commission on Marriage and Family Laws, appointed by the Government of Pakistan, Ministry of Law Resolution No F. 17 (24) 55- Leg. dated the 4th August 1955, is hereby published for general information. A note of dissent by Maulana Ehtishamul-Haq will be published as a supplement as soon as it is received:

[Extracts from:]

Report of the Commission on Marriage and Family Laws¹

Introduction

On the 4 th of August, 1955, the Government of Pakistan announced the formation of a seven member Commission on Marriage and Family Laws, consisting of the following persons:

¹ The Report takes up the entire issue (pp. 1197-1232); extracts are from pp. 1197-1199 and 1210.

- | | |
|--------------------------------|------------------|
| 1. Dr. Khalifa Shuja-ud-din | President |
| 2. Dr. Khalifa Abdul Hakim | Member-Secretary |
| 3. Maulana Ehtishamul-Haq | |
| 4. Mr. Enayat-ur-Rehman. | |
| 5. Begum Shah Nawaz | |
| 6. Begum Anwar G. Ahmad | |
| 7. Begum Shamsunnihar Mahmood. | |

The terms of reference were as follows:

Do the existing laws governing marriage, divorce, maintenance and other ancillary matters among Muslims require modification in order to give women their proper place in society according to the fundamentals of Islam? The Commission was asked to report on the proper registration of marriages and divorces, the right to divorce exercisable by either partner through a court or by other judicial means, maintenance and the establishment of Special Courts to deal expeditiously with cases affecting women's rights.

The first meeting of the Commission was held on the 5th October, 1955. This meeting dealt mainly with the procedure to be followed. Its principal recommendation was the preparation of a Questionnaire, by the Secretary, to be framed in the light of the terms of reference. Shortly after this meeting the President of the Commission Dr. Khalifa Shuja-ud-din unfortunately died suddenly of heart failure, and the Commission was stranded for lack of a President. The Ministry of Law took some time to select a President of wide legal and judicial experience. The Commission was happy to learn that the former Chief Justice of Pakistan, Mian Abdul Rashid, had been approached and willingly consented to act as the President. His appointment was formally announced on the 27th October, 1955, and the second meeting of the Commission was held on the 30th November. The new President was of the opinion that the framing of a comprehensive Questionnaire was a vital initial step and that this heavy responsibility could not be placed on the shoulders of the Secretary only. He placed his view before the members of the Commission and they agreed to frame the Questionnaire after a thorough discussion. The Questionnaire, as it emerged from the deliberations of the Commission, was printed both in Urdu and English, originally three thousand copies were printed and distributed. The dissemination of the Questionnaire in East Pakistan and the translation into Bengali were entrusted to Begum Shamsunnibar Mahmood. It was published in the Press, and the public was urged to realize the importance of the issues and assist the Commission with their knowledge and experience. The final date for the receipt of the answers was fixed as the 15th of January, 1956, which provided a period of more than a month to think out the problems at ease. The initial response, however, was unexpectedly

disappointing. The public then demanded a still wider circulation of the Questionnaire and the extension of the date fixed for answers. In response to this demand thousands of additional copies were printed and sent to any person who demanded them. The final date for answers was extended till the 15th February. After this the answers began to pour in by dozens every day and many persons whose opinion carries great weight answered the questions in detail, giving reasons and authorities. We are grateful to all the persons and organisations that have taken the trouble to study and answer our Questionnaire. The answers given are various and difficult to classify or tabulate, but a careful investigation has made it possible to assess the general trends. The members of the Commission have exercised their individual judgement, but have given careful consideration to the opinions of learned, liberal and enlightened persons.

The origin of the Commission

We shall state briefly the reasons for the formation of this Commission. It is an indisputable article of Muslim creed professed by every Muslim that so far as the basic principles and fundamental attitudes are concerned, Islamic teaching is comprehensive and all-embracing and Islamic law either actually derives or should derive its principles and sanctions from divine authority as revealed in the Holy Qur'an or clear injunctions based on the Sunnah. It is this belief which has been affirmed in the Objectives Resolution and the Constitution of Pakistan. It might be objected that if a well defined code about Marriage and Family Laws already existed, where was the necessity of appointing a Commission for the purposes of any revision or modification? This question can be easily answered both by reference to the history of Muslim jurisprudence and the present-day circumstances. So far as the Holy Book is concerned, the laws and injunctions promulgated therein deal mostly with basic principles and vital problems and consist of answers to the questions that arose while the Book was being revealed. The entire set of injunctions in the Holy Qur'an covers only a few pages. It was the privilege of the Holy Prophet to explain, clarify, amplify and adapt the basic principles to the changing circumstances and the occasions that arose during his life-time. His precepts, his example and his interpretation or amplification constitute what is called Sunnah. As nobody can comprehend the infinite variety of human relations for all occasions and for all epochs, the Prophet of Islam left a very large sphere free for legislative enactments and judicial decisions even for his contemporaries who had the Holy Qur'an and the Sunnah before their eyes. This is the principle of Ijtihad or interpretative intelligence working within the broad frame-work of the Qur'an and the Sunnah.

Chapter on Nikah

Questions Nos 6 and 7.

6. Do you agree that any condition may be inserted in the marriage contract which is not repugnant to the basic principles of Islam and morality, and that all such conditions shall be enforceable in a law-court?

7. Do you agree that it should be enacted that it would be lawful to provide in the marriage contract that the woman will have the right to pronounce divorce exactly in the same manner as the man?

There is a consensus of opinion that marriage under Muslim Law is a civil contract, and any conditions which are not repugnant to the basic principles of Islam and morality can be inserted in the Nikah-nama and that all such conditions can be made enforceable in a court of law. The Commission is also of the opinion that it should be enacted that it is lawful to provide in the marriage contract that the woman shall have the same right to pronounce divorce if the right to do so has been delegated to her in the marriage contract as a man. The doctrine of Tafweez, conditional as well as absolute, has been recognised as valid in Islamic law from the very beginning.

Question No 8.

8. What steps should be taken to prevent the sale of daughters in certain classes, and the receipt of money by the parents or guardians?

The sale of daughters by parent or guardians is condemned by all persons who have answered the Questionnaire. A vast majority of them have stated that it should be made a cognisable offence and the parents and guardians should be liable to imprisonment ranging up to 5 years. The Commission realize that it is very difficult to obtain proof of such sales, but if such a transaction can be established it should be treated as a criminal offence and visited with a heavy penalty. It often comes to the notice of the law courts that some girl has been married repeatedly by the parents to various individuals after extracting large sums of money from them one after the other; in such cases the parents deserve to be heavily penalized.

Note to Question No 6.

The Holy Prophet emphasized the fact that of all the transactions into which persons enter and of all the conditions accepted by a person solemnly, the conditions relating to marriage are the most deserving of being fulfilled.

احق الشروط التي تونوا به ما استحللتم به الفروج - (بخاري)

The conditions most deserving of being fulfilled are those that are attached to the fact and act of marriage.

Note to Question No 7.

The right of pronouncement of divorce by the wife granted to her by the husband in the marriage contract or after the marriage at any time is technically called Tafweez and is accepted as lawful by all Muslim jurists. Tafweez may be granted and exercised by the wife on certain conditions, but if no conditions are mentioned it is taken as an unconditional right.

وہی "لحافی نفسک متى شئت" لا بتتید بالمعہر (شرح و تالیہ)

If the husband at the time of marriage or at any time during the married life has said to his wife that you can divorce yourself whenever you like, this right of the wife becomes absolute for the whole of her life.

Editorial Comment:

The recommendation of the Pakistani Commission that the right to provide in the marriage contract that the wife would have a right to pronounce *talaq* equivalent to that of the husband should be recognized by statute was largely superfluous -- unless the intention were to remove any ambiguity concerning a completely blanket delegation. Contracts containing *talaq-i-tafwid* clauses have a long history in the Subcontinent and judicial treatment has always been favorable. Therefore, the fact that this recommendation did not find a place in the Muslim Family Laws Ordinance promulgated in 1961 -- which implemented several of the Commission's recommendations and is presently applicable in Pakistan and Bangladesh -- is not particularly significant.

On the other hand, the Ordinance made registration of all Muslim marriages compulsory. The Rules framed under the Ordinance prescribed the form that must be filled out at the time a marriage is registered. This form not only asks for information on "Special conditions [i.e. stipulations], if any," but also specifically asks, "Whether the husband has delegated the power of divorce to the wife; if so, under what conditions?" The latter phrase should not be taken as implying that the delegation must be circumscribed by conditions restricting the wife's right to pronounce *talaq* to narrowly defined circumstances (e.g. remarriage of husband).

Assuming that intending spouses and/or their families actually read the marriage registration form, this provision will serve the purpose of at least bringing to their attention the fact that such a delegation is possible.

Copies of the official marriage registration forms, which must be completed to register a Muslim marriage in Pakistan or Bangladesh, are reproduced on pages 48-52 and 108-111 below. Failure to register a marriage invites criminal sanctions and renders proof of the marriage difficult.

The Maulana's Dissent

"It may be said that all the decisions of the Commission on Marriage and Family Laws were unanimous, except that Maulana Ehtishamul Haq Sahib dissented from the opinions of the remaining members of the Commission on three or four points. The opinion of the Maulana is embodied in his note of dissent which is appended to this report."

(Report of Commission on Marriage and Family Laws, p. 1207.)

Extracts from English Version of the "Note of Dissent"¹ by Maulana Ehtisham-ul-Haq Thanvi, to the "Report of the Commission on Marriage and Family Laws."²

"The recommendation that women should have an equal right to pronounce divorce is not only *incompatible with human nature* but tends to make the future of women themselves uncertain. When *tafweez-i-talaq* is accepted as a condition at the time of nikah, then, *according to Shariat, it means that the right of pronouncement of divorce is granted to her by the husband*. This is a right which is delegated to the wife by the husband. But any attempt to make such changes or amendments in the laws as are not compatible with human nature, may prove most harmful for our society. A complete ban on divorce and a general permission of indulgence in divorces will be equally harmful to the cause of human society. That is why Islam enjoins upon its followers to follow the middle course and it is this course that would serve best the interests of women. *The [Marriage and Family Laws] Commission*, in this recommendation, has recognized tafweez-i-talaq as the absolute right of women. This right is not an absolute

1. Gazette of Pakistan Extraordinary, 30 August 1956, pp. 1560-1604.

2. Ibid., 20 June 1956, pp. 1197-1232.

right but is delegated to the wife by the husband." [Page 158l; emphasis added.]

"...[T]*alaq* is a special right conferred on man by the Holy Quran to be exercised when dissolution of marriage has become inevitable by the force of circumstances... The right of *talaq* accrues to man at the moment he becomes a party to the marriage contract. This right is absolute and is not shared by or assigned to any person, unless, of course, it is delegated by the husband at the time of *nikah* to the wife, any Government authority or relative of his own. This is technically called '*tafwiz-i-talaq*' (delegation of the power of divorce) which has been discussed earlier under that heading. It is, of course, possible to convert this right into delegated *talaq* at the time of *nikah* or hedge it in by certain conditions in the marriage contract. Unnatural as this step would be, it would lead to *disastrous consequences* as pointed out in the previous Chapter. Even so, it would be *none-the-less lawful in the eyes of Shariat*... *One of the greatest disadvantages of this step would be that men would generally avoid marrying the girls who insist on the inclusion of certain base and degrading conditions for men in the marriage contract and a vast number of young women would find themselves face to face with a new problem of finding suitable husbands for themselves.*" [Pages 1586-1587; emphasis added.]

Editorial Comment:

Note firstly that the Maulana himself admits, no less than twice, that the delegation by the husband to his wife of the (absolute or conditional) right to pronounce *talaq* is valid and lawful according to Shariat.

Since he cannot raise any legal argument against something which he has to admit is "lawful in the eyes of Shariat," the Maulana is forced to declare, from the depths of his learning and wisdom, that to confer upon women such a right to pronounce divorce would be "unnatural" and "incompatible with human nature." This is an extremely curious and totally unconvincing argument. The proponents of Islam delight in terming it a "natural" religion, and characterizing Muslim law as "natural" law, in accord with human nature and human needs. How then can the Maulana condemn as "unnatural" something which he has to concede is recognized by Shariat? How also can something admittedly recognized by Shariat be described as constituting the infliction of "base and degrading conditions for men," except, of course, in a very anti-woman, anti-Quran, anti-Shariat interpretation of Islam?

Failing on both legal and rational arguments, the Maulana is forced to fall back on the only weapon remaining in his arsenal, the weapon which so often, so effectively keeps women "in their place" -- the threat of social disapproval and social ostracism, in this case attempting to frighten the woman seeking justice for herself and realization of rights, which even the Maulana admits are granted to her by Shariat, with the cruel fate of being unable to find a suitable husband and having to live out her days as an old maid.

Note also that in attempting to refute the position of the majority of the Commission, the Maulana grossly distorts and misrepresents that position. "The Commission," he says, "has recognized *tafweez-i-talaq* as the absolute right of women. This right is not an absolute right but is delegated to the wife by the husband."

The Commission did *not* say that the right to pronounce *talaq* was an

"absolute right of women." The Commission merely recommended legal recognition of the right of the husband to delegate to his wife in the marriage contract authority to pronounce talaq on his behalf:

"The Commission is also of the opinion that it should be enacted that it is lawful to provide in the marriage contract that the woman shall have the same right to pronounce divorce, *if the right to do so has been delegated to her in the marriage contract*, as a man. The doctrine of tafweez, conditional as well as absolute, has been recognized as valid in Islamic law from the very beginning."¹

As a matter of fact, the Commission's recommendation on this point was superfluous.

1. "Report," loc. cit., p. 1210.

Talaq-i-Tafwid in the Classical Texts¹

Lucy Carroll

As a man may in person repudiate [i.e., talaq] his wife, so he may commit the power of repudiating her to herself or to a third party. This is termed *Tufweez [tafwid]*...

*Fatawa-i-Alamgiri*²

If a husband say to his wife, "divorce yourself when you please," she is at liberty to divorce herself either upon the spot or at any future period, because the word *when* extends to all times; and hence it is the same as if he were to say "divorce yourself at whatever time you like."

*Hedaya*³

Given the confusion regarding, and the lack of readily available accurate information concerning, talaq-i-tafwid, it is perhaps surprising to discover how thoroughly the topic is discussed in the Hanafi texts. Below are summarized the main points brought out by these discussions. Of particular interest are the fact that while the delegation itself is not revocable, the talaq pronounced under the delegated authority (talaq-i-tafwid) may be revocable; and the fact that, from the perspective of Muslim law, it is the delegation made prior to marriage which may be problematic and will run into difficulties unless the appropriate language is employed in making the delegation. (Cf. the situation under the Contract Act, 1872 -- applicable in South Asia -- which renders the post-nuptial delegation liable to impeachment on grounds of lack of consideration, while validating the pre-nuptial delegation.)

1. Much of the material in this essay has been extracted from the chapter on Talaq-i-Tafwid in volume III (divorce) of my forthcoming work on *Muslim Family Law in South Asia*.

2. Neil B.E. Baillie, *Digest of Moohummudan Law*, vol. I, (2nd edn., London, 1875), p. 238 (translation and paraphrase of *Fatawa-i-Alamgiri*).

3. Burhanuddin al-Marginani, *Hedaya*. Translated by Charles Hamilton, 1790; Grady edn., 1870, p. 92.

Delegation not revocable

The distinction between the delegation (*tafwid*) of authority to pronounce *talaq* and the appointment of an agent or *vakil* to act in the matter is that the former authority is not revocable, while the latter commission is revocable. "*Tufweez*" (*tafwid*), explain the translators of the *Fatawa-i-Kazee Khan*, "means the making another person owner of an act which appertains to the person making the *tufweez*." ⁴. The translator of the *Hedaya* adds:

[A]fter being thus empowered, she [i.e., the wife, recipient of the delegation in the example being discussed] stands as a principle in the execution of divorce, and not as an agent;... a commission of agency may be annulled at pleasure, whereas the power devolved to another to act as a principle cannot be so. ⁵

Ambiguous and express delegations

As might be expected, the Hanafi texts discuss a variety of ways in which the delegation of authority to pronounce *talaq* may be made and the effects of the different formulations. As a general proposition, if the words of delegation do not employ the word "*talaq*" (or one of its grammatical variations), the pronouncement by the wife (or other recipient of the delegation) results in an irrevocable *talaq*, if *talaq* were what the husband intended in using the words he did. ⁶

On the other hand, if the word "*talaq*" (or one of its grammatical variations) were used in making the delegation, the *talaq* pronounced under the delegated authority is revocable (by the husband) -- *unless* the husband in making the delegation had authorized the pronouncement of a *talaq bain* (irrevocable) or a triple *talaq*, and the pronouncement were made in these terms. (The person empowered by the delegation may make a pronouncement of lesser impact than allowed by the terms of the delegation, but may not exceed the authority delegated.) ⁷

4. Imam Fakhruddin Hassan Bin Mansur al Uzjandi al Farghani, *Fatawa-i-Kazee Khan*. Trans. and ed. by Moulvi Mahomed Yusoof Khan Bahadur and Moulvi Wilayat Hussain. Reprinted Lahore (Law Publishing Co.), 1977; vol. II, p. 257.

5. *Hedaya* (Grady edn.), p. 92.

6. The distinction between "ambiguous" and "express" delegations is analogous to that between pronouncements by the husband in "ambiguous" and "express" terms. In both cases, use of an "ambiguous" expression renders the resulting *talaq* (i.e., the *talaq* pronounced by the wife under a delegation effected in "ambiguous" terms, and the *talaq* effected by the husband's use of an "ambiguous" phrase) irrevocable.

7. *Hedaya* (Grady edn.), pp. 87-94. Baillie, vol. I, pp. 238-258. *Fatawa-i-Kazee Khan*, vol. II, pp. 255-282. Muhammad Ala-ud-din Haskafi, *Durr-ul-Mukhtar* (translated and edited by B.M. Dayal; reprint of 1913 edn.), pp. 171-192.

There are also in the Hanafi texts, illustrations of four distinct situations in which a delegation of the right to pronounce talaq may be made.

(1) Casual delegations

Most of the examples in the texts are of what might be termed "contemporaneous" or "casual" (as opposed to "contractual") delegations. The delegation is made in the course of a conversation between the spouses or in a discussion at which they and others are present (e.g., possibly a discussion concerning the couple's marital problems and involving relatives of the spouses). In the "contemporaneous" delegation, the authority delegated (although irrevocable like any other delegation) will expire very quickly if not acted upon immediately,⁸ unless the words used in making the delegation indicate otherwise. The delegation may be so worded as to convey authority that will endure for days, months, or permanently. It may also be so worded as to confer authority exercisable only should a particular set of circumstances arise.⁹

(2) Post-nuptial contracts

A second situation involves a post-nuptial agreement in which the husband's undertaking is sanctioned by a delegation of the right to pronounce talaq which the wife may exercise should the husband default on his promise.¹⁰ Such post-nuptial agreements may be executed some time after the marriage. Equally, they may be made immediately after the exchange of consents and as part of the marriage rites themselves. There is no reason (from the perspective of Muslim law)¹¹ why a blanket delegation may not be made in a post-nuptial agreement or by means of a unilateral post-nuptial grant.¹²

8. I.e., the wife must act upon the delegated authority within the same conversation or "meeting" in which the delegation was made.

9. *Hedaya* (Grady edn.), pp. 89-90. Baillie, vol. I, pp. 242, 243, 245-246, 250-254, 255-256.

10. For examples see Baillie, vol. I, pp. 251-253.

11. In South Asia a post-nuptial agreement or delegation, not made at or about the time of the marriage, may run into difficulty on the ground of lack of "consideration," unless the agreement is in writing and registered under the Registration Act, 1908. (See Contract Act, 1872, s. 25.)

12. See e.g. the passage quoted at the beginning of this note.

(3) Delegation as part of marriage consents

The third situation involves a delegation made at the time of the marriage and incorporated in the actual exchange of consents. E.g.:

[W]hen the proposal comes from the woman... and she says, "I have given myself in marriage to thee... on condition that the authority (in the matter of divorce) is in my hands, so that I may divorce myself whenever I choose," and the man then says, "I have accepted," then... the marriage is valid and... the authority (in the matter of divorce) will be in her hands.¹³

Note that the terms used in this example confer upon the wife a permanent and completely unrestricted right to pronounce *talaq* at her pleasure.

(4) Pre-nuptial delegation

The fourth situation involves a delegation made prior to the marriage and intended to take effect after the marriage.

The distinction between pre- and post-nuptial agreements is that a delegation of *talaq* must take place after the marriage; prior to the marriage the husband has no power to *talaq* the woman, who is not his wife, and thus no authority which he can delegate to anyone else. In the example above, involving the delegation made as part of the exchange of consents, the delegation takes place after the marriage, because, as Kaze Khan explains:

[W]hen the beginning is made by the woman, then... the husband, after the woman has already expressed herself, says, "I have accepted," and... what the husband says amounts to this, "I have accepted"¹⁴ on condition that... the authority (in the matter of divorce) is in thy hands." Therefore, the husband becomes the giver... of the authority after the marriage.¹⁵

The comparison being made is with the situation where the husband speaks first, proposing marriage on condition that the wife will have the authority to divorce herself, and *without* specifically delaying the operation of the delegation until after the marriage. The marriage is valid but the grant of authority to pronounce *talaq* is void because it was made before the marriage was contracted when the husband had no power which he could delegate.

13. *Fatawa-i-Kazee Khan*, vol. I, pp. 21-22.

14. The woman having spoken first and made the offer, the marriage contract is complete once the husband has expressed his consent; thus the rest of the sentence ("on condition that... the authority (in the matter of divorce) is in thy hands"), which constitutes the delegation, takes place after the marriage.

15. *Fatawa-i-Kazee Khan*, vol. I, p. 22. See also Baillie, vol. I, p. 19.

The Hanafi bridegroom may easily escape the difficulty that pre-nuptial agreements involving or sanctioned by a grant of *talaq-i-tafwid* might at first sight appear to involve. Just as he can pronounce a contingent or suspended *talaq*, he can make a delegation of authority to pronounce *talaq* that is contingent or suspended, in this case, on the marriage itself. Once the marriage has taken place, the delegation comes into force. E.g., the prospective husband might say:

“[I marry thee] on condition that thy authority (to divorce [thyself]) shall be in thy hands after I shall have married thee so that thou shalt divorce thyself whenever it pleaseth thee.”¹⁶

Although the husband speaks first and the delegation is thus pre-nuptial, the delegation is valid because the words used by the husband explicitly delay the operation of the delegation until after the marriage. This solution is, of course, not available to the Shia bridegroom: like a pronouncement of *talaq* in Shia law, the delegation of authority to pronounce *talaq* cannot be conditional.

Revocability

A delegation of authority to pronounce *talaq*, as mentioned previously, is not revocable. The question here is of the power of the husband to revoke the *talaq* pronounced by the recipient of that authority.

It is probably not without significance that the examples found in the Hanafi texts of delegations of authority to pronounce *talaq* made at the time of marriage (i.e., in the actual exchange of consents) and in pre- and post-nuptial contracts generally appear to involve the use of an “ambiguous” expression, which (as translated) refers to placing the business of the wife in her hands. The significance of this is that the *talaq* pronounced under such authority is irrevocable.¹⁷

Interestingly, Maliki texts explicitly declare that *talaq-i-tafwid*, pronounced by a wife empowered so to act by her marriage contract and whose marriage has been consummated, results in an irrevocable *talaq*.¹⁸

16. *Fatawa-i-Kazee Khan*, vol. I, pp. 23-24. Note again that what is involved is a blanket and completely unrestricted delegation.

17. Because the delegation was made in “ambiguous” terms; see fn. 5 above.

18. F.H. Ruxton, *Maliki Law: Being a Summary from the French Translation of the Mukhtasar of Sidi Khalil* (London: 1916; reprinted Westpoint, Conn.: Hyperion Press, 1980), p. 131. A.D. Russell and A.A. Suhrawardy, *A Manual of the Law of Marriage from the Mukhtsar of Sidikhalil* (reprinted Lahore: Law Publishing Co., n.d.), p. 200.

Stipulations in Ithna Ashari (Shia) Law

The *Sharaya-ul-Islam* declares "contrary to law" and "void" a stipulation to the effect that "the husband shall not marry another wife during the lifetime of the party with whom the contract is made."¹⁹ This statement is extremely curious given that the same paragraph of the *Sharaya-ul-Islam* goes on to affirm the validity of a stipulation that the husband will not have sexual intercourse with his wife.²⁰ This latter stipulation would appear not only a severe curtailment of the husband's rights but a negation of the fundamental purposes of marriage (sexual enjoyment and procreation). Surely, if the husband can legally commit himself to abstinence within marriage, he can legally commit himself to monogamous fidelity. It is relevant to note in this context that "[o]ne of the conditions stipulated at the time of [the] marriage of Hazrat Ali [the Prophet's cousin and the first of the Shia Imams] with Hazrat Fatima [daughter of the Prophet] was that he would not contract another marriage in her lifetime."²¹ In fact, as long as Fatima lived, Ali remained monogamous; after her death he had twelve other wives.²²

The *Sharaya-ul-Islam* not only does not appear to recognize *tafwid*, but is also ambiguous concerning conferment upon the wife of a right to act in the matter of *talaq* as her husband's agent or *vakil*.²³ However, a recent statement of Shia doctrine²⁴ (based largely on the *Sharaya-ul-Islam*) affirms that "express authority may be conferred upon the wife to pronounce . . . *talaq* on breach of any specified stipulations of the marriage."²⁵ The only specific example of a stipulation in a marriage contract found in this work occurs earlier²⁶ and concerns a stipulation to the effect that the bride will not be removed from her native town. This stipulation is said to be valid.

19. Neil B.E. Baillie, *Digest of Moohummudan Law*, vol. II, (2nd edn., London, 1887, 2nd edn.), p. 76 (translation and paraphrase of *Sharaya-ul-Islam*).

20. *Ibid.* "Some doctors [i.e., legal scholars] have limited the obligation of fulfilling this condition to cases of temporary marriage (*mutah*) alone, but the doctrine appears to be totally groundless." (*Ibid.*)

21. Aftab Hussain, *Status of Women in Islam* (Lahore: Law Publishing Co., 1987), p. 500.

22. John Norman Hollister, *The Shi'a of India* (New Delhi: Oriental Books Reprint Corp., 1979; 2nd edn.), p. 17.

23. "And though the Sheikh has said that the appointment of a woman as her husband's agent to repudiate herself would not be valid, yet it would seem that such an appointment is lawful." (Baillie, vol. II, p. 109.)

24. Maulana Sayed Saeed Akhtar Rizvi, *Islamic Laws Relating to Marriage, Dissolution... According to the Rulings of His Holiness Aqa Sayed Mohsin al-Hakim at-Tabatabai*. Mombasa, 1967.

25. *Ibid.*, pp. 41-42.

26. *Ibid.*, p. 23.

Much more informative is the discussion found in Abul-Fadl Ezzati's *Shi'i Islamic Law and Jurisprudence*²⁷ Relying on the writings of Allamah al-Hilli, the author gives as examples of valid stipulations which may be incorporated in a Shia contract of marriage, inter alia, the following:

- "that the wife should live in a certain place or that she should not be obliged to live anywhere against her wishes."
- "that the husband should not marry any additional wives or else... [the wife in whose favor the stipulation was made] would have the right to divorce herself [by *talaq-i-tafwid* or some similar process]."²⁸
- "stipulations limiting . . . [the husband's] power of repudiating the marriage [i.e., limiting the husband's right of *talaq*]."

Such stipulations are "valid and enforceable... because they are regarded as parts of the contract and the contract was not intended without them."²⁹

Ezzati characterizes the position concerning anti-polygamy stipulations found in the *Sharaya-ul-Islam* as that of a "minority of Shi'i jurists." And he distinguishes between a stipulation "that the husband should renounce the law which gives him the right to marry additional wives," which would be void; and a stipulation "that he should not marry again or else... [the wife in whose favor the stipulation was made] could divorce herself" by *talaq-i-tafwid* (or some similar process), which is valid and enforceable in that should the husband marry again, the wife may bring her own marriage to an end.³⁰

South Asia

In South Asia, the most usual occasion on which a delegation of *talaq-i-tafwid* is likely to be made is at the time of marriage. Stipulations inserted in marriage contracts may very considerably enhance the position of the wife and provide her with rights and remedies otherwise

27. Lahore: Ashraf Press, 1976. The author was (at the time of publication) on the faculty of Islamic Studies, University of Tehran.

28. Ezzati does not use the term *talaq-i-tafwid* nor does he explain exactly how the wife is to divorce herself.

29. *Ibid.*, pp. 152-153.

30. *Ibid.*, pp. 153-154. However, Ezzati states that a blanket delegation empowering the wife to "divorce herself at will for no reason" would be void "because it causes a kind of unpredictable uncertainty in [the] marital relationship. (*Ibid.*, p. 154.)

Apparently a stipulation permitting the wife to exercise *talaq-i-tafwid* in the event of serious and irreconcilable differences between the spouses (or some other equally general but weighty reason) would be valid.

unavailable to her. The husband's promise to abide by his nuptial promises may be effectively sanctioned by a grant of *talaq-i-tafwid* to the wife, empowering her to dissolve the marriage on her own initiative and at her discretion should the terms of the contract be breached. Alternatively, a blanket and unconditional delegation may also be made, effectively equalizing the access of the spouses to extra-judicial divorce.

Although marriage contracts will be negotiated and agreed prior to the marriage, they are usually signed or attested immediately after the exchange of consents, particularly if a delegation of *talaq-i-tafwid* is involved. However, one positive contribution of the Contract Act, 1872, in the context of Muslim marriage contracts involving grants of *talaq-i-tafwid* has been to render pre-nuptial agreements unambiguously valid as contracts, once the marriage has taken place (the marriage constituting the "consideration" for the contract). The technical details of the classical law prescribing the precise terms in which the Hanafi bridegroom must make a pre-nuptial delegation, and denying this right to the Shia bridegroom, have been superseded by the general law of contract.

Revocability of delegation

The South Asian contract generally employs the term "*tafweez*" (*tafwid*), which, by definition, involves an irrevocable grant of authority to act in the matter (here, in the matter of *talaq*). Nevertheless, the contract itself often additionally explicitly declares that the grant is irrevocable. The phrasing in the Sheherzad contract (reproduced pp. 20-21 of this volume) is:

That after marriage a delegated right of divorce (*haq talaq ba tafweez*) shall vest in the Wife and the Husband undertakes never and in no circumstances to revoke this right.

The phrasing in the Zohra contract (reproduced pp. 85-86 of this volume) is:

That the right of *talaq ba tafweez* (i.e., delegated power of divorce) shall at all times be vested in and possessed by the wife and the husband shall not revoke this power.

Further, the Contract Act, 1872, renders the terms of the contract unalterable by either party once the contract has been completed by receipt of consideration (i.e., once the marriage has taken place).

Form of delegation and revocability of *talaq*

The "ambiguous" Arabic phrase so commonly used in the Hanafi texts (placing the wife's business in her or someone else's hands) did not

survive into the South Asian idiom. Delegations in the subcontinent are invariably made in "express" terms. The delegation is also invariably made in terms authorizing the wife to pronounce a *talaq* that is clearly irrevocable by the husband. E.g.:³¹

...she [the bride] will have full power to leave me for ever, to give three *talaks* (irrevocable divorce) to herself and to take another husband.³²

...I delegate to you [the bride] my own power of giving three *talaks* such as is possessed by males. Whenever you choose you may talak or repudiate your person three times and then take another husband.³³

...my wife... [will have] authority and power from me to divorce herself and cancel this marriage and set herself at liberty to consider herself no longer as my wife. I will have no power and [sic; read "of"] objection to this cancellation of the marriage.³⁴

The words of the wife's recitation echo the terms of the delegation and usually invoke a triple *talaq*. E.g.:

I hereby free myself from this date from your wifehood by pronouncing three *talaks bain* against my person on the authority delegated to me by... [the marriage contract].³⁵

(Note, incidentally, that the wife exercising *talaq-i-tafwid* is not *talaq*-ing her husband; she is *talaq*-ing herself on behalf of her husband.)³⁶

That the delegation is usually made in the form of authority to pronounce three *talaqs* may be to ensure that the wife has been given sufficient authority to cause a dissolution of the marriage. (I.e., even if

31. Each of the statements of delegation set out below follows upon the recitation of the stipulations which the delegation sanctions; none constitutes a blanket or unrestricted delegation. This is worth stressing, since the Dacca High Court (*Aklima Khatun v. Mahibur Rahman*, PLD 1963 Dacca 602), in upholding a completely unrestricted delegation, was under the mistaken impression that the case from which the second extract below is taken ([1919] ILR 46 Calcutta 141) also involved an unrestricted delegation. The first sentence of the extract from the 1919 Calcutta case reads in full: -- "Be it noted that *if I violate any of the aforesaid conditions* or any portion thereof, I delegate to you..." (Emphasis added.) The 1963 Dacca case is the earliest report I have found in which the contract under consideration involved a completely blanket and unrestricted delegation.

32. *Mi Nafizunissa v. Bodi Rahiman*, (1913) 20 Indian Cases 642 (Lower Burma).

33. *Sainuddin v. Latifannessa Bibi*, (1919) ILR 46 Calcutta 141.

34. *Mst. Sahra Jan v. Abdul Raoof*, AIR 1921 Lahore 194.

35. *Srimati Samserannessa v. Abdus Samad*, AIR 1926 Calcutta 1144.

36. "A man vests the authority to divorce in the hands of his wife; the woman says to her husband, 'I have divorced thee;' this act shall be void just as if the husband refers the divorce to himself (saying I have divorced myself);..." (*Fatawa-i-Kazee Khan*, II:255.) The wife, acting on behalf of her husband and under his authority, must say, "I have divorced myself," or "I have pronounced *talaq* against myself," or something similar.

the pronouncements were made singly and the husband had the power of revocation, he could only revoke two of them.) It may also reflect the pervasive belief among South Asian Muslims that three *talaqs* are necessary to effect a divorce.

The question of whether the wife's pronouncement under the delegated authority is revocable by the husband has not arisen in South Asian case-law. Indeed, given the general form of the delegation and the nature of the wife's pronouncement, as illustrated by the examples above, the question could not arise. (A triple pronouncement of *talaq* is not revocable under the classical law.) The question has become of some importance, however, given the fact that the Pakistan/Bangladesh Muslim Family Laws Ordinance, 1961, in effect, converted all irrevocable pronouncements of *talaq* into revocable pronouncements. Does this mean that the Pakistani or Bangladeshi husband could revoke the *talaq* pronounced by his wife under his delegated authority? The importance of the question is enhanced by the fact that under the Ordinance there is no limit to the number of times *talaq* pronouncements may be revoked.

The answer to the question must depend on the terms of the delegation. It would certainly be possible for the husband to make the delegation in terms permitting pronouncement only of a revocable *talaq*. It is, however, clear from the illustrations above that what was conferred upon the wife was not merely the right to pronounce *talaq*, or even three *talaqs*, but *the right to obtain a dissolution of the marriage extra-judicially and by means of the talaq procedure*.³⁷ This necessarily involves an undertaking on the part of the husband that he will not revoke the *talaq* pronounced by his wife, even if pronounced in revocable form, or at least that he will not revoke such a pronouncement without the consent of the wife. In this context it is interesting to look at the terms of the Fyzee contract³⁸ (designed by Begum Sharifa Hamid Ali and Professor Fyzee in the 1940s). This contract confers upon the wife "the power to divorce in the manner mentioned in clause 3 below for *dissolving the said marriage* on any one or more of the following grounds..." Section 3 provides:

The said power to divorce shall be exercised by the Wife declaring before any two witnesses that in accordance with the power derived by her from this agreement she divorces the Husband and the said *marriage shall stand dissolved* as from the date of the declaration. [Emphasis added.]

37. Note that the husband in the third example given above explicitly asserted that he would have "no power of objection" (i.e., revocation) in respect of his wife's exercise of *talaq-i-tafwid*.

38. The contract appears as Appendix C of A.A.A. Fyzee's *Outlines of Muhammadan Law* (Delhi: Oxford University Press, 4th edn., 1974; 1993 reprint also available), pp. 474-476, and is reproduced pp. 95-98 of this volume.

Again it is clear that what has been conferred upon the wife *is a right to secure dissolution of the marriage extra-judicially and through the instrumentality of talaq*. The husband has foregone any right he might have of revoking the *talaq* that may be pronounced by his wife in exercise of the authority conferred upon her by the contract.

(Much less common and much less advisable than a delegation of the right to pronounce *talaq*, the suspended *talaq* is occasionally employed to sanction stipulations in a marriage contract or in post-nuptial agreements. A suspended *talaq*, once pronounced, cannot be retracted; the question of revocation cannot arise until the *talaq* actually comes into force. If it were pronounced in irrevocable form, it could not, under the classical law, be revoked should the event on which it is contingent happen and the *talaq* come into effect. However, after the Pakistan Ordinance converted all irrevocable *talaqs* into revocable *talaqs*, the position of a suspended *talaq* used as a sanction for stipulations and agreements is not free from doubt. This is obviously one reason for avoiding this particular sanction.)

What the wife must be prepared to prove

Although the exercise of *talaq-i-tafwid* results (in South Asia) in an extra-judicial dissolution of the marriage, the matter may get to court in various ways: the husband may sue for restitution of conjugal rights, arguing that the wife's exercise of *talaq-i-tafwid* was, for some reason, invalid; or the wife may sue for her mahr on the ground that she has divorced herself by *talaq-i-tafwid*.

If the matter gets to court, the wife must be able to prove the fact of the delegation; the fact of the occurrence of the event giving rise to her right if the delegation were restricted; and the fact of her pronouncement. Thus, the contract containing the delegation should be in writing, duly attested, and, preferably, registered. The woman's pronouncement of *talaq* should be witnessed and recorded in a written and attested document.

South Asian Shias

The distinction between the positions of the Ithna Ashari Shias and the Ismaili Shias on the matter of empowering the wife by conferring upon her a right of *talaq-i-tafwid* or merely appointing her as agent or *vakil* is reflected in the difference between the terms of the Resolution of the Khoja Ithna Ashari Jamat of Bombay and the marriage contract endorsed by the Ismaili organization. The former (reproduced p. 118 of this volume) reads: --

I have appointed my wife [name of wife] daughter of [name of bride's father] as Vakil that she herself may for reasons mentioned below claim a Talak

through the Jamat or she can appoint a Vakil to effect a talak on her behalf.

1. For lack of maintenance.
2. Desertion for more than six months without informing.
3. Unbearable cruelty.

If such an occasion arises and she claims Talak she must forewarn the Jamat. [Emphasis added.]³⁹

The latter (reproduced p. 115-117 of this volume) provides:

I... hereby *authorise and empower my said wife* [name of wife] daughter of [name of bride's father] *in my name and on my behalf to divorce herself as my wife* on any of the grounds mentioned in Article 13(c) of the Constitution of the Shia Imami Ismaili Muslims in India⁴⁰, provided she shall have obtained, as provided in the said Constitution, the previous permission of the Council having or exercising jurisdiction, to exercise such power. [Emphasis added.]

The former confers upon the bride merely *vakil*-ship; the latter involves a full *tafwid*. The distinction between the two would ordinarily be that *tafwid* cannot be revoked, while *vakil*-ship is revocable at any time.⁴¹ In South Asia, this distinction is irrelevant; once the contract is complete (i.e., the marriage has taken place), it is not open to either party unilaterally to revoke one of its terms. In this respect the Contract Act overrides any provision of Muslim marriage law to the contrary.

Note that both the Shia contracts contain terms emphasizing the involvement, if not the control, of the respective Jamat over the dissolution of the marriage; the woman can apparently only pronounce *talaq* with the prior approval of the Jamat. The marriage contracts would be legally valid (in South Asia) if those provisions were omitted; such omission probably be more beneficial to the wife by removing a possible clog on her autonomous action. However, failure to follow the form endorsed by the community might expose the families involved to social sanctions.

39. Note that the stated grounds on which the wife may act are extremely narrow and do not include the husband's remarriage or ill-treatment falling short of "unbearable cruelty."

40. The relevant articles of the Constitution of the Shia Imami Ismaili Muslims in India are set out below, pp. 112-114.

41. It is possible that the Bombay Jamat has endorsed a rule rendering *vakil*-ship in regard to *talaq*, when incorporated in the marriage contract, irrevocable. I have no information on this.

Pakistan Marriage Registration Form

[Urdu]

فارم نمبر ۲ (دیکھئے قاعدہ نمبر ۸، ۱۰)

مسلم خاندانی قوانین کے آرڈیننس مجریہ ۱۹۶۱ء (ختم ۱۹۶۱ء) کے تحت وضع کئے ہوئے قواعد کے قاعدہ نمبر ۸ اور ۱۰ کے تحت مجوزہ

نکاح نامہ

① وارڈ کا نام۔ ٹاؤن / یونین۔ تحصیل / تھانہ۔

اور ضلع۔ جس میں شادی وقوع پذیر ہوئی ہے۔

② دوہا اور اس کے والد کا نام معہ ان کی سکونت بالترتیب

③ دوہا کی عمر۔

④ ذہن اور اس کے والد کا نام معہ ان کی سکونت بالترتیب

⑤ آیا ذہن کنواری ہے یا بیوہ یا مطلقہ۔

⑥ ذہن کی عمر۔

⑦ اگر ذہن کی طرف سے کوئی وکیل مقرر کیا گیا ہے تو اس کا نام معہ ولایت و سکونت۔

⑧ ذہن کے وکیل کے تقرر کے بارے میں گواہوں ① کے نام معہ ولایت و سکونت اور ان کی ذہن کے ساتھ رشتہ داری۔

⑨ اگر دوہا کی طرف سے کوئی وکیل مقرر کیا گیا ہے تو اس کا نام معہ ولایت و سکونت۔

⑩ دوہا کے وکیل کے تقرر کے بارے میں گواہوں کے نام معہ ولایت و سکونت۔

⑪ شادی کئے گواہوں کے نام معہ ولایت و سکونت۔

⑫ شادی سرانجام پانے کی تاریخ۔

⑬ مہر کی رقم۔

⑭ مہر کی کتنی رقم معجل ہے اور کتنی موجل۔

⑮ آیا مہر کا کچھ حصہ شادی کے موقع پر ادا کیا گیا۔ اگر ادا کیا گیا ہے تو کس قدر۔

⑯ آیا چھ مہر یا اس کے کسی حصہ کے عوض میں کوئی جائیداد دی گئی ہے، اگر دی گئی ہے تو اس جائیداد کی صراحت۔

اور اس کی قیمت جو فریقین کے مابین طے پائی ہے۔

- ۱۷) خاص شرائط اگر کوئی محل
- ۱۸) آیا شوہر نے طلاق کا حق بیوی کو تفویض کر دیا ہے۔ اگر کرنا ہے تو کوئی شرائط کے تحت۔
- ۱۹) آیا شوہر کے طلاق کے حق پر کسی قسم کی پابندی لگائی گئی ہے۔
- ۲۰) آیا شادی کے موقع پر بہرہ و نان و نفقہ وغیرہ سے متعلق کوئی دستاویز تیار کی گئی ہے اگر کی گئی ہے تو اس کے مختصر مندرجات۔
- ۲۱) آیا دہا کے بیان پہلے سے کوئی بیوی موجود ہے مگر بے تو کیا اسے دوسری شادی کرنے کیلئے مسلم خاندانی قوانین کے تحت تعلق کے تحت تعلق کوئل سے اجازت نامہ حاصل کر لیا ہے۔
- ۲۲) نمبر تاج مرسلہ جس کے ذریعے تعلق کوئل نے دہا کو دوسری شادی کرنے کی اجازت دی ہے۔
- ۲۳) نکاح خواں کا نام اور ولدیت معہ پتہ
- ۲۴) شادی صبح جب کرانے کی تاریخ
- ۲۵) فیس رجسٹریشن جو ادا کی گئی

دہا کے وکیل کے تقرر کے گواہان کے دستخط

①

②

دہا کے وکیل کے تقرر کے گواہان کے دستخط

①

②

نکاح خواں کے دستخط

نکاح رجسٹرار کے دستخط معہ نمبر

نمبر

دہا یا اس کے وکیل کے دستخط

دہا کے دستخط

دہا کے وکیل کے دستخط

شادی کے گواہان کے دستخط

①

②

Pakistan Marriage Registration Form

Form of Nikahnama Prescribed by Rule 8 of the Muslim Family Laws Rules, 1961.

(1) Name of WardTown/Union.....Tehsil/Thana
.....and District.....in which the marriage
took place.

(2) Name of the bridegroom and his father, with their respective
residences

(3) Age of bridegroom.....

(4) The names of the bride and her father, with their respective
residences

(5) Whether the bride is a maiden, a widow or a divorcee

(6) Age of the bride

(7) Name of Vakil, if any appointed by the bride, father's name
and his residence

(8) The name of the witnesses to the appointment of the bride's Vakil
with their father's names, their residence and their relationship with the
bride:

(1)

(2)

(9) Name of the Vakil, if any appointed by the bridegroom, his father's
name and his residence

(10) The names of the witness to the appointment of the bridegroom's
Vakil, with their father's names and their residences

(1)

(2)

(11) Name of the witnesses to the marriage, their father's names and
their residences

(1)

(2)

- (12) Date on which the marriage was contracted
- (13) Amount of dower.....
- (14) How much of the dower is mu'wajjal (prompt) and how much ghair mu'wajjal (deferred).....
- (15) Whether any portion of the dower was paid at the time of marriage. If so, how much.....
-
- (16) Whether any property was given in lieu of the whole or any portion of the dower with specification of the same and its valuation agreed to between the parties
-
- (17) Special conditions, if any
-
- (18) Whether the husband has delegated the power of divorce to the wife, if so, under what conditions[*]
-
- (19) Whether the husband's right of divorce is in any way curtailed.....
-
-
- (20) Whether any document was drawn up at the time of marriage relating to dower, maintenance, etc. If no, contents thereof in brief:
-
- (21) Whether the bridegroom has any existing wife, and if so, whether he has secured the permission of the Arbitration Council under the Muslim Family Laws Ordinance, 1961, to contract another marriage:.....
-
- (22) Number and date of the communication conveying to the bridegroom the permission of the Arbitration Council to contract another marriage
-
- (23) Name and address of the person by whom the marriage was solemnized and his father
-
- (24) Date of registration of marriage.....
- (25) Registration fee paid.....
-

The Muslim Woman's Contractual Access to Divorce

Signature of the bridegroom
or his Vakil

.....

Signature of the witness to the .
appointment of bridegroom's ...
Vakil

.....

Signature of the bride:

.....

Signature of the
Vakil of the
bride:

.....

Signature of the
witness to the
appointment of
bride's Vakil:

.....

Signature of the witnesses to
the marriage

.....
(1).....
(2).....

Signature of the person who.....
solemnized the marriage

.....

Signature and seal of the
Nikah Registrar

.....

Seal

[*] **Editorial note on clause 18:** The Husband should clearly state in writing the following -
"I unconditionally delegate to my wife the right to pronounce talaq." The husband
should also sign this clause.

Pakistani women's groups have been trying to get clause 18 reformulated to read as
follows: "Does the husband refuse to delegate to the wife the right to pronounce talaq?"
This would mean that the unconditional delegation was part of the marriage contract,
unless the contrary were clearly indicated by the husband at this point on the Marriage
Registration Form.

Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract:

Important Means of Protecting the Position of the South Asian Muslim Wife¹

Lucy Carroll

Muslim law confers supreme authority in marital relations on the husband, to such an extent that the husband can unilaterally and extra-judicially dissolve the matrimonial bond by pronouncement of the verbal formula of divorce (*talaq*). The wife's position may be to some extent protected by the fact that her deferred dower becomes payable to her upon termination of the marriage by divorce or the death of her husband. However, the dower may either have been set at a minimal amount or have been severely reduced by intervening years of inflation so as to provide neither an affective restraint on the husband's exercise of his power of *talaq* nor much real assistance to the wife after she has been divorced and turned out of her husband's house. On the other hand, if the dower is set at such an amount as to constitute a real restraint on her husband in regard to his exercise of *talaq* and the marriage breaks down, the husband may refuse to divorce the wife by *talaq* (since by doing so he would incur liability for the dower debt) and may suggest that she agree to a divorce by mutual consent (*khula* or *mubara*). However, a concomitant of a divorce by mutual consent is some financial remuneration by the wife to the husband; usually the husband requires the wife to relinquish her rights to dower. The wife may thus easily be placed in a position of having to buy her way out of an unhappy marriage.

While the husband possesses an inherent right to dissolve the marriage at will, until the Dissolution of Muslim Marriages Act of 1939 the Hanafi² wife of South Asia had virtually no right to secure a divorce

1. This article has been reprinted from *Modern Asian Studies*, 16, 2 (1982), pp. 277-309 with the permission of the author and the editors of *Modern Asian Studies*, and was updated by the author for presentation in this volume.

2. There are four surviving schools of Sunni Islamic law: Hanafi, Maliki, Shafi, and Hanbali. The majority of the Muslims of the Indian subcontinent are Hanafis. Shia Muslims constitute an important minority of the Muslim population of the subcontinent.

in the absence of her husband's agreement to divorce her extra-judicially by *talaq* or *khula/mubara*. The only grounds upon which she could apply for a judicial dissolution of her marriage were: (1) the impotence of her husband at the time of the marriage and continuously since, and (2) her husband's false accusation of adultery against her in the ritual known as *lian*.³ The Dissolution of Muslim Marriages Act (applicable in the present states of India, Pakistan, and Bangladesh) improved this situation by allowing a Muslim wife to obtain a judicial divorce on such grounds as desertion, cruelty, failure to maintain, leprosy, and venereal disease. Obviously, in order to take advantage of this statute the wife not only has to be able to prove one of the recognized grounds but also has to institute litigation which might not be concluded for several years.

There has been no further statutory reform (as opposed to judicial decisions concerning, for example, the definition of legal cruelty and the applicability to Muslim divorcees of the provisions of the Criminal Procedure Code, 1974)⁴ of Muslim family law in India since the Act of 1939; the only statutory reform effected in Pakistan and Bangladesh has been the Muslim Family Laws Ordinance, 1961.⁵ Due to a variety of diverse political circumstances in these countries, it is unlikely that there will be further legislative initiative or statutory intervention in the field of Muslim family law in any of them in the near future.

There is, however, another way in which the equation of matrimonial power can be rebalanced, and this at the initiative of individual spouses themselves and/or their guardians.

While the Muslim husband has an absolute right to dissolve the marriage by pronouncement of the *talaq* formula, he may delegate the right to exercise this power on his behalf to another person. Such a

3. In South Asia the *li'an* of the classical law was converted into a judicial divorce available on the ground that the husband had made and failed to substantiate (by any proof admissible under the Evidence Act, 1872) a charge of unchastity against his wife.

A judicial divorce might also be obtained by a girl married as a minor who could repudiate the (unconsummated) marriage in some circumstances. (See: Lucy Carroll "Muslim Family Law in South Asia: The Right to avoid an Arranged Marriage Contracted During Minority," *Journal of the Indian Law Institute*, 23 [1981]: 149-180.) Or by the wife if the husband took an oath of *zihar* and failed to retract it. The later procedure is virtually unknown in the subcontinent. (A.A.A. Fyzee, *Outlines of Muhammadan Law* [Delhi: Oxford University Press, 1974], p. 162.)

4. See now Muslim Women (Protection of Rights on Divorce) Act, 1986. See Also Lucy Carroll, "The Muslim Women (Protection of Rights on Divorce) Act 1986: A Retrogressive Precedent of Dubious Constitutionality," *Journal of the Indian Law Institute*, 28 (1986): 364-376.

5. See: Lucy Carroll, "The Muslim Family Laws Ordinance, 1961: Provisions and Procedures. A Reference Paper for Current Research," *Contributions to Indian Sociology* (NS), 13 (1979): 117-43.

delegation does not deprive the husband of his inalienable right to pronounce *talaq*, but merely means that two people are now possessed of the power to dissolve the marriage by the verbal formula. If the husband delegates to his wife the right to exercise *talaq* on his behalf in regard to her own marriage, she is assured of being able to terminate the marriage extra-judicially and expeditiously while retaining her claim to the full amount of dower.

Like the husband's pronouncement of *talaq*, the wife's pronouncement under authority delegated to her by the husband (*talaq-i-tafwid*) dissolves the marriage without the intervention of a Court.⁶ Nonetheless, questions concerning such extra-judicial divorces may come before the Courts in various ways. A husband may answer his wife's suit for maintenance, for example, by alleging that he has divorced her by *talaq* and is thus no longer financially responsible for her support. Similarly, a wife may sue for her deferred dower on the ground that she has dissolved the marriage by *talaq-i-tafwid*; she may raise the same argument in defence to a suit for restitution of conjugal rights brought by her husband; or she may petition for a declaration that the marriage is no longer subsisting because of her exercise of the delegated right of *talaq*.

There is no reason in Muslim law why the delegation to the wife of the right to pronounce *talaq* should not be unconditional,⁷ but the Courts of the British-India period, staffed by judges obviously influenced by English ideas of marriage, were uncomfortable with such a concept and reiterated that the delegation was valid if the specified conditions under which the wife was authorized to pronounce *talaq* were "reasonable" and not contrary to "public policy," thereby implying that an unconditional delegation would be void. However, as a matter of fact, the most usual form of delegation of the power of *talaq* is as a means of enforcing specific stipulations written into the marriage contract.

Although stipulations in a marriage contract may be perfectly valid and legal under the Anglo-Muhammadan legal traditions of the subcontinent, enforcement may, in many situations, pose a problem if the contract does not itself provide for sanctions in the event of a breach of the agreed terms. If the marriage contract contained simply a stipulation, for instance, that the husband should not marry a second wife during the subsistence of the first union, the stipulation would be valid but

6. See: *Suroj Mia v. Abdul Majid* (All India Reporter [hereafter abbreviated A.I.R.] 1953 Tripura 6).

7. As was clearly, and quite properly, held by the Dacca High Court in *Aklima Khatun v. Mahibur Rahman* (All Pakistan Legal Decisions [hereafter abbreviated P.L.D.] 1963 Dacca 602). This is the earliest reported case involving an instance of completely unconditional delegation to a wife of the right to exercise *talaq* on behalf of her husband that I have found.

practically unenforceable. The husband could not be prevented from marrying a second wife if the fancy took him and his second marriage would be valid. The reliefs available to the first wife would be extremely limited. The fact of breach of a stipulation in a marriage contract may, in appropriate cases, enable the wife to defeat her husband's suit for restitution of conjugal rights, and it may, in appropriate cases, enable her to claim maintenance from her husband while refusing to live with him. These reliefs are largely at the discretion of the Court and all the circumstances, including the breach of the stipulation, would be taken into consideration.

A stipulation in a Muslim marriage contract may, however, be enforced by further provisions in the same contract delegating to the wife the right to dissolve the marriage by *talaq-i-tafwid* should the husband contravene the stipulation. Alternatively, the contract may provide that the stipulation is enforceable in that should the husband be guilty of a breach of the agreement the wife would be entitled to live apart from him and still be maintained by him (thus giving her a right based upon the contractual agreement as opposed to relief available at the discretion of the Court).

Although it is probably more common (and probably also more desirable) that the terms of the marriage be settled before the actual solemnization, contracts may also be agreed by the spouses after their marriage.

Marriage, according to Muslim law, is a civil contract, as opposed to a religious sacrament. Regarded as such a civil transaction by the British-Indian Courts, the Courts looked to the provisions of the Indian Contract Act, 1872,⁸ in interpreting and assessing the validity of the terms and conditions specified in Muslim marriage contracts and post-nuptial agreements between Muslim spouses. Thus the reported decisions concerning litigation arising from such contracts contain frequent references to three concepts derived from English law of contract: "consideration" (a contract made without consideration is void); "public policy" (a contract the consideration or object of which is opposed to public policy is void); and "restraint of marriage" (a contract in restraint of the marriage of any person other than a minor is void). (Indian Contract Act, 1872, Sections 25, 23, and 26).⁹

8. Statutes enacted prior to Partition in 1947 are applicable in the present states of India, Pakistan, and Bangladesh (unless, of course, repealed or amended by the governments of these independent states).

9. It is worth mentioning that marriage and divorce are excluded from the provisions of the Indian Majority Act, 1875, by section 2 which provides: "Nothing herein contained shall affect the capacity of any person to act in the following matters, namely, marriage, dower, divorce and adoption." Capacity to contract in these matters is determined, in the case of Muslims, by reference to Muslim law; according to Muslim law majority is reached on the attainment of puberty or the completion of fifteen years. (See: *Mst. Fatima Khatun v. Fazlal Karim Mea*, A.I.R. 1928 Calcutta 303.)

There has been little difficulty in regard to the question of “consideration” when the contract in question was a pre-nuptial agreement, the subsequent marriage constituting the necessary consideration. In 1882 the Calcutta High Court, in *Hamidoolla v. Faizunnissa* (1882 Indian Law Reports [hereafter abbreviated I.L.R.] 8 Calcutta 327), upheld a marriage contract, stressing that the agreement had been executed before the marriage:

We are aware of no reason why an agreement entered into before marriage between parties able to contract, under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself, under the form prescribed by Mahomedan Law, should not be carried out.

The requirement of consideration is, however, waived, if the contract “is made on account of natural love and affection between parties standing in a near relation to each other” (Indian Contract Act, Section 25 (1)),¹⁰ and this provision might appear to be applicable in regard to contracts between husband and wife. Nevertheless, the early cases drew a distinction between pre- and post-nuptial contracts and there are some early dicta implying that contracts between husband and wife (as opposed to contracts between prospective spouses) might run into trouble on the ground of consideration. E. g.:

[T]he distinction between a stipulation made at the time of marriage and a stipulation made later is one of consideration. The marriage itself is sufficient consideration, but after the marriage there would, as a rule, be no consideration for the husband's promise. [*Banny Saheb v. Abida Begum*, A.I.R. 1922 Oudh 251].¹¹

Although some lower Courts have impeached post-nuptial contracts on the ground of lack of consideration, the decisions have regularly been reversed on appeal and it must be taken as settled that contracts between husband and wife, if reasonable, are not invalid for any alleged lack of consideration.

The question of “restraint of marriage” has often been raised in regard to contracts in which the husband agrees that he will not marry a

10. In order to come within this exception, the contract must be in writing and registered. Given the possibility that the contract may be liable to impeachment on the grounds of lack of consideration, it is obviously advisable that any contract between the spouses executed some time after the marriage be registered under the Registration Act. Such a course would have the affect of avoiding altogether or at least greatly simplifying litigation should the husband attempt to avoid the contract subsequently.

11. In this case, however, the Court held that the agreement between the spouses had been executed as a means of compromising a suit for restitution of conjugal rights and the wife's surrender of her defences in that suit constituted sufficient consideration to validate the contract.

second wife in the presence of the first. But since such a contract can neither prevent the husband from marrying another wife nor render such a subsequent marriage invalid, the High Courts have refused to hold that the contract was one in restraint of marriage. The importance of such a contract is in defining the rights of the first wife should the husband break the agreement and marry again.

"Public policy" -- which undoubtedly covers a broad and vague legal terrain -- is probably the most important of these three concepts in the context of litigation on marriage contracts and contracts between husband and wife, simply because it continues to live on while the other two have been more or less securely laid to rest by the case-law accumulated to date. Courts of the subcontinent are, however, no more anxious to decide cases on the basis of "public policy" than are the English Courts.¹² Repelling a "contrary to public policy" argument in 1929, the Lahore High Court, in *Muhammad Ali Akbar v. Fatima Begum* (A.I.R. 1929 Lahore 660), quoted Lord Davey's remarks in *Janson v. Driefontein Consolidated Mines, Ltd* (1902 Appeal Cases 484): "Public policy is always an unsafe and treacherous ground for legal decision." Four years later the same Court considered an agreement between a husband and his wife whereby the husband agreed that should he take a second wife, the first wife would be entitled either to exercise the delegated power of *talaq* or to reside separately and receive a monthly allowance of Rs 75. The Lahore High Court upheld the contract and observed:

[A]n agreement such as... [that signed by the husband] is permitted by Mahomedan law and it certainly cannot be said to be opposed to public policy. I am unable to see anything "monstrous" or mad in the deed which, in my opinion, was a reasonable one for a husband to execute in favour of a wife who looks for treatment such as emancipated Indian women naturally consider they have a right to insist upon. [*Mst. Sadiqa Begum v. Ata Ullah*, A.I.R. 1933 Lahore 885].

In the result, and in spite of the sophistry of legal argument not infrequently advanced on behalf of litigants, the basic criterion for ascertaining the legal validity of contracts of the nature under discussion is "reasonableness," and the Courts of the subcontinent have demonstrated a marked reluctance to hold Muslim marriage contracts or contracts between Muslim husband and wife "unreasonable."

12. Arguably "public policy" in the context of Muslim Marriage contracts or post-nuptial agreements between Muslim spouses must mean the "public policy" of Muslim Law, which is vastly more generous in recognising such contracts as a means of securing and protecting the position of the wife than English common law. A saying of the Prophet declares: -- "Of all the conditions you have to fulfil, those most entitled to fulfilment are the conditions upon which you must enter the union of marriage."

The provisions and the legal effects of contracts between prospective spouses (or between husband and wife) are illustrated by the vignettes of domestic conflict to be found in the reported legal decisions of cases in which such contracts were the subject of litigation.

Stipulations re polygamy and *talaq-i-tafwid*

Muslim law permits a man to take to wife up to four women at any given time, subject only to the proviso that he must treat them equally and justly. Not all Muslim women, however, relish the idea of sharing their husband's affections with a co-wife, and an apparently not uncommon stipulation in marriage contracts relates to the possibility of such an occurrence. Thus the marriage contract may contain a stipulation that the husband shall not marry an additional wife as long as the first marriage subsists and a further provision that should the stipulation be contravened, the wife will be empowered to pronounce *talaq* on her husband's behalf in regard to her own marriage.

In *Sainuddin v. Latifannessa Bibi* (1919 I.L.R. 46 Calcutta 141) the husband agreed in the marriage document,¹³ *inter alia*, not to marry a second wife without the consent of the first wife, not to beat or ill-treat the wife, and to allow her to visit her parents. The document concluded as follows:

Be it noted that if I violate any of the aforesaid conditions or any portion thereof, I delegate to you my own power of giving three *talaqs* such as is possessed by males. Whenever you choose you may *talaq* or repudiate your person three times and then take another husband.¹⁴

The husband did marry a second wife, the first wife left him, and the husband filed a suit for restitution of conjugal rights against her. The wife thereupon "gave herself three divorces in accordance with Muhammadan law under the authority given to her by her husband," and pleaded in defence to her husband's suit that she was no longer his

13. The original document executed at the time of the marriage was not registered and had been lost. The document relied upon by the wife was executed and registered about five years after the marriage and one of the arguments raised on behalf of the husband was that such a post-nuptial delegation of *talaq* was void. The Court, quite properly, observed that the examples of *talaq-i-tafwid* found in the classical texts most commonly concern post-nuptial delegations and held the agreement and the delegation valid. (Since the post-nuptial contract had been registered, the question of consideration did not arise.)

14. Since the wife's pronouncement of *talaq* under the delegated right to do so, is regarded as, and takes effect as, a pronouncement of divorce by the husband, the wife is not divorcing her husband or repudiating her husband, but divorcing herself, repudiating herself, on behalf on her husband. Thus the expression used in this document, "*talaq* or repudiate your person."

In Hanafi law a triple *talaq* is immediately effective and irrevocable.

wife. The Court accepted the validity of her dissolution of the marriage and dismissed the husband's suit.

Two important points were reinforced by this decision: (1) That a contractual delegation to the wife of pronouncing *talaq* on her husband's behalf is not revocable by the husband. (2) That, unless the contract specifies otherwise, it is not incumbent upon the wife to exercise her right of *talaq-i-tafwid* immediately the contingency entitling her to do so arises; she may exercise the right at her option at any time after the event giving rise to her right has occurred.

Reported decisions of cases concerning a delegation of the right of *talaq* to the wife in the event that her husband should marry a second wife go back at least to the early 1870s. Such a case reached the Calcutta High Court in 1871: *Badarannissa Bibi v. Mafiattala* (7 Bengal Law Reports 442). The District Judge had refused the wife the declaration for which she prayed on the grounds that Muslim law permitted a man to marry up to four wives, that it was not illegal for her husband to contract a second marriage, and that Muslim law did not permit a wife to divorce her husband.

The High Court cited the *Hedaya* and Baillie's *Digest of Mahomedan Law* to establish the fact that a Muslim husband may validly delegate the right of *talaq* to his wife, thereby entitling her to dissolve the marriage extra-judicially. In the marriage contract the husband had made such a delegation to the wife and she was entitled, under the agreement, to exercise this right if he should marry a second wife without her consent. That contingency having been proved, the wife's exercise of *talaq-i-tafwid* was valid; the High Court decreed her suit.

In contrast to the delegation of the right of *talaq* to the wife in the event of certain contingencies arising, the husband may himself pronounce a suspended *talaq*, which will automatically come into effect should the event to which it is referred occur. Thus in *Muhammad Amin v. Mst. Aimna Bibi* (A.I.R. 1931 Lahore 134), the husband executed an agreement¹⁵ as follows:

I shall not marry another woman in the presence of Mt. Aimna Bibi, and if I do so she is to be held to have been divorced by me, on account of the second marriage; simultaneously with that second marriage, she will be *qatai haram* (absolutely forbidden) to my person and this very divorce by me in her favour would be valid and legal.

15. Again this was post-nuptial agreement and the Subordinate Judge had held that it was, therefore, without consideration and void. He also held that it was void for reason of being a contract in restraint of marriage. These findings have reference to the Indian Contract Act, Sections 25 and 26. The High Court reversed the lower appellate Court on both these points.

The High Court upheld the validity of the document and concluded that it operated automatically as a deed of divorce upon the husband's marriage to a second wife. The husband's suit for restitution of conjugal rights was accordingly dismissed.

In both pre- and post-nuptial agreements the suspended *talaq* would appear to be much less common than the delegated right of *talaq (talaq-i-tafwid)*.¹⁶ In general, provision for the exercise of *talaq-i-tafwid* is probably more beneficial to the wife, as it allows her, in the event of the contingency arising, to consider the entire situation and to decide whether to effect a divorce or not in view of all the circumstances. If the stipulation is enforced by a suspended *talaq*, she is automatically divorced whether or not she may wish to be.

The domestic complications of polygamous arrangements are manifold, and it may be noted that stipulations in a marriage contract may also be utilized to protect the interest of the wife who marries a man with one or more wives already.

Saifuddin Sekh v. Soneka Bibi (1954/55, 59 Calcutta Weekly Notes 139) concerned a woman who married a man with two previous wives, neither of whom was living with the husband at the time. A stipulation was incorporated in the marriage contract to the effect that the husband should not bring either of these women to the house where he was to live with the third wife without her consent. It was further provided that should this stipulation be violated by the husband, the wife (number three) would be empowered to dissolve her marriage with him. The husband did bring one of his formerly-married wives to live with him and the third wife. The third wife objected, left the house and proceeded to exercise the delegated power of *talaq* conferred upon her by the marriage contract.

The Assam High Court upheld the agreement and the wife's dissolution of her marriage, enunciating the principle that "a contract which serves to ensure peace and domestic happiness should not be disregarded as invalid and opposed to public policy."

16. The contingent *talaq* is more common as a means of enforcing stipulations in the marriage contract in Shafi law and in countries where Shafi law is predominant than in Hanafi law and in South Asia where Hanafi law (with its preference for the delegated right to pronounce *talaq*) is predominant. In Southeast Asia (particularly Indonesia) it is customary for a bridegroom, as part of the actual marriage ceremony, to pronounce a contingent *talaq* which will come into force against the woman he is marrying in the specified circumstance -- e.g., if he should fail to maintain her, should beat or ill-treat her, or should marry another woman in her presence.

Stipulations re polygamy and separate residence and maintenance

A stipulation in a marriage contract to the effect that the husband shall not marry an additional wife during the subsistence of the first union may be enforced, in the alternative, not by a provision in the contract allowing the wife to exercise a delegated power of *talaq* in the event that the stipulation is breached by her husband, but by a provision entitling her, in such a situation, to live apart from her husband and still be maintained by him.

Ordinarily a wife would not be entitled to maintenance from her husband if she were not living with him, unless she had a legal reason to stay away. Physical cruelty on the part of the husband, non-payment of the prompt dower (absolutely if the marriage has not been consummated and at the discretion of the Court if it has been)¹⁷ would, for example, constitute legal reasons for the wife to reside separately. But the fact that the husband had married another wife would not constitute a legal excuse, under classical Muslim law, for the first wife to absent herself from the conjugal residence.¹⁸

17. This is the situation in India. In Pakistan/Bangladesh non-payment of prompt dower is a legal reason for the wife to refuse to live with her husband even when the marriage has been consummated. (*Mst. Rahim Jan v. Muhammad*, P.L.D. 1955 Lahore 122.)

18. This was the position until 1960 in India and until 1961 in Pakistan/Bangladesh. In *Itwari v. Smt. Asghari* (A.I.R. 1960 Allahabad 684) it was held that in the changed social conditions of modern India and "in the absence of a cogent explanation" for his action, the Court will presume that the marrying of a second wife constitutes legal cruelty to the first. "Today the importing of a second wife into the household ordinarily means a stinging insult to the first. It leads to the asking of awkward questions[,] and the pointing of derisive fingers at the first wife who is automatically degraded by society." In this case the fact that the husband had taken a second wife was held to involve sufficient cruelty toward the first wife as to entitle her to live apart from him and his suit for restitution of conjugal rights was dismissed.

In Pakistan and Bangladesh the Muslim Family Laws Ordinance, 1961, provides that a man already married shall not contract a second or subsequent marriage except with the previous permission in writing of the Arbitration Council. A marriage contracted in violation of this provision is nonetheless valid, although a polygamous marriage in these circumstances entitles the previous wife (or wives) to judicial divorce under the Dissolution of Muslim Marriages Act as amended by the Ordinance. It would probably also entitle her to resist her husband's suit for restitution of conjugal rights and to claim separate maintenance if she choose not to pursue her right of suing for divorce.

If the polygamous marriage were contracted either before 1961 or with the requisite permission, the Pakistani/Bangladeshi wife would not be entitled to raise a plea of cruelty (as could her Indian sister after the *Itwari* decision), and the fact that her husband had married a second wife in such circumstances would not, of itself, constitute a legal reason for her to refuse to reside with him. (See: *Mst. Resham Bibi v. Muhammad Shafi*, P.L.D. 1967 Azad Jammu and Kashmir 32.)

Although I am basically concerned in this essay with the law applicable in civil cases, for the sake of completeness it may be noted that since 1949 in India (although not

Further, in the absence of an agreement between the parties which the Court will enforce, a Hanafi wife seeking maintenance from her husband, even when she has a legally valid reason for not residing with him, cannot collect arrears of maintenance; a decree for maintenance will only operate from the date of the decree, or, in some circumstances, from the date of the application for maintenance.¹⁹ Of course, the husband may terminate any liability for future maintenance by simply exercising his prerogative of divorcing his wife;²⁰ such action would, however, make him liable for her dower debt.

Thus, an agreement for separate residence and maintenance could be very advantageous to a wife who needed financial support but did not wish to share her husband and the conjugal domicile with a co-wife and whose husband refused to divorce her.²¹

A post-nuptial agreement along these lines came before the Bombay High Court early in the century in *Bia Fatma v. Ali Mahomed Aiyeb* (1913 I.L.R. 37 Bombay 280). The document read as follows:

in Pakistan or Bangladesh) the fact that the husband has married another wife or keeps a mistress will constitute a "just ground" for the wife's refusal to live with her husband in the context of proceedings for maintenance under the Criminal Procedure Code. (Criminal Procedure Code [Amendment] Act, 1949, section 2; Code of Criminal Procedure, 1974, section 125 (3).) See for example: *Mohammad Haneffa v. Mariam Bi*, A.I.R. 1969 Madras 414. See also: Lucy Carroll, "Muslim Family Law in South Asia: Important Decisions Regarding Maintenance for Wives and Ex-Wives," *Islamic and Comparative Law Quarterly*, 1 (1981):95-113.

19. This statement represents the situation in India to the present day; and in Pakistan/Bangladesh until 1966. Decisions of the Lahore High Court and the Pakistan Supreme Court in 1966, 1968 and 1972 have re-interpreted the Hanafi law in regard to past maintenance with the result that past maintenance is now recoverable (subject to limitation). These decisions would probably be followed in Bangladesh. (See: *Sardar Muhammad v. Mst. Nasima Bibi*, P.L.D. 1966 Lahore 703; *Rashid Ahmad Khan v. Mst. Nasim Ara*, P.L.D. 1968 Lahore 93; and *Muhammad Nawaz v. Mst. Khurshid Begum*, P.L.D. 1972 Supreme Court 302.) See also: Lucy Carroll, "Muslim Family Law in South Asia: Important Decisions Regarding Maintenance for Wives and Ex-Wives," loc. cit.

20. However, provision for maintenance following divorce (alimony) can be contracted; see below.

21. As a result of the Indian amendment to the Criminal Procedure Code in 1949 and the decision of the Allahabad High Court in 1960 (*Itwari v. Smt. Asghari*, A.I.R. 1960 Allahabad 684) this statement has somewhat greater relevance to the Pakistani or Bangladeshi wife than to an Indian wife. The advantage to an Indian wife of a stipulation for separate residence and maintenance in her marriage contract would lie, for instance, in the fact that if she left the conjugal residence as a consequence of her husband's remarriage and subsequently sought separate maintenance under the Criminal Procedure Code, she would only be entitled to maintenance either from the date of the Court order or from the date of her application; if she did not institute proceedings immediately, she would forfeit arrears of maintenance. If her claim for separate maintenance were based on the terms of her marriage contract, arrears would be recoverable from the date she left her husband's house.

You are my married wife. And now as I mean to marry a second wife, I give you this agreement in writing as follows: We are to live together as long as I and you (i.e.,) all agree. However, if disagreement takes place between us, I am to go on paying you from month to month at the rate of Rs 8, namely, Rupees eight per month for (your) maintenance.

The parties separated, the wife leaving the conjugal residence some months after the husband's second marriage. She later brought suit for arrears of maintenance on the basis of the agreement.

In a judgment that has since frequently been cited by counsel (representing husbands who have bound themselves by similar contracts) but never followed by any High Court in a case in which the wife left her husband's house subsequently to his marriage to a second wife or due to dissension between the couple²² when the contract in question permitted her to leave the conjugal domicile in such circumstances, Mr Justice Batchelor held the agreement void. In so doing, he was obviously influenced by English matrimonial law, which contemplates a much different matrimonial regime than that appertaining in a system where marriage is a civil contract which may be terminated extra-judicially by mutual consent or unilaterally by the husband alone, and where polygamy is legal and the resultant domestic complications arising from plural wives in an man's household may tax the wisdom of a Solomon. Given that such an agreement, contemplating future separation between the spouses, would have been void in English law, Batchelor J. proceeded to apply the English law to the Muslim litigants through the "public policy" clause of the Contract Act:

It is, as I understand it, as much the policy of the Mahomedan law as of the English law, that people who are married should live together and not apart; and if that is so, it seems to me that there should be no difficulty in applying to Mahomedans the English rule that any agreement such as this, which provides for, and therefore encourages, future separation between the spouses, must be pronounced void as being against public policy.²³

A strong dissent to the Bombay decision was registered by the Chief Court of Oudh in *Mansur v. Mst. Azizul* (A.I.R. 1928 Oudh 303). In this case a man married a second wife and the peace of his household was thereby disrupted as the two women did not get along well together. About a week after his second marriage the husband executed an agreement in favour of his first wife whereby he agreed to pay her

22. See below.

23. Focusing his attention on English law, Justice Batchelor completely overlooked the facts that it is not the policy of Muslim law that co-wives should be compelled to live together, and that the Muslim husband is obliged to provide separate, private accommodation for each of his wives. If his habitation is not sufficiently spacious to provide separate apartments for each of his wives, he must necessarily arrange for one (or some) to lodge elsewhere.

maintenance at the rate of Rs 5 a month even if she did not live with him in his house. Sometime thereafter the first wife went to live in her father's house and subsequently brought suit to recover arrears of maintenance on the basis of the contract.

The husband contended that the agreement was void because opposed to public policy on the basis of the Bombay decision.²⁴ The Oudh Court quoted the provisions of the *Hedaya* to the effect that a Muslim husband with more than one wife is obliged to provide each with a separate, private apartment for her own exclusive use, and held:

If a Mahomedan marries a second wife and finds that his first wife cannot pull on well with his second wife and if he does not or cannot provide a separate apartment or habitation for her exclusive use, and for the sake of preservation of family peace executes an agreement in her favour giving her maintenance, even if she does not reside in the same house with him and his second wife[,] that agreement is not in our opinion against public policy.

The Oudh Court also observed that "it is the highest policy of the law that contracts should be enforced." The wife was awarded her maintenance.

A similar case came before the Lahore (Pakistan) Court in 1967, *Muhammad Zaman v. Mst. Irshad Begum* (P.L.D. 1967 Lahore 1104). Approximately a year after he had married his first wife, the husband executed an agreement in her favour to the effect that should he ever take a second wife, she would be entitled to receive maintenance while living apart from him. He later did marry a second wife and the first wife returned to her father's house. When the first wife attempted to collect maintenance by proceedings under Section 488 of the Criminal Procedure Code, the husband responded with a suit for restitution of conjugal rights and argued that the agreement was void because opposed to public policy. This argument was emphatically rejected by the Lahore High Court:

A marriage between Muslim male and female is purely of the nature of a civil contract and the wife is entitled to protect herself at the hands of her husband in case of their future differences. In the present case the agreement is to the effect that the wife is entitled to receive alimony [i.e., maintenance] in the house of her parents or anywhere else she chooses to reside in case the husband takes a second wife and there is nothing in such an agreement which may be considered to offend against the term public policy.

24. The contention that the agreement was void for lack of consideration was also mooted and rejected by the Court: "The defendant is bound to maintain his wife during the subsistence of the marriage. So long as the right to maintenance lasts, the contract in question subsists and it cannot be treated as devoid of consideration."

In rejecting the husband's suit for restitution of conjugal rights, the Lahore Court was clearly enforcing the terms of the contract entered into by the spouses. In the absence of the agreement, the wife, unless she were able to prove physical cruelty, would neither have been able to successfully defeat her husband's suit nor obtain maintenance from him while living in her parents' house.²⁵

Stipulations re dissension

Stipulations may also define the terms upon which the spouses will deal with future dissension and disunity between themselves. Thus the stipulation in the marriage contract relied upon in *Mst. Hamidan v. Muhammad Umar* (A.I.R. 1932 Lahore 65 (2)), provided that the husband would pay the wife separate maintenance at the rate of Rs 20 a month if relations between them "became bad." When the wife sued for arrears of this maintenance, the Court held that the agreement was valid, that all it was necessary for the wife to establish was that there was dissension between the parties, and, this being proved, decreed her maintenance. Again the fact that the contract conferred an important right upon the wife is evident. In the absence of proof of cruelty, the wife, were it not for the contract, would not have been able to collect maintenance from her husband while not living with him.

The marriage contract in *Mirjan Ali v. Maimuna Bibi* (A.I.R. 1949 Assam 14) contained the following stipulation:

If Khatun Maimuna, due to any ill-feeling[,] resides at her father's place for a period of 90 days, and if I fail to bring her back to my own house by persuasion within the said period of 90 days and [fail to persuade her] to live with me, then on completion of the said 90 days, my 1, 2, 3 *talak bain* upon... [her] will be effective and she will be able to take another husband after the period of *iddat*.²⁶

The wife petitioned for a declaration that her marriage had been dissolved, alleging that she had left her husband's house because of ill-feeling between herself and her husband and ill-treatment by him, that she had been living at her father's house for some eight months, and that under the terms of the contract the marriage had come to an end.

The Court refused the declaration, firstly, on the ground that the wife had failed to establish that she had left her husband's house due to ill-

25. Compare with the Indian situation, *Itwari v. Smt. Asghari* (A.I.R. 1960 Allahabad 684), and *Mohamed Haneffa v. Mariam Bi* (A.I.R. 1969 Madras 414). See above fn 17.

26. *Iddat* is the period following a divorce during which the husband is obliged to support his ex-wife and the ex-wife is prohibited from remarrying. The period of *iddat* is three months or, if the wife is pregnant at the time of the divorce, until delivery.

feeling as it was incumbent upon her to do under the terms of the contract.²⁷

Secondly, although the wording of the stipulation makes it clear that what was involved was a suspended *talaq*, not a delegated right of pronouncing *talaq*, the Court interpreted the stipulation as a delegation²⁸ and held that the wife had failed to prove that she had actually pronounced the *talaq* formula.

27. The husband alleged that she had gone on a visit to her parents' house and that while staying there she had "fallen under the influence" of another man.

28. A similar confusion is to be found in *Ahmed Ali v. Sabha Khatun Bibi* (P.L.D. 1952 Dacca 385). The terms of the contract in this case read:

"(1) I shall keep my wife in *parda* and privacy and teach her all the duties incumbent according to *Shariat* and guide her in accordance therewith. If I oppress her wrongfully she will be entitled to reside at her father's house and realize a maintenance charge from me at the rate on Rs 7 per month.

"(2) I shall not contract marriages of any kind whatsoever without the consent of the wife unless she happens to be either barren or perpetually ill. If the said wife be in need of going to or coming back from her father's residence I shall send her there and bring her back at my own expense.

"(3) If I am to take a remission of any portion of the dower money of the wife, I shall do it in the presence of her near relations. The remission obtained in the absence (of near relations) will not be tenable before law Courts.

"(4) If I do not give the wife her maintenance for two years[,] three *talak-i-bain* (irrevocable) will take effect on the wife herself."

Although this obviously is an example of a suspended *talaq* rather than a case of a delegated right of *talaq* to the wife, and although this sanction is only attached to the fourth stipulation in the contract, the Court interpreted the document as establishing that "the husband did give a power to his wife to divorce herself on breach of any of the conditions in the *kabinnama* [marriage contract]."

On a clear reading of the contract, clause (1) contains an implied stipulation that the husband would not "wrongfully oppress" the wife, enforced by entitling the wife to separate residence and maintenance in such an event. Clause (2) stipulates, *inter alia*, that the husband will not marry a second wife without the consent of the first wife, unless the first wife prove either barren or chronically ill, but there is no sanction provided to enforce this condition; however, it could possibly be argued that marrying a second wife in contravention of clause (2) would constitute "wrongful oppression" under clause (1) and thus entitle the wife to separate residence and maintenance. Clause (3) concerns the conditions under which a remission of dower can be obtained by the husband, sanctioned by the specification that a remission obtained otherwise will not be tenable in any Court. And clause (4) contains a stipulation as to maintenance, enforced by the suspended *talaq* which would come automatically into operation in case of a breach of the stipulation. If the husband "wrongfully oppressed" the wife, she would be entitled, under clause (1), to receive maintenance in the house of her father; if this maintenance were not paid for the two years specified in clause (4), the suspended *talaq* would operate to dissolve the marriage. In any other situation, however, the maintenance referred to in clause (4) would only comprehend maintenance to which the wife was entitled, and which the husband was obliged to pay, under Muslim law. (See below.)

The contract under consideration in *Buffatan Bibi v. Sheikh Abdul Salim* (A.I.R. 1950 Calcutta 304) provided that in case of disagreement between the spouses the wife would be permitted to live in her father's house and the husband would provide her maintenance there at the rate of Rs 10 per month. If he failed to pay such maintenance for six consecutive months, the wife would be empowered to dissolve the marriage by *talaq-i-tafwid*.

The wife left her husband and went to her father's house. When the husband sued for restitution of conjugal rights, the wife's defence was that she had exercised the right of dissolving the marriage conferred upon her by the marriage contract and the parties were no longer husband and wife.

The Subordinate Judge held that so long as cruelty and ill-treatment were not proved, the husband was under no legal obligation to maintain his wife if she were not living with him (which would, in fact, have been the legal position were it not for the stipulation in the contract). Therefore, there had been no failure to maintain on the part of the husband and, consequently, no valid exercise of *talaq-i-tafwid* by the wife.

The High Court disagreed with the lower Court's interpretation of the contract:

[T]he *kabinnama* [marriage contract] expressly confers upon the wife the right to live in her father's house in case of disagreement and imposes a liability upon her husband to pay separate maintenance so long as she lives in her father's house and we hold that this agreement is valid and binding upon the... [husband].

However, the High Court was unable to determine whether the wife had left her husband's house, as contemplated by the contract, due to disagreement with him, because, among other things, the Subordinate Judge had found that it was not really a matter of the wife being at odds with her husband but rather that she "is in the complete control of her father . . . and the latter is thinking of another marriage for her or for his own selfish gain." The case was remanded for further consideration as to the reasons that had caused the wife to leave the house of her husband.

Stipulations in the marriage contract to the effect that the wife will be permitted to reside in her parents' house or elsewhere apart from her husband in case of dissension or ill-feeling between the spouses or in the event that her husband takes a second wife, and that while living apart from her husband for such a reason she will be entitled to be maintained by him, clearly confer an important right on the Muslim wife and one which the Courts can and will enforce by decreeing the maintenance she claims. Of course, the wife will have to prove to the satisfaction of the

Court that she has fulfilled the conditions of the contract, that is, that she actually left her husband's house for a reason that, while perhaps not constituting a sufficient legal cause under Muslim law, is squarely within the contemplation of the terms of the contract upon which the right she claims is based.

Further, when a wife claims maintenance on the basis of such a contract, she is entitled to claim and collect arrears of past maintenance due her, in contrast to the situation were she to sue for maintenance under the general Hanafi law or the vagrancy provisions of the Criminal Procedure Code.²⁹

The husband's obligation to pay separate maintenance under a contract of the nature discussed in this and the preceding section will, however, be terminated should he divorce the wife -- unless the contract also contains a provision entitling the wife to maintenance after a divorce.

Stipulations re maintenance, alimony, or allowance

A stipulation to the effect that a husband will maintain his wife, when it is not combined with a clause giving the wife the right to reside apart from him in the event of dissension, ill-feeling, ill-treatment, or the presence of a second wife, as in the cases discussed above, would be interpreted as entitling the wife to maintenance only when she was entitled to it under Muslim law. If she were residing apart from her husband and had no legal reason for not living with him, she would not be entitled to maintenance either under Muslim law or under the stipulation in the marriage contract.

Thus in *Ahmed Ali v. Sabha Khatun Bibi* (P.L.D. 1952 Dacca 385), where the marriage contract contained a clause reading: "If I do not give the wife her maintenance for two years[,] three *talak-i-bain* (irrevocable) will take effect on the wife herself," the High Court held that this clause was to be interpreted as only applying to a situation where the husband had not maintained the wife for two years when he had a legal obligation to do so. To interpret it otherwise, the Court held, would be unreasonable and contrary to the policy of Muslim law. "[A] husband's duty to maintain his wife is conditional upon her obedience and the performance of her marital duties," and as the wife had refused to live with her husband

29. Note, however, the right to collect arrears of maintenance conferred on the Hanafi wife by recent decisions of the Pakistan Courts; see above, fn. 18.

without sufficient legal reason,³⁰ the husband's obligation to maintain her had been suspended.³¹ There had thus been no breach of the contract on the part of the husband and no valid dissolution of the marriage; the husband's suit for restitution of conjugal rights was accordingly decreed.

There are dicta in earlier Indian cases that an agreement which allows the wife to leave her husband's house for no reason (which was the effect of the wife's interpretation of the stipulation in *Ahmed Ali's* case) would be void. (E.g., *Banny Saheb v. Abida Begum*, A.I.R. 1922 Oudh 251; *Sabed Khan v. Bilatunnissa Bibi*, A.I.R. 1919 Calcutta 825.)

However, not only can a right to separate maintenance be secured to the wife by stipulations entitling her to reside apart from her husband on some cause (e.g., dissension, ill-treatment, her husband's remarriage) and still claim maintenance from him, but provision for maintenance following divorce (alimony) can also be contracted. In the absence of such a stipulation, the husband's obligation under Muslim law to support his divorced wife continues only for three months following the divorce, unless the wife is pregnant at the time and in such case until delivery.³²

30. The marriage contract contained another clause entitling the wife to separate maintenance in the house of her father if she were "wrongfully oppressed" by her husband. (See above, fn. 27.) If the wife had been able to prove such oppression and that it was for this reason that she had left the house of her husband, the contract would have conferred upon her a legal reason for refusing to live with her husband. However, the wife raised no such contention; indeed, the Court observed that there was "no suggestion in this case that he was living apart from her husband because of any ill-treatment."

31. It may be noted that Section 2 (ii) of the Dissolution of Muslim Marriages Act provides that the wife may sue for divorce on the ground "that the husband has neglected or has failed to provide for her maintenance for a period of two years." This provision has been (generally) interpreted as applying only to a situation where the husband is under a legal obligation to maintain the wife, which he is not if she absents herself from the conjugal domicile without either the husband's permission or a lawful reason. Although I have not found a reported case involving such a situation, I think it is clear that if the marriage contract contains a stipulation entitling the wife to separate maintenance in the event of dissension between the couple or the husband's marriage with another wife and, such dissension or remarriage having been proved, it was further proved that this maintenance had not been paid for the statutory period of two years, the wife would be entitled to sue for divorce on this ground under the Dissolution of Muslim Marriages Act. The marriage contract would be regarded as giving the wife a legal reason for not residing with her husband and as putting the husband under a legal obligation to pay the separate maintenance. If the wife had not been empowered to dissolve the marriage by *talaq-i-tafwid* in case of such default, she would be entitled to sue for judicial divorce under the Act.

32. The *iddat* period (see above, fn. 25). The purpose of the *iddat* is to establish whether the wife is pregnant and to prevent confusion of paternity.

Muhammad Muin-ud-Din v. Jamal Fatima (A.I.R. 1921 Allahabad 152) involved in a pre-nuptial contract between a woman, her prospective husband, and her prospective father-in-law by which it was provided that in case of dissension or disunion between the spouses the prospective husband and his father would pay an allowance of Rs 15 a month to the woman *for her life*. Dissension between the couple was proved, and she was eventually divorced by her husband.

When she sued to recover the allowance, the question was whether the contract was enforceable after the divorce of the two parties. The agreement was impugned as without consideration and contrary to public policy; Batchelor J.'s decision in the Bombay case was invoked on behalf of the husband.

The Allahabad High Court repelled the contentions that the contract offended against public policy, was without consideration, or encouraged separation between the spouses. The ex-wife was held entitled to the allowance "until she dies or breaks . . . [the agreement]." (The latter phrase undoubtedly means that she would not be entitled to the allowance if she remarried.)

This case was cited and endorsed by the Calcutta High Court, which observed in the course of *Ahmad Kasim Molla v. Khatun Bibi* (1931 I.L.R. 59 Calcutta 833):

No doubt it is competent for the relations of a Mahomedan girl at the time of her marriage[,] or for a Mahomedan woman herself[,] to take measures for her protection in the event of ill-treatment or even divorce on the part of the husband.

The contract in the Calcutta case provided that if the husband committed any mischief or showed any carelessness toward the wife, she would be entitled to reside where she pleased and the husband would be liable for her rent and subsistence. The husband (a "lustful" middle-aged man with two existing wives and grown children) divorced the child-wife (wife number three) after only about a month of matrimony and the question, when the wife sued for maintenance under the contract, was again whether it was enforceable after the divorce. With "the greatest possible reluctance," the Court was compelled to hold that, on a strict construction of the contract, the stipulations concerning maintenance only applied during the existence of the marriage.

If the conditions had expressly stated that the bridegroom should . . . pay to his wife subsistence money and rent of a house to dwell in for her life . . . the case would have been different. In my opinion, it would have been quite competent for those acting on behalf of the wife to have stipulated that, if there were a divorce, the husband should be under an obligation to continue to pay to the wife an adequate subsistence allowance . . . during the life-time of the wife or for any other specified period.

Among middle and upper class Muslim families of North India and Pakistan it is common for the husband to give his wife a regular allowance, termed *kharch-i-pandan*, literally "expenses of the pan-box." The amount of this allowance is usually agreed before or at the time of marriage. A case concerning such a contract for *kharch-i-pandan* went to the Privy Council early in the century: *Nawab Khwaja Muhammad Khan v. Nawab Husaini Begum* (1909/10 I.L.R. 37 Indian Appeals 152). The judgment of their Lordships was delivered by Ameer Ali, an Indian jurist whose influence on the development of Anglo-Muhammadan law has yet to be fully appreciated.

By the contract executed by the girl's prospective father-in-law, as guardian of the minor bridegroom, the father-in-law agreed to pay to the girl the sum of Rs 500 a month *in perpetuity* for *kharch-i-pandan*, commencing with the date of her reception into the husband's house. The couple lived together for about 13 years and then the wife left the husband's house due to disagreements.

She subsequently sued her father-in-law for arrears of the allowance on the basis of the agreement. He, in reply, pleaded that the agreement was void for lack of consideration and opposed to public policy and that, in any case, the wife had forfeited her rights under it by ceasing to live with her husband. The Indian Courts negated the first two contentions. The consideration or object of the contract was clearly to secure the marriage of the defendant's son into a respectable family (the bride was closely related to the Maharaja of Rampur). The Subordinate Judge had, however, accepted the argument that the allowance was only payable to the wife while she was living with her husband. The Allahabad High Court, reversing the lower Court, held that there was nothing in the contract releasing the father-in-law from the liability he had assumed to pay the allowance in perpetuity in the event that the wife left the husband's house.

The Privy Council dismissed the father-in-law's appeal, holding that by the contract he had bound himself "unreservedly to pay to the plaintiff the fixed allowance; there is no condition that it should be paid only whilst the wife is living in the husband's house, or that his liability should cease whatever the circumstances under which she happens to leave it."

It seems clear that on such a construction of the contract, the allowance would be payable after a divorce, unless and until the wife remarried.

A Lahore case, *Muhammad Ali Akbar v. Fatima Begum* (A.I.R. 1929 Lahore 660), illustrates the difference between a husband's liability for maintenance under Muslim law and his liability for *kharch-i-pandan* under a contract. The husband had executed an agreement at the time of the marriage that he would pay his wife Rs 25 a month as *kharch-i-*

pandan during his life-time. A couple of years after they were married, the wife left the husband's house and went to live with her parents due to quarrels with her mother-in-law. She subsequently sued her husband for maintenance (concerning which there was no contractual agreement and her rights fell to be determined according to Muslim law) and the *kharch-i-pandan* allowance (on the basis of the contract).

The Court held that she was not entitled to maintenance as quarrels and disagreements with her mother-in-law did not constitute a legal reason for her to leave her husband's house.³³

In regard to the *kharch-i-pandan* agreement, the husband urged that it was contrary to public policy and cited the Bombay decision (Batchelor J.) that has haunted so much of the litigation on marriage contracts and contracts between husband and wife. The Bombay rule that an agreement between a Muslim husband and his wife providing that a certain maintenance should be paid to the wife in the event of a future separation is void, was not relevant to this case where it was contracted that the allowance would be paid, not that it would be paid only in the event of a future separation. But the argument having been raised, the Lahore Court took occasion to register its dissent from the Bombay decision:

With all due reference to the learned Judges who decided that case, I do not see why a stipulation by the husband to make an allowance to his wife in case of separation should be deemed to offend against the rule of public policy. Such a stipulation encourages their living separate from each other no more than their living together by imposing an obligation on the husband calculated to prevent him from doing any act which would lead to separation.

The *kharch-i-pandan* contract was held valid and enforceable on the authority of the Privy Council decision mentioned above.

33. But the right of separate residence and maintenance in such a contingency could have been contracted. See: *Sabed Khan v. Bilatunnissa Bibi* (A.I.R. 1919 Calcutta 825), where the contract contained terms allowing the wife to leave her husband's house and reside elsewhere on two contingencies: (1) ill-treatment by the husband or any member of his family; and (2) differences or disagreements with the husband or any member of his family. The contract was upheld and when the husband sued for restitution of conjugal rights, it was held that although he was entitled to his conjugal rights, they would have to be exercised in the house where the wife was residing with her parents and the husband could not compel his wife to rejoin him in the house. In reply to the argument that cruelty of such a degree as to entitle the wife to resist her husband's suit recalling her to the conjugal residence had not been established, the Court observed: "But... the defence is based not on cruelty but on ill-treatment as a breach of a condition of the *kabinnama* [marriage contract], which entitled her to leave her husband's house and permitted her to go to her parents."

Stipulations re place of residence

A stipulation which has caused the Courts some difficulty is one by which it is agreed that after the marriage the couple would live in the house of the wife's parents. It may be that what was involved in at least some of these cases was the custom whereby a father with one or more daughters but no sons brings a son-in-law into his domestic establishment as a substitute son.³⁴ However, with the exception of some cases in Kashmir (where, interestingly and in contrast to the general trend of the case-law, the stipulation was upheld),³⁵ this is not clear from the reported decisions.

With the exception of the Kashmir cases and situations where there were clearly special circumstances, the Courts have held stipulations as to the residence of the spouses with the wife's parents contrary to public policy and void.

Imam Ali Patwari v. Arfatunnesa (A.I.R. 1914 Calcutta 369 and A.I.R. 1916 Calcutta 223) involved such a stipulation, coupled with a delegation to the wife of the right to dissolve the marriage by *talaq-i-tafwid* in the event that the husband failed to honour this provision of the marriage contract. The wife sued for her deferred dower on the ground that, her husband having left the house of her parents in violation of the agreement, she had dissolved the marriage by exercise of the delegated right of *talaq*. The husband, for his part, instituted a suit for restitution of conjugal rights.

The Court held that the stipulation, and therefore the wife's pronouncement of *talaq*, were void; the wife's suit was dismissed and that of the husband decreed.

A similar stipulation was, however, upheld by the same Court in *Nizamul Haque v. Begum Noorjahan* (A.I.R. 1966 Calcutta 465), a case where the Court was clearly prepared to recognize that there was a reasonable explanation for the inclusion of the stipulation in the marriage contract. The wife was the posthumous child of a Hindu father; after her father's death, her mother had converted to Islam and married

34. One of the reasons why female children are devalued in contemporary South Asia is that, while the daughter customarily leaves her parental home on marriage (and spends her life looking after someone else's parents), the son remains with his parents and brings his bride home to reside with the extended family. In the absence of other provisions for old age, sons are essential for a couple's security in old age.

Far from being "contrary to public policy," enabling a daughter to contract with her bridegroom that the couple will reside with her parents after marriage will contribute toward the "public policy" (of Muslim law and contemporary States) of reducing the devaluation of, and discrimination toward, female children.

35. See: *Mst. Jani v. Muhammad Khan*, A.I.R. 1970 Jammu and Kashmir 154 and A.I.R. 1971 J. and K. 40; and *Muhammad Khan v. Mst. Shahmali*, A.I.R. 1972 J. and K. 8.

a Muslim. Some years later the wife herself also converted to Islam and married a Muslim husband. Fearing that she would be expected to observe strict Muslim customs and restrictions should she go to live with her husband's people, it was agreed between the nuptial couple that they would live in the wife's house (presumably the house that her mother had inherited from her deceased father). After about three years the husband left the wife's house and the wife subsequently applied for maintenance for herself and the child of the marriage under Section 488 of the Criminal Procedure Code. The husband replied that he would maintain his wife and child if they came to live with him in his family's house. Were it not for the contract, the wife would have had to prove a legal reason for not taking up her residence with her husband in his house in order to be able to collect maintenance from him while residing elsewhere.

The husband, of course, argued that the contract was contrary to public policy and void.

The Court, however, held that under the circumstances of the case the agreement was reasonable and valid and that the wife was entitled on the basis of it to recover maintenance from her husband while living in the house where it had been agreed that the couple would reside.

The complications of polygamy may apparently constitute a reasonable justification for allowing the bride to reside with her family. *Mst. Sakina Faruq v. Shamshad Khan* (A.I.R. 1936 Peshawar 195) involved agreements made by a husband in favour of his second wife. He originally contracted some months before the marriage to build a separate house for her in his village in order that she would not have to reside with the first wife. He further stipulated that in case of disagreements arising, the wife would be allowed to live with her parents and receive maintenance at the rate of Rs 30 a month. Apparently the house for the second wife was not constructed and a few months after the marriage the husband executed another agreement in her favour confirming a verbal promise made at the time of the marriage that she would not be removed from the house of her parents.

When the wife sued for maintenance on the basis of these agreements, the Court held them valid and the wife entitled to her maintenance on analogy with the Oudh case, *Mansur v. Mst. Azizul* (A.I.R. 1928 Oudh 303), in which an agreement to pay maintenance to the first wife when she was living apart from her husband and his second wife was upheld.³⁶

Another agreement concerning residence that was upheld illustrates not only another set of special circumstances but a situation where the

36. For the Oudh case, see above, pp. 64-65.

wife's parents effectively intervened to assist their daughter when her marriage broke down and she was neglected by her husband: *Muhammad Yasin v. Mumtaz Begum* (A.I.R. 1936 Lahore 716). After some few years of marriage the husband "took to a life of idleness" and disregarded his obligations to his wife. The wife's parents succeeded in obtaining an agreement from the husband that in future he would earn his living and maintain his wife, that he would establish the wife in a respectable dwelling approved by the wife and her parents, and that he would behave properly toward his wife. The agreement was enforced by a provision providing that should the husband default in any of these particulars, the wife would be at liberty to dissolve the marriage by *talaq-i-tafwid*.

The husband defaulted, the wife exercised the delegated power of *talaq*, and the husband sued for restitution of conjugal rights, alleging that the agreement was opposed to public policy and void.

The Court however, considered the contract to be reasonable in the circumstances of the case and observed that the case was readily distinguishable from those in which stipulations binding the husband to reside in the house of his wife's parents had been declared void. In the present case the husband's choice of residence was not completely restricted; he merely had to reside with his wife in a dwelling approved by the wife and her parents and his choice was not limited to the wife's parental home.

The question of reasonableness

Early in this essay I commented that the Courts of the subcontinent had evinced a marked reluctance to hold Muslim marriage contracts and contracts between Muslim spouses "unreasonable." I will conclude the discussion of the case-law with three examples illustrating this statement.

One of the stipulations in the marriage contract of an East Pakistan (now Bangladesh) couple was that the husband would pay the wife her prompt dower on demand.³⁷ The stipulation was enforced by a delegation of the right of *talaq* to the wife. The wife repeatedly demanded payment of her prompt dower shortly after the marriage; her husband did not pay it and she purported to dissolve the marriage by *talaq-i-tafwid*. Her husband sued for restitution of conjugal rights, alleging the divorce pronounced by the wife invalid.

Among other contentions, the husband argued that it was unreasonable that a delegated right of divorce should be exercised for

37. The dower is usually divided into two portions, one (the prompt dower) payable on demand and the second (the deferred dower) payable on termination of the marriage by death or divorce.

such a reason as non-payment of dower. Dower ranks simply as a debt and there are legal ways of recovering the amount due from the debtor. The Dacca High Court upheld the contract: the right to exercise *talaq* in the event that the prompt dower was not paid on demand had been duly delegated to the wife and, the contingency having been proved, there was no legal bar to her exercise of the right conferred upon her. (*Tahazzad Hossain Sikdar v. Hosseneara Begum*, P.L.D. 1967 Dacca 421.)

Nearly a century earlier a Bengali bridegroom had executed the following document in favour of his wife on their wedding day:

I, Fyez Buksh, son of Meah Nubi Buksh, now of the town of Chinsurah, having executed the *kabinnama* [marriage contract] in the presence of witnesses, do hereby execute this *ikrar* [agreement] to the effect that I shall never give you troubles in feeding and clothing you; that I shall make over to you and to nobody else besides you whatever money I shall draw from employment; that I shall never exercise any violence on you; that I shall never assault or abuse [you]; that I shall not take you anywhere else away from your home; that it will not be within my power to marry or make any *nikah* [marriage] without your permission; that I shall not prevent those men from visiting you who may bear any relationship to you, or come to you for conducting your law suits, but they only and nobody except themselves will have the liberty of seeing you; that I shall do nothing without your permission; that if I do anything without your permission, you will be at liberty to divorce me and realize from me the amount of *dinmohur* [deferred dower] forthwith, and this *nika* will then be null and void. I execute this *ikrar* of my own free-will to give effect to the above conditions.

The husband later obtained salaried employment and, although he had earned something over 565 rupees by the date of the suit, he had only given his wife 54 rupees, in contravention of the terms of the contract. The wife therefore sued for the amount remaining.

The Subordinate Judge agreed with the husband's argument that the contract was unreasonable and void, that it made a slave of the husband and placed him at the complete mercy of his wife.

The High Court, however, observed that while some part of the contract might be void,³⁸ the clause with which the litigation was concerned could be given a reasonable interpretation. A reasonable construction would entitle the wife, not to every *anna* of her husband's earnings, but to a fair sum for her maintenance. This amount the Court assessed at the rate of Rs 10 a month from the date of the agreement; the wife's suit was accordingly decreed. (*Poonoo Bibee v. Fyez Buksh*, 1874, 15 Bengal Law Reports Appx. 5.)

38. The Court referred in this context to the stipulations that the husband would do nothing without the permission of his wife and that if he did do anything without her permission, she would be entitled to exercise a delegated right of *talaq*.

On the other side of the subcontinent and half century later the Lahore High Court considered the following document, executed by Abdul Raoof on his wedding day in favour of his newly-wedded wife, Sahra Jan:

I Abdul Raoof, son of Sardar Muhammad Ismail Khan, do hereby write a sacred agreement with my own hand on this Quran, the sacred book of God and His Holy Prophet, that I will always fulfil the wishes of my wife, Sahra Jan, daughter of Sardar Sher Muhammad Khan, and will never disobey her in any way. I will never question her though she may abuse me and say improper things in certain matters, and I will never give her any trouble and will always serve her like a servant, and will always seek her happiness. But I can go out with her permission to learn and receive education so that I may learn the good things in this world and in the next world; and also [I] will never disobey my father in any way, and if ever openly or secretly I disobey the wishes of my father or my wife, may God, this word of God and the Holy Prophet turn enemies to me, Abdul Raoof, the writer of this agreement, and whenever I do anything contrary to the terms of this agreement my wife Sahra Jan has authority and power from me to divorce herself and cancel this marriage and set herself at liberty to consider herself no longer as my wife. I will have no power and objection to this cancellation of marriage.

About nine years after the marriage Sahra Jan purported the exercise the authority to pronounce *talaq* in regard to her marriage with Abdul Raoof and sued for a declaration that she was no longer his wife. Her husband argued that the agreement was invalid and unenforceable on the grounds that it was unreasonable. The District Judge agreed that any contract whereby the husband was to become the servant of his wife was neither reasonable nor enforceable.

The Lahore High Court (*Mst. Sahra Jan v. Abdul Raoof*, A.I.R. 1921 Lahore 194) overruled the District Court, observing that the contract in question "has been drawn up in an oriental language between a husband and wife at the time of marriage, and . . . the words used in a document on such occasions are not to be construed too literally, but in a reasonable and intelligent manner." Putting a reasonable interpretation on the wording of the document, the Court held it valid. It further held that as it had been found that the husband had ill-treated the wife, the contract had been breached and the wife was therefore empowered under it to dissolve her marriage. The declaration was granted.

The Fyzee contract

Professor A.A.A. Fyzee, in Appendix C of his *Outlines of Muhammadan Law*,³⁹ provides a transcript of an "Agreement for Dissolution of Marriage" designed some years ago by himself and a firm

39. Delhi: Oxford University Press, 1974, 4th edn, pp. 474-6.

of Bombay solicitors at the instance of a prominent worker in the field of women's rights, Begum Sharifa Hamid Ali.⁴⁰ This document is intended to be signed by the prospective spouses before the marriage ceremony.⁴¹ Under the agreement the wife is empowered by her husband to dissolve the marriage by *talaq-i-tafwid* on a number of grounds, subject to the proviso that the existence of one or more of the specified grounds shall first be either admitted by the husband in writing or certified in writing by the wife's father (or, if he is not living, two respectable persons) after giving the husband opportunity to make appropriate representations.

The grounds specified in the document are amply broad enough to secure to the wife the means of exit from an unhappy marriage without either prolonged litigation (if she were to sue for judicial divorce under the Dissolution of Muslim Marriages Act) or the surrender of her dower (if she were to agree to an extra-judicial *khula* or divorce by mutual consent). The grounds are as follows:

- (a) That the Husband failed to observe and perform the duties imposed upon a husband by Muslim Personal Law, namely,
 - (i) kindness in general behaviour and treatment,
 - (ii) the fulfilment of conjugal rights, and
 - (iii) the maintenance and support of the Wife.
- (b) That the Husband has married or gone through the form of marriage with another woman after the date hereof.
- (c) That the temperaments of the Husband and the Wife are incompatible or otherwise the Husband is unable to keep the Wife happy.
- (d) The grounds mentioned in Section 2 of the Dissolution of Muslim Marriages Act 1939 or any of them.

The agreement provides that, the ground or grounds having been admitted or certified to exist, the wife shall exercise the power derived from the agreement by so declaring in the presence of any two witnesses. It is also provided that the power to pronounce divorce delegated to the wife is not revocable by the husband and is not affected by her having failed on one or more occasions to exercise it.

The agreement does not give to the wife exactly the same power as that possessed by her husband to dissolve the marriage extra-judicially. A husband need not have any ground for his exercise of *talaq* and, in Hanafi law, no witnesses are necessary for the husband's pronouncement (although they are useful in proving the fact of the event). But the

40. The full agreement is reproduced in this volume, pp. 95-98 below.

41. f it is signed before the ceremony, the marriage itself constitutes "consideration" and there is no possibility of the contract being impugned on grounds of lack of consideration. Further, on general principles of prudence it is advisable to secure the terms of the marriage contract before actually solemnizing the union.

grounds on which the wife is authorized to exercise her delegated right of divorce are so broad that the matrimonial power-balance in regard to dissolution of the marriage is substantially equalized.

Indeed, by virtue of clause (d) she is entitled to extra-judicial divorce at her option on any of the grounds that would entitle her to judicial dissolution of her marriage in India; while this clause, together with clause (b), gives her more liberal grounds than those available to Pakistani and Bangladeshi women under the Dissolution of Muslim Marriages Act as amended by the Muslim Family Laws Ordinance (whereby, in addition to the grounds available under that statute to an Indian wife, judicial divorce is also available if the husband marries a second or subsequent wife without the permission of the Arbitration Council). Further, clause (c) gives the wife a right to extra-judicial divorce on grounds upon which a Pakistani or Bangladeshi wife (although not an Indian wife)⁴² may obtain a judicial *khula*,⁴³ but without the surrender of her dower, which this innovative form of judicial dissolution of the marriage requires of the Pakistani or Bangladeshi wife forced to resort to this relief.

More worthy of comment, perhaps, given the possibilities that such contracts afford, is the fact that the agreement does not secure to the wife maintenance during the period following a divorce. Such a provision, entitling her to alimony until death or remarriage, could easily have been incorporated.⁴⁴

It would be interesting to know how widely this, or any similar, contract is utilized in the Bombay area (or elsewhere).⁴⁵ And what, if any, efforts women's organizations are making to popularize the use of such contracts.

42. Some cases are emerging which may indicate that the Indian Courts will come to the position of allowing the Muslim wife judicial dissolution of her marriage on grounds of irreparable breakdown. See e.g.: *Aboobacker Haji v. Mamu Koya*, 1971 Kerala Law Times 663, in which the leading Pakistan case on judicial *khula* is cited.

43. For a discussion of judicial *khula* see: Doreen Hincliffe, "Divorce in Pakistan: Judicial Reform," *Journal of Islamic and Comparative Law*, II (1968): 13-25; and Lucy Carroll, "The Muslim Family Laws Ordinance," pp. 117-43, loc. cit. See also Lucy Carroll, "Quran II:229: 'A Charter Granted to the Wife'? Judicial *Khul* in Pakistan," *Islamic Law and Society*, 3 (1996): 91-126.

44. Provision for alimony was probably not included because of the decision of the Bombay High Court (Bachelor, J.) in the case of *Bai Fatima v. Ali Mahomed Aiyeb* (see above, pp. 63-64). As noted above, that decision has been strongly dissented from by other Courts of the subcontinent and I would venture the opinion that the High Court of Bombay would overrule its previous decision if the matter came before it now.

45. At one place Professor Fyzee describes this agreement as "an Indian form in common use;" at another place he reports that it "is fairly wide use among certain educated families in Bombay; and... is not well known outside." (*Outlines*, pp. 158 fn., 474.)

Concluding remarks

The Muslim law of marriage places the wife in a weak and subordinate position. If the marriage turns out to be a happy and contented one, she, secure in the love and affection of her husband, may not have occasion to consider her legal position. However, if the marriage is unhappy and breaks down, her vulnerability becomes readily apparent. The fact that Muslim marriage is a civil contract and is so regarded by the Courts of the subcontinent means that the prospective spouses themselves and/or their guardians may, within "reasonable" limits, define the terms of the marriage contract, thereby investing the wife with legal rights unavailable to her under the general Muslim law in the absence of such a contractual agreement.

There are clearly a variety of ways in which stipulations in a Muslim marriage contract may be used to secure and protect the position of a Muslim wife in South Asia. An accumulation of case-law going back over a century exists to demonstrate the validity of such agreements and the fact that the Courts will enforce them, with two exceptions: (1) an agreement that the couple will permanently reside in the house of the wife's parents where there are no special circumstances investing such a provision with the aura of "reasonableness;" and (2) an agreement allowing the wife to leave her husband's house without any reason at all and still be entitled to maintenance from him.

However, for effective enforcement it is necessary that the contract itself define the liability of the husband and the rights of the wife in the event that the stipulations specified in the contract are breached by the husband. The two most effective sanctions that may be provided in the contract are: (1) a delegation to the wife of the power to dissolve the marriage by pronouncement of *talaq* on behalf of the husband, and (2) a clause entitling the wife to separate residence and maintenance. There is no reason why these two sanctions might not both be incorporated in the same contract, thereby giving the wife the option of choosing which remedy she may prefer under the circumstances.⁴⁶ If the contract were to give the wife the option of either divorcing herself or collecting separate maintenance, there are undoubtedly situations in which she may reasonably prefer the latter alternative, as for instance if she were of an age where remarriage was a remote possibility and her deferred dower (payable on divorce) were inadequate to meet her financial needs.

In such a situation, however, or in a situation where the only sanction available to the wife is separate residence and maintenance, the husband may terminate his liability to maintain the wife by himself divorcing

46. See the contract in *Mst. Sadiqa Begum v. Ata Ullah* (A.I.R. 1933 Lahore 885), in which the husband agreed that should he take a second wife, the first wife would be entitled either to exercise the delegated power of *talaq* or to reside separately and receive a monthly allowance of Rs 75.

her.⁴⁷ The wife could be protected against such an eventuality by a further provision in the contract entitling her, in the event of a divorce, to maintenance for life or until remarriage.

The relevance and importance of provisions for maintenance following divorce may be increased in contemporary circumstances, because both in Pakistan and Bangladesh restrictions have been imposed on polygamy (the Muslim Family Laws Ordinance requires that prior permission be obtained for a polygamous marriage), while at the same time the husband's power of divorce remains virtually unrestricted. Faced with the irksome requirement of obtaining public permission to contract a second marriage, the husband may be tempted to resolve the situation by simply divorcing his first wife.⁴⁸

There have been voluntary provisions for the registration of Muslim marriages and divorces since 1876 in the areas which comprised the old Bengal Presidency. It would seem probable that whatever proportion of marriages were actually registered under the provisions of the Bengal Muhammadan Marriages and Divorces Registration Act of 1876,⁴⁹ those marriage contracts which contained stipulations would be more likely to be registered than other marriage contracts. I am unaware of any work that has examined these records and, assuming that they are extant, they would provide much rich material on the terms of Muslim marriage contracts going back over a century.

The 1876 Act is still in force in West Bengal and Bihar. The applicable statute in Assam is the Assam Muslim Marriages and Divorces Registration Act, 1935; and in Orissa, the Orissa Muhammadan Marriages and Divorces Registration Act, 1949.⁵⁰ These statutes require that information on dower and "special conditions [i.e., stipulations], if any" be entered in the register when any marriage is registered. Registers of divorces are also maintained under these statutes. The 1876 Act provides for separate

47. But see the dramatic decision from the Dhaka High Court in *Muhammad Hefzur Rahman v. Shamsun Nahar Begum*, decided in January 1995 and reproduced in the "Stop Press" section of this volume.

48. The Pakistan Commission on Marriage and Family Laws, 1956, recommended that the Court should be authorized to order a husband to maintain his divorced wife until death or remarriage, because the "large number of middle-aged women who are being divorced without rhyme or reason should not be thrown out on the street without a roof over their heads and without any means of sustaining themselves." (*Report, in The Gazette of Pakistan [Extraordinary]*, June 20, 1956, p. 1215). The Muslim Family Laws Ordinance did not implement this recommendation, and may in fact have exacerbated the situation by introducing restrictions on polygamy.

49. This Act may be found in *The Bengal Code*, 2nd edn, 1890, vol. II, pp. 256-65.

50. The Orissa Act is reproduced in Tahir Mahmood, *Family Law Reform in the Muslim World* (Bombay: N.M. Tripathi, Ltd., 1972), pp. 184-91. I have been unable to locate a copy of the Assam statute; I assume it closely parallels the Orissa Act.

registers for divorces by *khula* (mutual consent) and for divorces other than by *khula* (e.g., *talaq* and *talaq-i-tafwid*); to register a divorce other than by *khula* it is necessary to record in the register a "description of [the] divorce" and details on the "manner in which the divorce was effected." The Orissa Act prescribes separate registers for divorces by *talaq*, by *khula*, and by *talaq-i-tafwid*. In order to register a divorce effected by *talaq-i-tafwid*, the particulars of the document presented to the registrar proving the delegation of the power of *talaq* to the wife and a description of the exercise of this power must both be entered in the appropriate register. The registers of marriages and divorces are open for public inspection upon payment of a small fee.

While the provisions for registration of Muslim marriages and divorces in the areas of eastern India provide for voluntary, not compulsory, registration, in Pakistan and Bangladesh⁵¹ registration of Muslim marriages has been compulsory since the Muslim Family Laws Ordinance was promulgated in 1961. The forms prescribed by the Pakistan and Bangladesh Rules framed under this Ordinance require that information on the following points, among others, be entered in the register:⁵²

Amount of dower.

How much of the dower is prompt and how much deferred.

Special conditions [i.e., stipulations], if any.

Whether the husband has delegated the power of divorce to the wife; if so, under what conditions.

Whether the husband's right of divorce is in any way curtailed.⁵³

Whether any document was drawn up at the time of marriage relating to dower, maintenance, etc. If so, contents thereof in brief.

Under the Pakistan and Bangladesh Rules, the marriage registers are open for inspection at the Office of the Union Council at all reasonable times by anyone wishing to examine them. A fee for such privilege is set at fifty paisa for each register or index examined. The registers are to be preserved "permanently."

51. Note that the area of present-day Bangladesh was included within the region to which the 1876 Act applied; the Act continued in force in Bangladesh until superseded by the Ordinance of 1961 (in regard to registration of marriages) and repealed and replaced by the (Bangladesh) Registration of Muslim Marriages and Divorces Act of 1974.

52. See: "Form II, Form of Nikahnama as Prescribed by Rule 8, Muslim Family Law Rules, 1961," reproduced above, pp. 48-52 and 108-111.

53. This provision is particularly intriguing; it would be extremely interesting to know whether any stipulations under this particular head have been included in marriages registered according to the provisions of the Muslim Family Laws Ordinance.

For example of one manner in which the husband's right to *talaq* might be restricted, see the terms of the marriage contract of the great-great-granddaughter of Sir Syed Ahmed Khan reproduced above, pp. 20-21. See also clause 4 of the Bombay Women's Nikahnama, reproduced below, pp. 99-101.

In contrast to the legislation in force in eastern India, there is no provision under the Muslim Family Laws Ordinance or the Rules for the maintenance of registers of divorces. Bangladesh has, however, in the Registration of Muslim Marriages and Divorces Act of 1974, re-enacted the provisions of the 1876 Act for voluntary registration of divorces.

Again I am unaware of any study that has examined these documents with a view toward investigating the extent of the use of stipulations in marriage contracts, the nature of the stipulations, the provisions (if any) for enforcement of the stipulations, whether there is any correlation between the occurrence and nature of stipulations on the one hand, and economic/educational/social variables on the other.⁵⁴

Until these records are systematically examined, our only sample of the use of stipulations and provisions for *talaq-i-tafwid* in marriage contracts is comprised of those contracts upon which there has been both litigation and a reported decision.

These documents pertaining to marriage contracts will undoubtedly be in the indigenous languages of the areas, and probably will be hand-written. The language skills that analysis of them would require virtually dictates that scholars undertaking such research should be those whose mother tongue is the language concerned. As I am obviously disqualified on this ground, I can only hope that this essay will serve to encourage someone else to undertake what I think would be an interesting and exciting study.⁵⁵

54. It is further customary for a copy of the marriage contract to remain with the wife of her family. Inquiries concerning the contents of such contracts could be included in any survey of a particular community.

55. And should anyone undertake such an investigation, I would be most grateful indeed to be informed of the results of their research.

Zohra's Nikahnama



Nikahnama

An agreement of "NIKAH" (marriage) made on the 26th of December 1987 between Zohra, age about 23 years (daughter of Mr.....) of Address..... and M. K., age about 25 years (son of Mr.....) of Address.....

Whereby it is recorded that the parties have mutually agreed as hereunder:

1) That the marriage (*nikah*) is being solemnised on the 26th of December 1987 at Address..... between the above-mentioned parties.

2) That the "*nikahnama*" (marriage contract) inter alia, includes the following terms:

a) That each spouse shall love, honour and respect the other and shall respect the ambitions and aspirations of the other and they shall have an attitude of help and understanding towards each other.

b) That as a token of love and respect for the wife the husband agrees to give to the wife *mahr* (dower) of RS. 10000, (Rs. ten thousand only).

c) That in the matter of inheritance, maintenance of wife and off-springs of the marriage, the provisions of the Muslim Personal Law shall apply.

d) That the right of "*talaaq-ba-tafweez*" (i.e. delegated power of divorce) shall at all times be vested in and possessed by the wife and the husband shall not revoke this power.

e) That if ever there are any differences and there is a fear of a breach, both parties agree to follow the procedure laid down in the Holy Quran, Sura IV verse 35 which reads :

If ye fear a breach between them twain
appoint two arbiters
one from his side
and the other from hers;
if they wish for peace, god will cause their reconciliation;
for god hath full knowledge
and is acquainted with all things.

f) That if even such arbitration does not succeed in bringing about a reconciliation within a period nine months either party shall have the right to pronounce "*talaq*" (divorce) subject to the provision that the "*talaq*" so pronounced by either party shall be "TALAAQ-E-AHSAN" or "*talaq-e-rijaee*", which means that it shall be revokable by mutual consent within the "*iddat*" period of three months, but if not so revoked within the stipulated period the "*talaq*" shall become effective.

g) That the wife will have the custody of any offspring(s) born of this marriage until such offspring(s) attain(s) majority.

h) That if the "*tallaq*" becomes effective, the maintenance provided by the father of the offspring(s) shall be used only for the upbringing, education and welfare of the offspring(s), the father will be kept informed of the children's progress and shall have frequent visiting rights.

Signed by Zohra

Signed by Zohra's Vakil

(Name).....
Address.....

Signed by M. K.
In the presence of:
1. Witness - Name

Signature.....
Address.....

.....

2. Witness - Name

Signature.....
Address.....

.....

3. Witness - Name

Signature.....
Address.....

.....

Note: [This is an actual contract from India, 1987; names have been altered and personal details have been withheld. - Editors]

Drafting a Marriage Contract with a Tafwid Clause:

Practical Considerations and Information¹

Lucy Carroll

As the *Modern Asian Studies* article (reproduced above) indicates, the delegation of *talaq* may be made in either specific and restricted terms (e.g., "If I marry another woman in the presence of [bride's name], then..."), or in general and unrestricted terms.

Restricted delegation

If *talaq-i-tafwid* is used as a means of enforcing specific stipulations, the wife's right to dissolve the marriage will only accrue should the husband default on the undertaking which has been so sanctioned; the delegation is thus restricted. E.g., if the contract contains a stipulation by which the husband promises to live monogamously with the woman he is marrying, sanctioned by a delegation to the wife of the right to pronounce *talaq*, the wife will only be able to dissolve the marriage by reciting the *talaq* formula should the husband marry another woman during the subsistence of his marriage with her. If he beats or ill-treats her, consorts with prostitutes, keeps a mistress, or deserts her, although she will have grounds for judicial divorce, she cannot terminate the marriage extra-judicially by pronouncing *talaq*.

Anti-polygamy clause enforced by *talaq-i-tafwid*

A common concern of Muslim women is that her husband might exercise his right of marrying another wife, thus reducing her to the status of a co-wife in a matrimonial triangle. Stipulations in marriage contracts are often aimed at preventing such an eventuality and/or protecting the position of the wife should it come to pass.

1. Much of the material in this essay has been extracted from the chapter on Stipulations in Marriage Contracts in volume I (marriage) of my forthcoming work on *Muslim Family Law in South Asia*.

It is extremely unfortunate that much confusion has been caused by statements in some secondary sources that a stipulation in the marriage contract to the effect that the husband will not marry an additional wife is void.² This proposition, which is not supported by the Hanafi texts (or the Maliki texts), probably derives from a failure to differentiate between a stipulation which is absolutely void,³ and a stipulation which is merely unenforceable. In practical terms, there is very little difference -- except this: a properly drafted marriage contract containing its own enforcement mechanism defining the sanctions that breach of the stipulation will attract can render a stipulation otherwise unenforceable, enforceable.

Of course, a stipulation against the husband taking another wife is totally unenforceable in the sense that the husband cannot legally be prevented from marrying again should the fancy take him.⁴ But this does not mean that the husband's (or bridegroom's) promise not to marry again in the presence of the existing wife (or intended bride) cannot be effectively sanctioned by other means. And it does not mean that a well-drafted marriage contract cannot virtually guarantee that, although he may have the legal right to marry additional women, the husband will not breach his undertaking not to relegate the woman he is marrying to the status of co-wife in a polygamous union.

2. E.g., N.J. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964), pp. 189-190. Note how Coulson's passage is mechanically (and illiterately) paraphrased (without citation) in the Cambridge 'textbook' (David Pearl, *A Textbook on Muslim Law* [London: Croom Helm], 1979 edn., p. 74; 1987 edn., p. 83). This 'textbook' must be approached with scepticism and used (if at all) with very great caution.

3. E.g., a stipulation that the husband will not maintain the wife; or a stipulation that the spouses will not inherit from each other. (See e.g. Imam Fakhruddin Hassan Bin Mansur al Uzjandi al Farghani, *Fatawa-i-Kazee Khan* [trans. and ed. by Moulvi Mahomed Yusoof Khan Bahadur and Moulvi Wilayat Hussain; reprinted Lahore, 1977], vol. I, pp. 150, 160.)

4. Unless the parties are resident or domiciled in a country where polygamy is prohibited by law.

Note, however, that in the classical Hanafi law it is quite possible for an anti-polygamy stipulation to be sanctioned by a suspended (contingent) *talaq* timed to come into force immediately against any woman the husband marries in the presence of the wife in whose favor the stipulation was made. The result of such a sanction is that, although the husband might marry another woman, that marriage is immediately dissolved by the suspended *talaq*. Whether or not such a suspended *talaq* directed against the new wife would survive the "restraint of marriage" test in South Asia is an open question, particularly given that the second wife (whose marriage is interfered with) was not a party to the contract between the man and his first wife.

The classical law also allows the husband to delegate to his bride (wife) authority to pronounce *talaq*, not against herself, but against any woman he may subsequently marry. Again, whether a *talaq* pronounced by the wife under such a delegation would be upheld in South Asia is an open question.

The distinction is between a stipulation which merely states something to the following effect:

I promise not to marry another wife in the presence of my bride, Mst. Fatima.

Such a stipulation is totally unenforceable and meaningless.⁵

Quite different is the situation when the stipulation includes its own sanctioning mechanism:

I promise not to marry another wife in the presence of my bride, Mst. Fatima.
If I should fail to honor this vow, Mst. Fatima shall be entitled to claim the following rights against me...

Although the husband might legally marry again, the first wife may pursue the remedies conferred upon her by the contract. The stipulation not to take another wife is enforceable to the extent that, and in the manner that, the contract itself provides.

And, of course, one of the ways that an anti-polygamy stipulation may be enforced is by a delegation to the wife of the right to pronounce *talaq* should her husband marry another woman while married to her. The *Fatawa-i-Alamgiri* provides an example directly to the point:

A man having placed the business of his wife in her hand [i.e., delegated to her the right to pronounce *talaq*], *if he should marry another woman upon her* (that is, while she is still his wife), she sues her husband on the ground that he has married such an one, the person mentioned being present admitting the fact, and witnesses also attesting the marriage, -- the business is thereupon in her hand [i.e., the wife is entitled to exercise the delegated right of pronouncing *talaq*, and the dissolution of marriage consequent upon her action is valid]. [Emphasis added.]⁶

Of course, and as the passage quoted above reiterates, a wife claiming to exercise *talaq-i-tafwid* in circumstances where the terms of the delegation have been so restricted as to convey authority to act only in specified circumstances, is obliged to establish that the relevant circumstance did in fact occur.

5. Except perhaps in Hanbali law. Interestingly, some Muslim countries have more or less adopted the Hanbali position and decreed stipulations in marriage contracts enforceable in the sense that their breach entitles the wife to a judicial divorce.

6. Neil B.E. Baillie, *Digest of Moohummudan Law*, vol. I, (2nd edn., London, 1875), p. 251 (translation and paraphrase of *Fatawa-i-Alamgiri*). This illustration implies that the wife has to go to court to establish the fact of the breach of the stipulation before she can exercise her delegated right of pronouncing *talaq*. In South Asia she does not have to seek prior judicial approval, although she must be able to prove the fact of the delegation, the occurrence of the relevant circumstance, and her pronouncement should the matter subsequently go to court on the initiative of one or other of the parties.

Clearly, the settlement of a significant amount as *mahr*,⁷ and the delegation to the wife of a right to pronounce *talaq* in the event that the husband should marry another wife -- both perfectly valid clauses which may be legally incorporated in the marriage contract -- add up to a very good insurance policy against the possibility of the bride finding herself party to a polygamous relationship later in her married life. And if she should find herself in such a relationship, she can unilaterally, expeditiously, and extra-judicially bring her marriage to an end and claim payment of her outstanding *mahr*.

Unrestricted delegation

While the restricted delegation is commonly found in South Asian marriage contracts on which there has been litigation and a reported decision, there is no reason to assume that a general delegation is any less legally valid.⁸

The general or unrestricted delegation is preferable for at least two reasons:

(1) A delegation by the husband to his wife (bride) of a blanket, unrestricted right to pronounce *talaq* is a means by which the access of the spouses to divorce may be completely equalized. In the absence of such a delegation,⁹ while the husband may simply dissolve the marriage by uttering the verbal formula, the wife is faced with a choice of either attempting to purchase her way out of an unhappy marriage (the dissolution by *khula*) or entering upon what may prove to be a lengthy legal battle to obtain a judicial divorce.

7. All unpaid *mahr*, both prompt and deferred, is payable on divorce by *talaq*, whether pronounced by the husband or by the wife under authority delegated by her husband. The contract might even set differential rates of *mahr*, a higher sum being payable (e.g.) in the event of the husband's polygamous marriage to another woman.

8. Undoubtedly one of the major reasons for the unpopularity of the blanket or unrestricted delegation is the fact that British judges of the courts of the Raj were uncomfortable with such a concept and reiterated -- with such frequency that the phrase became part of the legal jargon of the subcontinent; repeated in textbooks, from which it is picked up again by judges, the circle continues -- that a contractual delegation to the wife of the right to pronounce *talaq* in regard to her own marriage is valid if the circumstances under which she was permitted to exercise the (obviously restricted and circumscribed) right were not "unreasonable" or "contrary to public policy." The implication might appear to be that a completely unrestricted delegation would be void. It is not, at least in Sunni law.

9. Unless, of course, the husband has breached a specific stipulation in the marriage contract which was sanctioned by a restricted grant of the right of pronouncing *talaq* in precisely that situation.

(2) Incorporation of a general delegation of the right to pronounce *talaq* greatly simplifies the drafting of a marriage contract. While stipulations in a marriage contract may in theory deal with virtually any aspect of the matrimonial relationship, it is difficult in advance to anticipate causes of disagreement which may precipitate matrimonial crisis years later.

If the contract includes a blanket delegation of *talaq-i-tafwid* and basic terms (i) dealing with the financial aspects of the marriage (*mahr*, remission of *mahr*, and provision for the wife in case of divorce) and (ii) appointing the wife legal guardian of the person and property of the children of the marriage in the event of the husband's death,¹⁰ there is no need to attempt to cover every eventuality by specific terms in the contract. The most useful formulation is to include statements in the contract recognizing those matters that are most important to the wife -- e.g., monogamy, right to continue her education, right to pursue a career, right to an equal voice in major decisions concerning the family, etc.¹¹ Rather than sanctioning each such statement (or all of them severally), the contract should contain a blanket, unrestricted delegation of *talaq-i-tafwid*.

A simple example of this form of contract is found in that of Sheherzad, Sir Syed Ahmed Khan's great-great-granddaughter, which has been reproduced above, pp. 20-21. This contract contains, firstly, a blanket delegation to the wife of the right to pronounce *talaq*; a subsequent clause contains a promise (not specifically sanctioned) on the part of the husband that he will not marry another wife in the presence of the woman he is marrying. The order is highly significant and emphasizes the fact that the delegation of the right to pronounce *talaq* is independent of any other undertakings on the part of the husband. The wife could, of course, exercise her right of dissolving the marriage by *talaq-i-tafwid* should the husband marry an additional wife, but her right to effect such a dissolution is not limited to the occurrence of this particular circumstance; the delegation is completely unrestricted.

10. This is a very important provision, particularly for the Hanafi woman, and protects the widowed mother from harassment by relatives of her deceased husband anxious to obtain custody of her children and/or control of their property. Such a stipulation, as far as custody of the children is concerned, brings the position of the Hanafi widow into line with that of the Ithna Ashari (Shia) widow. (If the Shia father is dead, the mother takes precedence over both the paternal grandfather or other male agnatic kin and the testamentary guardian in terms of her right to custody of her children. Hanafi law does not so favor the surviving parent and unless the mother has been appointed testamentary guardian by the children's father, her position is vulnerable.)

11. These unsanctioned statements are without legal significance and merely ensure that the husband is aware of his bride's views and expectations.

The extremely simple and concise Sheherzad contract can serve as a pattern, easily embroidered to fit any special circumstances and to encompass any special concerns.

Restricting both spouses' access to divorce

The marriage contract may also provide in general terms for the method of handling domestic disputes, with the objective of preventing a hasty and ill-considered divorce by either husband or wife. In the contract of Sir Syed's descendant, it is provided that neither husband nor wife (to whom has been granted a blanket right of *talaq-i-tafwid*) shall pronounce *talaq* until there have been attempts at mediation involving third parties.

Alternatively, the contract may provide for a cooling off period, during which the wife is allowed to live separately from the husband, who remains responsible for her maintenance, in the event of domestic tension and disputes between the spouses, or between the wife and her co-resident in-laws. It could be provided, for example, that neither spouse may pronounce *talaq* and bring the marriage to an end for a specified period after commencement of the initial separation.

The Zohra contract reproduced above pp. 85-86, contains an excellent clause defining the procedure which must be followed in order for a divorce to be effected on the initiative of either spouse (the wife having been granted a blanket right of *talaq-i-tafwid*).

That if ever there are any differences and there is a fear of a breach, both parties agree to follow the procedure laid down in the Holy Quran, Sura IV verse 35 which reads: -- "If ye fear a breach between them twain, appoint two arbiters, one from his side and the other from hers; if they wish for peace, God will cause their reconciliation; for God hath full knowledge and is acquainted with all things."

That if even such arbitration does not succeed in bringing about a *reconciliation within a period of nine months either party shall have the right to pronounce talaq* (divorce) subject to the provision that the *talaq* so pronounced by either party shall be *talaq-e-ahsan* or *talaq-e-rijaee*, which means that it shall be *revocable by mutual consent within the iddat period of three months*, but if not so revoked within the stipulated period the *talaq* shall become effective. [Emphasis added.]

Note that a divorce cannot be effected by either spouse in less than a year -- nine months for reconciliation attempts and three months for *iddat*. Further, either party can only pronounce a single revocable *talaq*, which can only be revoked by mutual consent.

The Bombay Women's Contract, reproduced below, pp. 99-101, contains the following interesting provision designed to prevent the

triple *bain talaq* procedure -- a form of *talaq* pronouncement extremely common in South Asia and instantly and emphatically destructive of marital life.

That the husband gives up his right to pronounce *talaq* by the mode of *talaq ul bain*. In the event that he resorts to the form of *talaq ul bain*, he will pay double the amount of *mahr* to the wife.

Stipulations Concerning Children

The Zohra contract also contains a stipulation concerning children of the marriage, giving custody of the children (either sex) to the mother until they reach majority, with frequent visiting rights to the father. Such a stipulation is neither binding nor legally enforceable.¹² No contractual agreement can oust the jurisdiction of the Guardian Court (in South Asia) to determine the issue of custody of minors. The Guardian Court will decide an issue of custody according to what is in the best interests, and most conducive to the welfare, of the child at the time the dispute arises. These questions cannot be answered years in advance by the terms of a contract.

More important than a stipulation concerning custody of children is a clause appointing the wife guardian of the person and property of the couple's minor children in the event of the husband's death. Whether this would be regarded as a testamentary disposition (which it actually is),¹³ or as an essential term of the marriage contract is probably immaterial -- although the testamentary disposition is revocable, and an essential term of the marriage contract cannot be unilaterally revoked. The dispute will not be between the spouses (the husband being dead), but between the widow and her husband's relatives; and it is only the testator himself who can revoke a testamentary disposition.

The reason for including such a statement (whether it is legally regarded as a testamentary disposition or a term of the marriage contract) in the *nikahnama* is that -- in spite of the fact that the father does have the right to name a testamentary guardian for his children, and in spite of the fact that wills are well-known in Muslim society and jurisprudence -- few men take the trouble of naming a testamentary guardian. This, I believe, is essentially a function of the fact that young men (i.e., those most likely to have minor children) do not generally

12. This is not necessarily a reason for not including a particular clause in a marriage contract. Some people actually abide by their promises and undertakings even in the absence of legal sanctions. It is undoubtedly advantageous for prospective spouses to discuss and agree on as many aspects of their future relationship as possible.

13. Muslim law does not lay down any particular form that a testamentary disposition must take, as long as the will itself is proved.

make wills; wills are made by elderly gentlemen (and ladies)¹⁴ who have property and are reaching the twilight of their years (i.e., those least likely to have minor children).

Of course, the clause may be held to be a testamentary disposition and thus revocable, and if the marriage breaks down while the children are still minors the husband may well revoke it. But the woman in this worse-case-scenario is no worse off than if no such clause had been included in her marriage contract. On the other hand, the woman whose loving husband dies tragically young, leaving her with minor children, may find herself immediately at loggerheads with her husband's relatives anxious to get custody of the children and control of their property. In these circumstances, the testamentary disposition (albeit placed in the marriage contract) will be tremendously to the woman's benefit.

Concluding observations

The limiting factor on the use of stipulations in marriage contracts, including the delegation to the wife of the right to pronounce *talaq*, as the law now stands, is, of course, that it takes two parties to contract; as long as stipulations are merely voluntary, the husband's consent to their inclusion in the marriage contract is essential. Until standard stipulations are included in all Muslim marriage contracts, women most in need of the protection that a well-drafted marriage contract can provide -- women who are exploited by their relatives and virtually sold or bartered in marriage -- are the ones most unlikely to be married with the benefit of such a contract.

Circulation of information on the use of stipulations in marriage contracts and the greater use of such contracts by those women in a position to insist upon them for themselves and their daughters (or sisters, nieces, cousins, etc.) may hasten the day when a standard contract, recognizing rights which Islam intended women to be accorded, becomes a matter of statutory law rather than male whim.

It is also particularly important for young Muslim women who have been raised in a non-Muslim country (e.g., Asian women in England) who are taken back to their country of origin for purposes of marriage to be married with well-drafted marriage contracts. It is equally important for the Christian girl who falls in love with a Muslim foreign student and marries him in a ceremony (civil or religious) in her own country to have a well drafted Muslim marriage contract prepared. This because at some point in their matrimonial career the couple may return to the husband's country; the marriage would then fall to be governed by the Muslim law of that land, and without a good marriage contract, the wife's position may be very vulnerable. Thus, circulation of information on these matters is imperative in non-Muslim, as well as Muslim, countries.

14. However, a child's mother may not validly appoint a custodian or a guardian of the child by means of a will or any other device.

The Fyzee Contract

The agreement set out below, and the accompanying explanatory text, are reproduced with permission from A.A.A. Fyzee, Outlines of Muhammadan Law (Delhi: Oxford University Press, 4th edn., 1974; 1993 reprint also available), Appendix C, pp. 474-476.

Some years ago, at the instance of Begum Sharifa Hamid Ali, a prominent worker in the cause of women's rights, a leading firm of solicitors in Bombay drafted an agreement, in consultation with me, to ensure to a Muslim wife in India the fullest possible rights of obtaining her freedom by the rules of law as applied to *talaq-e tafwid*. This agreement, to be signed BEFORE the *nikah* ceremony,¹ is in fairly wide use among certain of the educated families in Bombay; and, as it is not well known outside, it is printed here in order to facilitate its more general use.

1. In South Asia, because of the Contract Act, 1872, pre-nuptial delegations of the right to pronounce *talaq* are valid; the rules of the classical law requiring such express and unconditional delegations to be made AFTER the marriage have been superseded by the general law of contract. Nevertheless, even in South Asia it is common for the contract to be confirmed and attested after the ceremony, even if it were drawn up and agreed (and perhaps even signed) beforehand. In countries where there may not be legislation comparable to the Contract Act, 1872, and the rules of classical Muslim law are likely to be applied to such contracts, it is important to be aware of the fact that under Muslim law a delegation of authority to pronounce *talaq* cannot be made before marriage (except in a special form of words whereby the effect of the delegation is delayed until after the marriage has taken place; this subterfuge is not available to the Shia couple), because before the parties are married the husband himself has no power to *talaq* the woman and thus no authority in that respect that he can delegate to her or anyone else. -- Lucy Carroll

Agreement for the Dissolution of Marriage

IN THE NAME OF ALLAH, THE COMPASSIONATE, THE MERCIFUL

This agreement is made at Bombay this... day of... Between Ali the son of Muhammad (hereinafter called 'the Husband') of the one part and Fatima the daughter of Hasan (hereinafter called 'the Wife') of the other part.

WHEREAS the Husband and Wife both profess the...² Muslim faith and declare that they are governed by the...² Muslim Personal Law

AND WHEREAS a marriage is to be contracted³ and solemnized between the Husband and Wife on... the... day of Hijri i.e., the... day of... A.D.

AND WHEREAS it is mutually agreed and it is of the essence of the said contract of marriage between the Husband and the Wife that the Wife should have the power of divorce as hereinafter mentioned

NOW IT IS HEREBY AGREED AND DECLARED as follows

1. The Husband shall pay to the Wife by way of *mahr* a sum of Rs.... such *mahr* being payable by the Husband to the Wife as to the sum of Rs... [i.e., half the total *mahr*] at the time of the said marriage and as to the remaining sum of Rs... only in the event of his death or divorce taking place between him and the Wife.

2. Subject to the provisos hereinafter mentioned the Wife shall have the power to divorce in [the] manner mentioned in clause 3 below for dissolving the said marriage on any one or more of the following grounds namely

(a) That the Husband failed to observe and perform the duties imposed upon husband by Muslim Personal Law namely

- (i) kindness in general behaviour and treatment,
- (ii) the fulfilment of conjugal rights, and
- (iii) the maintenance and support of the Wife;

(b) That the Husband has married or gone through the form of marriage with another woman after the date hereof;

2. Mention the school of the parties, i.e., Hanafi, Shafi'i, Ithna 'Ashari, etc. If the parties differ in their schools, it is all the more necessary to say so in India and Pakistan.

3. It is necessary to emphasize that the agreement should be entered into *before* the marriage takes place. [See fn 1 above. -- LC]

(c) That the temperaments of the Husband and the Wife are incompatible or otherwise the Husband is unable to keep the Wife happy; or

(d) The grounds mentioned in Section 2 of the Dissolution of Muslim Marriages Act, 1939, or any of them.

[NOTE: The grounds mentioned in Section 2 of the Dissolution of Muslim Marriages Act, 1939, upon which a Muslim woman in the Subcontinent may sue for a judicial decree of divorce are:

(i) that the whereabouts of the husband have not been known for a period of four years;

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

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards.

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

(v) that the husband was impotent at the time of the marriage and continues to be so.

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of... [fifteen years, India; sixteen years, Pakistan; eighteen years, Bangladesh] repudiated the marriage before attaining the age of... [eighteen years India and Pakistan; nineteen years, Bangladesh].

(viii) that the husband treats her with cruelty, that is to say:

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.]

PROVIDED that the Wife shall not have the said power to divorce unless and until

(i) It has been admitted by the Husband in writing that the said grounds or ground exist or existed, or

(ii) It has been certified in writing by the said Hasan the father of the Wife so long as he shall be alive and after his death by any two respectable persons after giving the Husband a reasonable opportunity to make such representations in the matter as he may desire that such grounds or ground exist or existed.

3. The said power to divorce shall be exercised by the Wife declaring before any two witnesses that in accordance with the power derived by her from this agreement she divorces the Husband and the said marriage shall stand dissolved as from the date of the declaration.

4. The said power to divorce shall not be revocable by the Husband and shall not be affected by the Wife having failed on one or more occasions to exercise the same.

IN WITNESS WHEREOF the parties to these presents have hereunto set their respective hands the day and year first herein above written.

SIGNED by the abovenamed

in the presence of.....

SIGNED by the abovenamed

in the presence of.....

Bombay Women's *Nikahnama*

The contract set out below was drafted by a group of progressive Muslim women in Bombay; a copy was supplied by Asghar Ali Engineer.

Nikahnama

Name of husband.....
Address
Age.....
Whether presently marriedyes/no
If yes, whether consent taken from first wife.....yes/no
Whether previously marriedyes/no
Present occupation/status.....

Name of wife.....
Address
Age.....
Whether previously marriedyes/no
Present occupation/status.....

Name of *Vakil-i-Nikah* (from wife's side).....
Address
Age.....
Occupation
Relationship (with wife)

Name of *Vakil-i-Nikah* (from husband's side).....
Address
Age.....
Occupation
Relationship (with husband)

Name of witness (1)
Address
Age.....
Occupation

Name of witness (1)

Address

Age.....

Occupation

The *nikahnama* records that this..... day of..... the parties hereunder, namely..... (hereinafter referred to as the husband) and..... (hereinafter referred to as the wife) have orally contracted and solemnised their *nikah* by *cejaab* and *qabool* in the presence of two witnesses on the terms and conditions hereinafter appearing (which have been read out to and heard by those present).

The husband and wife both profess Islam. The parties are both bound by Hanafi law.

The parties have agreed to the following terms and conditions:
(Cancel the clauses that do not apply.)

1.(i) That the *mahr* due from the husband to the wife is fixed as follows:

Quantity.....

Amount paid.....

Amount payable on demand.....

Amount deferred

(ii) That the husband agrees that he or his relatives or any one on his behalf will not apply any physical, social, emotional and psychological, or economic pressure on the wife to remit the *mahr* or to decrease the amount.

2. That if the husband contracts another marriage during the subsistence of the present one, he will: --

(i) Inform the wife of the second marriage.

(ii) Take the consent of the wife.

(iii) Let the wife continue to live in the matrimonial house and will provide a separate establishment for the second wife, and he will not bring her to live with the wife.

(iv) The custody and guardianship of the children of the present marriage will be with the wife.

(v) Maintain the wife and children in the same way as they have been accustomed.

(vi) Pay immediately whatever balance of *mahr* is due to the first wife, which amount if not so paid shall be recoverable as arrears from his assets.

3. That the wife shall possess and enjoy a delegated right and power of divorce (*haq talaq ba tafwid*) which is hereby granted irrevocably and unconditionally by the husband to the wife and that shall be subject to the same terms and conditions as those governing the exercise and right of *talaq* possessed by the husband. In the event that she exercises this right, the husband will pay the *mahr* amount, give maintenance during *iddat*, and will return without delay her articles and gifts given during the marriage.

4. That the husband gives up his right to pronounce *talaq* by the mode of '*talaq ul bain*.' In the event that he resorts to the from of *talaq ul bain*, he will pay double the amount of *mahr* to the wife.

5. That in the event of divorce the custody and guardianship of the children of the marriage will be decided on what is best for the welfare of the child. This may be done with the consultation of the Court.

6. That in the event that the wife does not conceive a child, both husband and wife will agree to have a medical examination.

7. Lists of Articles:

Given by the parents of the bride:

Given by the husband and his family:

Both the parties have read and understood the above terms and conditions and have signed it without any force, pressure or coercion, and while in possession of full faculties.

Signature of husband:

Signature of wife:

In the presence of --

Witness (1):

Witness (2):

Two Illustrative South Asian Cases

Bengal, India: *Mangila Bibi v. Noor Hossain*, All India Reporter 1992 Calcutta 92; before Justice A.K. Chatterjee.

Synopsis: The wife in this case apparently was married on a *nikahnama* similar to the Sheherzad contract,¹ containing a blanket grant of *tafwid-i-talaq* and also certain (unsanctioned) promises or conditions which the husband undertook to honor. (Unfortunately the judgment does not reproduce the relevant terms of the marriage document.)

The marriage did not prosper and after less than two years, the wife purported to dissolve the marriage by *talaq-i-tafwid*, and executed a formal divorce deed which she registered under the facilities available in Bengal for voluntary registration of Muslim marriages and divorces.

Having thus divorced her husband, she wished to recover her dowry (*jahez*), her *mahr*, and her *iddat* maintenance. To this end she made an application under section 3(1) of the much maligned Muslim Women (Protection of Rights on Divorce) Act, 1986, for return of her dowry, payment of outstanding *mahr*, and maintenance for herself and the child of the marriage.

The magistrate who dealt with her application rejected it on the ground that she was not a divorced woman because, as he read the *nikahnama*, the authority to dissolve the marriage by *talaq* could only accrue to the wife on violation by the husband of one of the stipulations in the contract, and none of these promises had been breached.

The woman appealed, arguing that the authority conferred upon her by the marriage contract was completely unrestricted.

The High Court found that the marriage contract delegated "an unrestricted power to the petitioner [wife] to give *talaq*." The main question then became whether such a blanket delegation was valid.

1. See above, pp. 20-21.

The High Court held that the delegation was valid. The wife's pronouncement being proved, it naturally followed that *the wife had been a divorced woman at the time of her application to the magistrate* under the Muslim Women Act. The magistrate was instructed to deal with her application for relief under that Act expeditiously.

Note that the Court neither decreed the divorce, nor confirmed it in some way (e.g., perhaps as a preliminary to registration); it merely recognized that the woman's act was legally valid and that *she had been a divorced woman* prior to her application to the magistrate.

Judgment:... [T]he petitioner Mangila Bibi was admittedly married with the opposite party No. 1, Noor Hossain on the 6th March, 1986, according to Muslim Rights when a *kabinnama* [marriage contract]² was executed. She contended that after the marriage she came to know that the said opposite party was not a medical graduate as represented before the marriage and further, she was ill-treated at her husband's place and ultimately driven away.

In this situation, she dissolved the marriage by virtue of the authority delegated to her by her husband as recorded in the *kabinnama* and executed a divorce deed before the Muslim Marriage Registrar and Kazi on the 27th February 1988. The divorce was communicated to the said opposite party but as he did not pay any maintenance and dower and other properties given to her at the time of marriage as noted in the *kabinnama*, she made an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, before a competent Magistrate for appropriate relief.

This application was sought to be resisted on behalf of the said opposite party, mainly on the ground that the petitioner was not a divorced woman as there was never any delegation of power to give *talaq*. He also contended that even if there was any such delegation of power to give *talaq*, it could be exercised only in specified contingencies and since no such contingency had taken place, the petitioner could not lawfully repudiate herself. He also denied the allegation of false representation said to have been made by him before the marriage as well as the allegation of ill-treatment. He has also taken a plea that certain entries in the *kabinnama* were made against his will and some others were written subsequently without his knowledge.

The learned Magistrate has found on evidence that the petitioner had power to dissolve the marriage but such power could be exercised only when any of the conditions specified in the agreement was violated by her husband. He has further held that since there was no such violation

2. In the eastern part of the subcontinent, *kabinnama* is more commonly used than *nikahnama*; both mean the same.

she could not validly give a *talaq* and accordingly the marriage was still subsisting and so the application made by her as a divorced woman could not be sustained... The learned Magistrate has overruled the plea of the said opposite party that certain entries in the *kabinnama* were made against his will or without his knowledge and also disbelieved the petitioner's case regarding the alleged ill-treatment to her.

Mr. Habibullah [counsel representing the petitioner] has assailed the finding of the learned Magistrate that the power to dissolve the marriage could be exercised by the petitioner only when any of the conditions specified in the agreement was violated by her husband and it was pointed out that the *kabinnama* tendered in evidence as Ext. 1 did not stipulate that such power could be exercised only on the happening of any contingency. The finding of the learned Magistrate that the evidence did not reveal any ground for giving *talaq* has not been challenged and indeed, it being a pure question of fact could not be challenged in revision.

The *kabinnama* Ext. 1 apparently delegates an unrestricted power to the petitioner to give *talaq* and, therefore, the principle question which calls for adjudication is whether she had an absolute authority to dissolve the marriage at her will or whether such power could be exercised by her only in certain circumstances.

Mr. Habibullah has drawn inspiration from Article 314 of Mulla's Mahomedan Law to argue that the power to give divorce which primarily belongs to the husband may be delegated to his wife either absolutely or conditionally. This argument is further reinforced by the observation of Ameer Ali in his Mahommedan Law (5th edn., vol. II, pp. 495-497)... Thus it is abundantly clear from the observation made by these erudite authors that the delegation of the power to divorce can be made either conditionally or without any condition at all...

...In the case on hand, . . the inescapable conclusion seems to be that the opposite party Noor Hossain the husband had... delegated to the petitioner a power to divorce unconditionally and since it is not prohibited by the personal law of the parties, as already found, it was quite open to her to divorce herself at her will as she in fact did. In other words, the petitioner was very much a divorced woman and the finding of the learned Magistrate that the marriage was still subsisting cannot be upheld.

...For the reasons stated above, the order of the learned Magistrate dismissing the application of the petitioner under S. 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is set aside and he is directed to determine, on the evidence already on record, the relief to which the petitioner may be entitled and dispose of the application in accordance with the provisions of law with utmost expedition.

East Pakistan (now Bangladesh): *Gul Newaz Khan v. Mst. Maherunnessa Begum*, All Pakistan Legal Decisions 1965 Dacca 274; before Justice M.R. Khan

Synopsis: This is an example of a restricted grant of *tafwid-i-talaq*, the conditions on which it would be exercisable being (*inter alia*) non-payment of prompt dower (*mahr*) on demand and/or non-maintenance. The former stipulation appears to be quite common in the Bengal region of the subcontinent (present-day West Bengal in India, and Bangladesh). If the prompt *mahr* is set at an amount that would be at least inconvenient for the husband to pay, such a stipulation can amount to a right to divorce at the wife's pleasure and for any reason. Should the wife become disenchanted with the marriage, all she has to do is demand payment of her prompt *mahr*, a demand which the husband, predictably, will resist, and her right to pronounce *talaq* immediately arises.

This case arose before the Muslim Family Law Ordinance of 1961 (the parties were married 1955 and the wife pronounced *talaq* in 1958). The registration of the divorce document took place under the provisions in force in that region for voluntary registration of Muslim marriages and divorces.

The matter came to Court because, when the husband contested the legal validity of his wife's action, she filed suit for a declaration that she was no longer his wife and the marriage had been terminated by her exercise of *talaq-i-tafwid*.

The husband unsuccessfully contested her suit in the trial Court and took the matter to two appeals, both of which he also lost.

Judgment: ...The defendant married the plaintiff-respondent according to Muslim Law on 4-11-55, on a dower of Rs. 5,000. He executed a *kabinnama* by which he delegated to the plaintiff the right to repudiate the marriage on the happening of any of the contingencies mentioned therein, including non-payment of prompt dower on her demand and non-maintenance. After the marriage, the plaintiff stayed in her father's house where the defendant used to go at times. But since 31-3-56, the defendant did not take care of the plaintiff and give her any maintenance. Nor did he give her prompt dower though demanded; rather the defendant treated her with cruelty and neglect. Thereupon the plaintiff, in the exercise of the right delegated to her in the *kabinnama* (*talak-i-tafweez*) repudiated the marriage on 30-6-58, and got a *talaknama* [divorce deed] registered in token thereof.

The defendant contested the suit. He denied the plaintiff's allegation about non-payment of prompt dower and maintenance and the alleged cruelty and neglect on his part. According to him, the plaintiff did not ever make any demand for prompt dower and maintenance from him.

But he, of his own accord, paid her Rs. 3,200 towards prompt dower and maintenance on different dates. Accordingly, the defendant contended that the right to exercise *talak-i-tafweez* did not really accrue to her and as such, the marriage was not dissolved according to law. His further contention was that the suit was an outcome of a grudge of the plaintiff's brother against him.

The trial Court held, amongst others, that the defendant did not pay the plaintiff the prompt dower in spite of her demand for it and that he did not give her maintenance either. In view of this finding, the trial Court, having regard to the plaintiff's delegated power to repudiate the marriage conferred by the *kabinnama* Exh. 1 and the actual repudiation of the marriage on 30-6-58, by her in the exercise of that power as per *talaknama* Exh. 2, decreed the suit declaring that the marriage between the parties was legally dissolved by the due exercise of *talak-i-tafweez* by the plaintiff.

The defendant appealed against the judgment and decree of the trial Court. The lower appellate Court agreed with the trial Court that the defendant failed to pay the plaintiff's prompt dower in spite of her demand, but took a different view with regard to maintenance on the ground that she had been voluntarily living in her father's house from the time of her marriage when she was studying in a local school. However, the lower appellate Court held that non-payment of the prompt dower in spite of the plaintiff's demand was a valid ground for repudiating the marriage in exercise of the power delegated to her in the *kabinnama*. Accordingly, the lower appellate Court upheld the judgment and decree of the trial Court. The defendant has appealed to this Court against the decision of the lower appellate Court.

Mr. Md. Fazlul Karim, learned Advocate for the appellant, has pressed only one point in this appeal, namely, Ground No. 1 in the memorandum of appeal which runs thus:

For that the Court of appeal below erred grievously in law in holding that non-payment of prompt dower simpliciter, specially after consummation of marriage, can be a valid reason for dissolution of a Muslim marriage.

The *kabinnama*, Exh. 1, is admitted. In clause (5) of the *kabinnama*, the defendant delegated to the plaintiff the power to repudiate the marriage in the event of happening of any of the contingencies mentioned therein. Non-payment of prompt dower on demand and non-maintenance are two of the several contingencies mentioned in the said clause. After careful and elaborate analysis of the evidence on record, both the Courts below came to a concurrent finding that the plaintiff did, in fact, make a demand of prompt dower and that the dower so demanded was not paid by the defendant. Thus, one of the contingencies mention in clause (5) of the *kabinnama*, according to the concurrent finding of the Courts below, stood satisfied in this case.

The learned Advocate for the appellant, however, contends that once the marriage is consummated, the mere non-payment of prompt dower cannot, under the Muslim Law, be a valid ground for repudiating the marriage by the wife in the exercise of her delegated power...

In the case of *Hamidoolla v. Faizunnissa*,³ it was held that non-payment of prompt dower on demand is a valid condition for the exercise of the delegated power of divorce by the wife. This decision was followed by this Court in the case of *Abdul Sukur v. Sm. Machuma Khatun*.⁴ In the latter case, it was held that the wife can validly exercise the delegated power on the failure of the husband to pay the prompt dower on demand [when the delegation was specifically linked to that stipulation]...

[T]here is no reason why the marriage cannot be lawfully repudiated by the wife in the exercise of the delegated power in case of non-payment of prompt dower on demand. The exercise of such power by the wife on the husband's failure to pay the prompt dower on demand does not appear to be against public policy or the principles of Muslim Law. Thus the point raised in this appeal has no merit.

As regards actual repudiation of the marriage by the plaintiff in the exercise of her delegated power, the evidence of the plaintiff and the *talaknama* Exh.2 are sufficient to establish it.

The appeal, therefore, fails and is dismissed.

3. (1882) Indian Law Reports 8 Calcutta 327.

4. 7(1955) Dacca Law Reports 451.

Bangladesh Marriage Registration Form

[Bangla]

বাংলাদেশ ফর্ম নং ১৬০১

সত্যায়িত প্রতিলিপি
কনের জন্য/বরের জন্য

নিকাহ নামা

[১৯৭৪ সালের মুসলিম বিবাহ ও তালাক (রেজিস্ট্রেশন) আইনের ৯ ধারা অনুযায়ী প্রতিলিপি]

- ১। ওয়ার্ড, শহর, ইউনিয়ন, তহশীল, থানা এবং জেলার নাম যেখানে বিবাহকর্তৃক নিষ্পন্ন হইয়াছে
- ২। নিজ নিজ বাসস্থানসহ বর ও তাহার পিতার নাম
- ৩। বরের বয়স
- ৪। নিজ নিজ বাসস্থানসহ কন্যা ও তাহার পিতার নাম
- ৫। কন্যা কুমারী, বিধবা, অথবা তালাকপ্রাপ্ত নারী কিনা ?
- ৬। কন্যার বয়স
- ৭। কন্যাকর্তৃক উকীল নিযুক্ত হইলে ঐ উকীলের পিতার নাম ও বাসস্থানের ঠিকানা
- ৮। পিতার নাম, বাসস্থান, ও কন্যার সহিত সম্পর্কের বর্ণনাসহ কন্যার উকীল নিয়োগের ব্যাপারে সাক্ষীদের নাম:-
(১)
(২)
- ৯। বর কর্তৃক উকীল নিযুক্ত হইলে ঐ উকীলের ও পিতার নাম ও বাসস্থানের ঠিকানা
- ১০। পিতার নাম ও বাসস্থানসহ বরের উকীল নিয়োগের ব্যাপারে সাক্ষীদের নাম -
(১)
(২)
- ১১। বিবাহের সাক্ষীদের নাম, তাহাদের পিতার নাম ও বাসস্থানের ঠিকানা -
(১)
(২)
- ১২। যে তারিখে বিবাহের কথাবার্তা ঠিক হইয়াছিল সেই তারিখ
- ১৩। দেনমোহরের পরিমাণ
- ১৪। দেনমোহরের কি পরিমাণ মু'য়াজ্জল এবং কি পরিমাণ মু'অজ্জল ?

Bangladesh Marriage Registration Form

১৫।	বিবাহের সময় দেনমোহরের কোন অংশ পরিশোধ করা হইয়াছে কিনা ? যদি হইয়া থাকে, তবে উহার পরিমাণ কত?	.....
১৬।	বিশেষ বিবরণ ও পক্ষগণের মধ্যে চুক্তিসূত্রে নির্ণীত মূল্যসহ কোন সম্পত্তি সম্পূর্ণ দেনমোহর বা উহার অংশ বিশেষের পরিবর্তে প্রদত্ত হইয়াছে কিনা ?	.....
১৭।	বিশেষ শর্তাদি থাকিলে তাহা	.....
১৮।	স্বামী স্ত্রীকে তালাক প্রদানের ক্ষমতা অর্পণ করিয়াছে কিনা ? করিয়া থাকিলে, কি কি শর্তে ?	.....
১৯।	স্বামীর তালাক প্রদানের অধিকার কোন প্রকারে খর্ব হইয়াছে কিনা ?	.....
২০।	বিবাহের সময় দেনমোহর, খোরপোষ ইত্যাদি সম্পর্কে কোন দলিল করা হইয়াছে কিনা ? যদি হইয়া থাকে, তবে উহার সংক্ষিপ্ত বিবরণ	.....
২১।	বরের কোন স্ত্রী বর্তমান আছে কিনা এবং থাকিলে অন্য বিবাহে আবদ্ধ হইবার জন্য বর ১৯৬১ সালের মুসলিম পারিবারিক আইন অর্ডিন্যান্স মোতাবেক সালিশী কাউন্সিলের অনুমতি লাইয়াছে কিনা ?	.....
২২।	অন্য বিবাহে আবদ্ধ হইবার জন্য সালিশী কাউন্সিলের নিকট হইতে বরের নিকট প্রেরিত অনুমতিপত্রের নম্বর ও তারিখঃ	.....
২৩।	যে ব্যক্তির দ্বারা বিবাহ পড়ান হইয়াছে তাহার নাম ও তাহার পিতার নাম	.....
২৪।	বিবাহ রেজিস্ট্রী করার তারিখ	.....
২৫।	পরিশোধিত রেজিস্ট্রী ফিস	.....
বর বা তাহার উকীলের স্বাক্ষর		বরের উকীল নিয়োগের ব্যাপারে সাক্ষীর স্বাক্ষর
কন্যার স্বাক্ষর		কন্যার উকীল নিয়োগের ব্যাপারে সাক্ষীর স্বাক্ষর।
বিবাহের সাক্ষীদের স্বাক্ষর :		নিকাহ রেজিস্ট্রারের স্বাক্ষর ও সীল
(১)		যে ব্যক্তির দ্বারা বিবাহ পড়ান হইয়াছে তাহার স্বাক্ষর
(২)		

জিপিপিডি-শাখা-৪-১৪৫/৯৩-৯৪/(লা)-২৩-৮-৯৩-৬,০০,০০০।

Bangladesh Marriage Registration Form

Translated by Sultana Kamal

Form of Nikahnama Prescribed by Clause 9 of the Muslim Marriage and Divorce (Registration) Act, 1974.

1. Name of the ward, town, union, tahsil, police station, and district where the marriage took place.
2. Names and addresses of the bridegroom and father.....
3. Age of the groom.....
4. Names and addresses of the bride and father.....
5. Whether the bride is a virgin, widow or divorcee.....
6. Age of the bride
7. Name and address of the pleader on behalf of the bride, if appointed
8. Names, fathers' names and addresses of the witnesses in connection with pleader's appointment and their relationship with the bride. (2).....
.....
9. Name and address of the pleader on behalf of the groom, if appointed
10. Names, fathers' names and addresses of the witnesses in connection with the appointment of the pleader on behalf of the groom. (2)
11. Names, fathers' names and addresses of the witness to the marriage. (2).....
.....
12. Date of betrothal.....
13. Amount of dower
14. Amount of prompt and deferred dower
15. Whether any amount of the dower has been paid at the time of marriage? If so, how much?.....
16. Whether any transfer of any kind of property has been made in lieu of the agreed amount of dower or part of it?
17. Any special conditions.....
18. Has the groom delegated his wife the power to divorce? If yes, what are the conditions?

19. Has the husband's right to divorce been curtailed by any condition?
.....
20. Has any document been made in connection with dower, maintenance etc.? if so, describe them
21. Whether the groom has any other wife/wives and if yes, whether he has obtained permission from the Salish Council (Arbitration Council) for the marriage as per the Muslim Family Law Ordinance 1961?
22. Number and date of the letter of permission from the Arbitration Council for the marriage.
23. Name, father's name of the person solemnizing the marriage.....
.....
24. Date of marriage registration.....
25. Amount of the Registration Fee paid.....
- Signature of the Groom
- Signature of his pleader
- Signature of the witnesses regarding
appointment of the pleader
- Signature of the Bride
- Signature of her pleader
- Signature of the witnesses regarding
appointment of the pleader.....
- Signature of the witnesses of the marriage.....
- Signature and seal of the
Marriage Registrar
- Signature of the person
solemnizing marriage.....

Documents concerning Shia Marriages in South Asia

- a) Extracts from Constitution (Dastur al-Amal) of the Shia Imami Ismaili Muslims in India, 1967.
- b) A Standard Shia Imami Ismaili Muslims Marriage Contract (from India)
- c) A Standard Khoja Shia Ithna Ashari Marriage Contract

a) Extracts from Constitution (Dastur al-Amal) of the Shia Imami Ismaili Muslims in India, 1967.

Reproduced from Tahir Mahmood, "Recent Religious Reform of Khoja Ismaili Personal Law," Islamic & Comparative Law Review, 12(1992):55-75, pp. 67-71.

9. (b) The marriage contract shall be in such form as may be prescribed from time to time by the Federal Council. The marriage contract may contain a delegation by the husband to the wife of the power to divorce herself from the husband subject to the wife obtaining the previous permission of the Council having or exercising jurisdiction to exercise such power.

11. (a) The *mukhi* and/or the *kamadia* shall seek to persuade the bridegroom to fix a generous amount as *mahr*.

(b) The amount of *mahr* shall not be less than Rs. 2501/- except if the *mukhi* and/or the *kamadia* is/are satisfied that special circumstances exist which justify a lower figure being fixed as *mahr*.

(c) *Mahr* shall, unless the parties agree otherwise and record the same in the marriage contract, be deemed to be deferred.

12. (a) Remarriage of an Ismaili during the subsistence of a previous marriage shall not be performed unless the previous permission of the Council having or exercising jurisdiction has been obtained by such Ismaili.

(b) Permission under clause (a) may be granted on any one of the following grounds: --

(i) that the wife has ceased to be an Ismaili;

(ii) that the whereabouts of the wife have not been known for a period of two years;

(iii) that the wife has been sentenced to imprisonment for a period of four years or upwards and the sentence has become final;

(iv) that the wife has failed to perform, without reasonable cause, her marital obligations for a period of one year;

(v) that the wife has been insane for a period of two years;

(vi) that the wife has failed to resume cohabitation with the husband for a period exceeding six months although ordered by the Council to do so; and

(vii) in extreme circumstances which appear to the Council to be a sufficient and proper ground.

(c) The Council may, at the time of granting permission to an Ismaili husband to contract another marriage during the subsistence of a marriage, impose upon the husband such terms as it may in its discretion deem proper for the maintenance and residence of the wife and the children by previous marriage and/or for securing other benefits for them.

13. (a) Marriage of an Ismaili may be dissolved with the previous permission of the Council having or exercising jurisdiction.

(b) Permission under clause (a) may be granted to a husband on any one of the following grounds: --

(i) that the wife has ceased to be an Ismaili;

(ii) that the whereabouts of the wife have not been known for a period of four years;

(iii) that the wife has been sentenced to imprisonment for a period of seven years or upwards and the sentence has become final;

(iv) that the wife has failed to perform, without reasonable cause, her marital obligations for a period of three years;

(v) that the wife has been insane for a period of two years;

(vi) that the wife has failed to resume cohabitation with the husband for a period exceeding six months although ordered by the Council to do so; and

(vii) in extreme circumstances which appear to the Council to be a sufficient and proper ground.

(c) Permission under clause (a) may be granted to a wife, to whom power to divorce herself from her husband has been delegated by the husband, on any one of the following grounds: --

(i) that the husband has ceased to be an Ismaili;

- (ii) that after remarriage the husband fails to fulfil towards his previous wife those terms on which he was permitted to contract such marriage;¹
 - (iii) that the whereabouts of the husband have not been known for a period of four years;
 - (iv) that the husband has been sentenced to imprisonment for a period of seven years or upwards and the sentence has become final;
 - (v) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
 - (vi) that the husband has been insane for a period of two years;
 - (vii) that the husband has failed to take back his wife for a period exceeding six months although ordered by the Council to do so;
 - (viii) that the husband has failed to provide for the maintenance of the wife for a period of two years; and
 - (ix) such other grounds for dissolution of marriage as are provided for under the Dissolution of Muslim Marriages Act 1939, or any amendment or modification or re-enactment thereof.
- (d) Permission under clause (a) may be granted to an Ismaili couple to dissolve their marriage by mutual consent if the Council is of the opinion that in all the circumstances it is just and proper that the marriage should be dissolved.
- (e) The Council may, if it considers fit to do so, grant permission to a wife to have her marriage dissolved by a court of law under the Dissolution of Muslim Marriages Act 1939, or any amendment or modification or re-enactment thereof.
- (f) It shall be the duty of the Council to make every earnest endeavour to bring about reconciliation between the parties before granting permission to dissolve the marriage.

1. See section 12(c) above.

**b) A Standard Shia Imami Ismaili Muslims Marriage Contract
(from India)**

This contract of Marriage between

.....Ageson of
(father's name & surname)

residing at

.....(permanent address)

andAgedaughter of
(father's name & surname)

residing at.....
(permanent address)

both Shia Imami Ismaili Muslim followers of Mowlana Hazrat Imam Shah
Karim Al-Huseini, His Highness Prince Aga Khan, made at
on theday of.....Hirji being the.....of.....19.....

WITNESSETH AS FOLLOWS

1) I,son ofhereby accept
(name) (father's name & surname)

.....daughter ofas my lawful wife in
(name) (father's name & surname)

accordance with the principle of the Shia Imami Ismaili Muslim faith and
undertake and agree to pay a sum of Rs.....

(rupees.....) as Mehr to my said wife.

(in words)

2) I,daughter ofhereby accept
(name) (father's name & surname)

.....son ofas my lawful husband in
(name) (father's name & surname)

accordance with the principles of the Shia Imami Ismaili Muslim faith and
the said sum of Rs.....

(rupees.....) as Mehr.

3) I,son ofhereby authorise and
(name) (father's name & surname)

empower my said wife
(name)

daughter ofin my name and on my behalf to divorce
(father's name & surname)

herself as my wife on any of the grounds mentioned in Article 13 (c) of the Constitution of the Shia Imami Ismaili Muslim in India, provided she shall have obtained, as provided in the said Constituion, the previous permission of the Council having or exercising jurisdiction, to exercise such power.

4. Each of usson ofand
(name) (father's name & surname)

daughter of
(father's name & surname)

hereby agree to abide by and to act in accordance with this Contract and the provisions of our said Holy Constitution.

IN WITNESS WHEREOF weson of
(name) (father's name & surname)

anddaughter of
(name) (father's name & surname)

after having fully understood the terms of this Contract and its implications have, with the consent of our respective guardians of marriage testified by their countersigning these presents, set our hands hereunto in the presence of Marriage Officer and the witnesses to our marriage who have also subscribed hereunder their respective signature, the day and year first hereinabove written.

.....
Signature of the Bridegroom's father/guardian
Date

.....
Signature of the Bride's father/guardian
Date

.....

Signature of the Bridegroom

Date

.....

Signature of the Bride

Date

.....

Signature of the Marriage Officer

Date

1.

.....

.....

2.

.....

.....

Signature of the witnesses to the marriage

Date

c) A Standard Khoja Shia Ithna Ashari Marriage Contract

Nikahnama

In the year of the Hejira 13datemonth
in the Christian Year 19datemonth
time at the strike ofhours in the place ofwhose
nikah through this Jamat is solemnized under the present and future
laws and resolutions. The Maher amount Rs
in words Rupees.....
has been agreed prior to the solemnization of this Nikah. At the time of
Nikah on behalf of the bride Msas wali
andas wakil
and on behalf of the bridegroomas Wakil were present
and both the Vakils jointly solemnized the Nikah. Signature of the
members of the Jamat present at the time of Nikah as witness

- 1.....
- 2.....
- 3.....
- 4.....
- 5.....

Signature of the Vakils who solemnized the Nikah

The Resolutions passed by the consulting Committee dated 24.2.1952:

At the time of marriage, the clothes, jewellery etc. given to the bride in
Puda from the bridegrooms side and the jewellery, clothes, furniture,
utensils and whatever else is given in Dehej by the parents and relatives
and friends of the bride, the bride has complete right over all the above
mentioned things.

The Resolution of the consulting Committee dated 14.3. 1965

I have appointed my wife.....daughter of.....as Wakil
that she herself may for reasons mentioned below claim a Talak through
the Jamat or she can appoint a Wakil to effect a talak on her behalf.

1. For lack of maintenance
2. Desertion for more than six months without informing
3. Unbearable cruelty

If such an occasion arises and she claims Talak she must forewarn the
Jamat.

Khoja Shiah Ithna Ashari Jamat Samud Street 66-70 Bombay 9.

Source: Reproduced from Zeenat Shaukatali Marriage and Divorce in Islam (Bombay: Jaico Books).

**Middle East
North Africa
South East Asia
and the
United Kingdom**

The Delegated Right To Divorce: Law and Practice in Morocco and Iran¹

Ziba Mir-Hosseini

What is the delegated right to divorce?

The delegated right to divorce is an option available to women under Shari'a law, which can in theory provide them with the same access to divorce as their husbands. It is a right conferred on a woman by her husband which enables her to divorce herself on his behalf; this right can be either absolute (i.e. the wife can use it whenever she wishes), or conditional (i.e. its exercise is tied to the presence of a specified condition, for instance the husband taking another wife). A woman can obtain this right either at the time of marriage in the form of a stipulation in her marriage contract, or subsequently in the course of another binding contract, for instance as part of a notarized reconciliation agreement between the spouses after a marital dispute (see below, the case of Iran).

To understand why women need to obtain such a right, we need to address three related issues: (i) how marriage and (ii) its termination are constructed in Islamic law and (iii) what its rules entail for women.

How is marriage defined in Islamic law?

In Islamic law marriage is defined as a civil contract, freely entered by a man and a woman, which renders sexual relations between them licit.² In its legal structure, marriage is a contract whose essential components are: the offer (*ijab*), the acceptance (*qabul*), and the payment of 'dower' (*mahr, sadaq*): a sum of money or any other valuables that the husband gives or undertakes to give to the bride upon marriage. Only a man can contract more than one marriage at a time: up to four permanent wives are allowed in all schools of Islamic law. In the Shi'a school, he can also

1. I am grateful to Dr Lucy Carroll Stout for her incisive comments on an earlier draft of this article. I remain responsible for any errors and shortcomings.

2. Its name, '*aqd al-nikah*', means 'contract of coitus'.

contract as many as temporary marriages as he desires.³ Although Islamic law does not positively prescribe any service, in practice a marriage contract is enacted in a ceremony intertwined with religious symbolism and rituals, such as the recitation of the *fatiha* (the opening verse of the Koran), and a recitation of the marriage formula by a religious functionary (*mullah* in Iran, *'adul* in Morocco) who also draws up the contract, which has defined terms and creates uniform effects.

The contract creates neither commonality in matrimonial resources nor parity in rights and obligations between spouses. The husband is the sole provider and the owner of the matrimonial resources, and the wife remains the possessor of her *mahr* and her own wealth. With the marriage contract, a woman comes under her husband's *isma'* (a mix of authority, dominion and protection), which entails set and defined rights and obligations for each party, some with moral sanctions and others with legal force. Although boundaries between the legal and the moral are hazy, it can be said that the sanctions with legal force are embodied in the concepts of *tamkin* (submission) and *nafaqa* (maintenance). *Tamkin*, defined as unhampered sexual access, is a man's right and thus a woman's duty; whereas *nafaqa*, defined as shelter, food and clothing, is a woman's right and a man's duty. A woman becomes entitled to *nafaqa* only after the consummation of marriage, and loses her claim to it if she is in a state of *nushuz* (disobedience).⁴

How can marriage be terminated?

In all schools of Islamic law, the right to terminate the marriage contract unilaterally and extra-judicially rests exclusively with the husband. This is known as *talaq*. In its legal structure, *talaq* is an act of '*iqa*, as opposed to marriage, which is an act of '*aqd*. The difference between the two is that '*aqd* is a type of legal act requiring the consent of two parties, its formula containing offer and acceptance; while '*iqa* is a unilateral act which acquires legal effect through the declaration of only one party: in the case of *talaq*, the husband. In short, as defined in Islamic law, *talaq* becomes the absolute and exclusive power of a man to repudiate his wife at any time he wishes. He needs no grounds, and his mere pronouncement of the *talaq* formula will result in the dissolution of

3. For this type of marriage, see S. Haeri, *The Law of Desire: Temporary Marriage in Iran* (London: I. B. Tauris, 1989); Z. Mir-Hosseini, *Marriage on Trial: A Study of Islamic Law in Iran and Morocco* (London: I. B. Tauris, 1993), pp. 163-171.

4. *Nushuz*, literally 'rebellion', implies the abandonment of marital duties; although it is acknowledged that such abandonment can take place on the part of both spouses, in *fiqh* (Islamic jurisprudence) sources the term *nashiza* (rebellious) is used mainly in the feminine form and in relation to maintenance rights.

the marital bonds; neither the consent nor the presence of his wife is required.⁵

On the other hand, a woman cannot be released from marriage without her husband's consent, although she can secure her release through offering him inducements, by means of either *khul'* or *mubarat*. In *khul'*, separation is claimed by the wife because of her extreme dislike (*ikrah*) of her husband, and there is no ceiling to the amount of compensation (*'awaz*) that she pays. In *mubarat*, on the other hand, the dislike is mutual and the amount of compensation should not exceed the value of the *mahr* itself. These two are commonly referred to as divorce by mutual consent.

If the wife fails to secure his consent, her only recourse is the intervention of the court, and the power of the judge either to compel the husband to pronounce the *talaq* or to pronounce it on his behalf upon the application of the wife. This is known as *tatliq* or *tafriq*, often translated as judicial divorce. The facility and grounds upon which a wife can demand the dissolution of marriage vary in schools within the Shari'a. The Maliki school is the most liberal, and grants her the widest grounds upon which she can initiate divorce proceedings, which are: the husband's refusal or inability to provide for her, his failure to perform his marital (sexual) duties, his maltreatment of her, and his affliction with a disease that would endanger her life. The classical Hanafi school is the most restrictive, and recognizes only one ground: the husband's impotency. Today, in many Muslim countries, women's access to divorce is regulated by a modern legal system, which applies a codified and often reformed form of the provisions of one of the schools of Islamic law. The situation varies from one country to another. In some, such as Tunisia, radical reforms have been introduced, and women have more or less the same access to divorce as men. In others, such as Gulf countries where family law is not codified, the provisions of the different schools are applied as found in classical manuals.

It is here that the delegated right to *talaq*, distinct from both *khul'* and *tatliq*, can provide legal protection for a wife who wishes to obtain her freedom from a defunct marriage if the husband proves unwilling to negotiate. All schools of Islamic law allow a wife to dissolve her marriage if the husband agrees to grant her such a right at the time of marriage or subsequently. This is usually done by inserting into the marriage contract a stipulation by which the husband either delegates the right to divorce (*tafwiz*) to his wife, or grants her or someone else the agency (*tawkil*) to

5. Despite the fact that there exist a number of traditions in which the Prophet condemned men's arbitrary exercise of *talaq*, Muslim jurists appear not to have made any serious attempt to contain it. *Talaq* can take place with the utmost facility in all schools of Islamic law; the intricate differences and rules all pertain to the forms of *talaq* (revocable or non-revocable) and the correct procedure for its exercise.

release herself or to be released on his behalf. Although in theory delegation or grant of agency to *talaq* can be made unconditional or absolute, in marriage contracts its exercise is tied to certain circumstances, for instance the event of his marrying a second wife without her consent.

Such stipulations neither affect the husband's right to *talaq* (he can still exercise it whenever he wishes) nor necessarily enable the wife to dissolve the marriage without recourse to court (in many countries the separation needs to be effected by a judge). However, it frees the wife from the need to establish a ground; she merely needs to prove the non-fulfilment of the condition stipulated in her marriage contract, and not even that if her right to delegated divorce is unconditional.

How much is the delegated right to divorce used in practice?

Although this option, at least in theory, can redress some of the disparities inherent in the divorce provisions of Islamic law, in practice women seldom resort to it. Why?

Three important factors are at work here. First, there is a gap, and at times a tension, between what the Shari'a in theory grants women and what happens in practice; that is to say, marriage and its termination as defined and regulated by the Shari'a rules and ethos are not exactly the same as their application and translation into legal practice in Muslim societies. Shari'a ideals, and the spirit of its legal rules, are often modified, by-passed or even negated when they are translated into a legal code or when they are interpreted and applied in courts. In addition, customary laws and the social construction of marriage and women's rights within it not only vary from one Muslim society to another, but they can be, and often are, at odds with how Shari'a legal rules defined and construct them. That is to say, there is a distance not only between Shari'a precepts and their translation into legal norms, but also between the latter and actual practices. It is, therefore, not surprising that a large majority of Muslim women are not aware of the legal consequences of their marriage contracts; their understanding of marriage and their rights within it is shaped by customary practices, cultural norms and rules rather than the legal and judicial ones. It is only when a woman encounters a crisis in her marriage, and has to negotiate with her husband, that she is confronted by the limitations that the terms of her marriage contract impose on her. Powerlessness to release herself from a defunct marriage without the husband's goodwill is often experienced as nasty shock.

Secondly, the strong patriarchal ethos that imbues the Shari'a legal rules is often in line with local cultures, and reinforced by them. The end result is that a large majority of Muslim women have little say at the time

of their marriage, particularly in defining the terms of the contract, which is negotiated for them by their families in cultural contexts in which it is believed that the fate of such a union should not be left to the whims of women. Even those Muslim women who have a say in setting the terms of their marriage, see it a bad omen to think of marital breakdown at the onset of a union. In addition, the intricate ritual in which marriage ceremonies are embedded not only inhibits women from taking an active role at the time of signing the contract but also does not inform them as to the nature and legal effects of the contract that they are about to sign. Those who officiate at marriage and draw up the contracts are always men, and often religious functionaries who, as we shall see, are opposed to the notion of women having equal access to divorce.

Finally, legal mechanisms to enable Muslim women to use this option are undeveloped. This is also the case in those countries where Shari'a provisions of marriage and divorce are codified and applied by a modern legal system. It is interesting to note that these modern codes either are silent on the option of delegated *talaq* or do not deal with its procedural rules. This silence reflects religious functionaries' entrenched reluctance to insert conditions in marriage contracts.

A comparison between Morocco and Iran, geographically distant from each other and with different cultural and legal traditions, can shed light on both the legal and the social implications that the exercise of the delegated right to *talaq* can have for women, as well as on the role of the state in creating legal recourse for women.

What happens in Morocco?

Family law was codified in Morocco in 1957. The code, known as *Moudawanat al-ahwal al-shakhsiya*, the Code of Personal Status, is derived from the Maliki school of the Shari'a, one of the four schools of Sunni Islam.⁶ The Maliki school, which has always been the dominant school of law in the Maghreb, is in some ways the most liberal and in others the most restrictive school of Islamic law as far as women are concerned. As already stated, it has the most liberal position on the question of divorce: it gives women easier access to divorce by providing them with the largest number of grounds for obtaining a court divorce. Likewise, under Maliki law a woman can acquire the unconditional right to delegated *talaq*, either at the time of marriage in the form of a stipulation in her marriage contract, or later in the form of a notarized

6. For the codification and reform of family law in Morocco, see M. Borrmans, *Statut Personnel et Famille au Maghreb de 1940 à nos Jours* (Paris: Mouton, 1977); J. N. D. Anderson, "Reform of Family Law in Morocco," *Journal of African Law* 2 (3), 1958, pp.146-59.

reconciliation agreement.⁷ However, it is one of the more restrictive schools in the sense of imposing tighter control over women.⁸ The reforms introduced at the time of codification in 1957 were few and insignificant, and more recent reforms, that is those initiated in 1993, do not go as far as removing the power of the male guardian or restricting the right of the husband to polygamy and unilateral divorce. Until 1993, a husband not only could effect an extra-judicial divorce (*talaq*), but could even register it without the presence or even the knowledge of his wife.⁹ Although a man still can effect a *talaq*, he can no longer do it extra-judicially.¹⁰

On the whole, the Moroccan code (Moudawana) has remained faithful to the classical Maliki position. It recognizes and allows women to resort to the option of delegated *talaq*,¹¹ but does not define its legal formalities and only makes passing reference to it, notably in Articles 44 and 67. During fieldwork in Morocco (1988-9), I encountered no woman who either had terminated her marriage by pronouncing a *talaq* under authority delegated by her husband or had a stipulation in her marriage contract which would enable her to do so if she desired; very few women I met were aware of the existence of such an option under Maliki law. I found the whole situation rather puzzling. Then when I started collecting data on divorces initiated by men, in the Court of Notaries (*mahkamat al-tawthiq* - where marriage and divorce are registered in Morocco) I came across a type of *talaq* in which the husband has the option of making it irrevocable (*ba'in*); but it is not a *talaq thalath* (triple divorce), as it does not in itself create a temporary bar between the couple.¹² This type of divorce was referred to as *talaq al-mumalik* (lit. possessed *talaq*).

When I asked the judges in the Courts of Notaries about the origins and rationale of *talaq al-mumalik*, they all told me that originally, in

7. A. A. Fyzee, *Outlines of Muhammadan Law* (3rd edn, Oxford: University Press, 1961), p. 161; J. N. D. Anderson, *Law Reform in the Muslim World* (London: Althone, 1976).

8. In Maliki legal doctrine, a woman remains an 'eternal minor' who is never free from the guardianship of her male relatives; see F. Sebt Larichi, *Vivre Musulmane au Maroc* (Paris: Librairie Generale de Droit et Jurisprudence, 1985), pp. 127-8.

9. For women's access to divorce in Morocco and court procedures, see Mir-Hosseini, *Marriage on Trial*, Chapter 3.

10. The amended version of Article 48 requires a *talaq* to be registered with a judge's order and in the presence of the wife.

11. The last Chapter of Book Two, which deals with 'Termination of Marriage and its Effects', recognizes as valid all Maliki provisions on marriage and divorce that are not included in the Moudawana. This Chapter, which has no title, consists of a single article (Article 82), which reads: "All cases that cannot be resolved by the application of the present code, will be determined by reference to dominant opinion within the Maliki rite."

12. For this and other types of divorces registered in Morocco see Mir-Hosseini, *Marriage on Trial*, pp. 86-8.

Maliki law, *mumalik* was a form of irrevocable *talaq* which followed in the case of a marriage contract where the wife 'possessed' the right, given by her husband, to divorce herself if he breached a certain stipulated condition in the contract. They then added that *mumalik*, as practised now, is an irregular form of divorce (*talaq al-bida'*) in which the husband says that he wants the repudiation to be final (*ba'in*). It seems to me that the *mumalik* in Morocco originated as delegated divorce, but now, instead of giving women the option of divorce, it gives men the option of finalizing a repudiation by using a distorted version of the original *mumalik* formula.

This distortion, I believe, has its origins in a pronounced reluctance among religious functionaries, the '*adul*', who have always been men, to insert conditions in the marriage contract. This attitude is still very prevalent among present-day '*adul*'; some of them told me that they would never agree to a marriage with such a stipulation, as it sets a shaky foundation for marriage. It seems probable that in time this led to the disappearance of that element in *talaq al-mumalik* which restricted men's power in marriage, and its transformation into an element which gave men a freer hand in disposing of their wives. In modern times, by not providing a clear directive on the legal formalities of the Maliki option of delegated divorce, the Moroccan code has in effect given the '*adul* in Morocco a free hand, as well as failing to inform women about this aspect of their rights under the classical Maliki law and empowering them to use the legal system to their advantage.

What happens in Iran?

Iran follows the *ithna 'ashari* (Twelver) school of Shi'a law, to which the majority of the Shi'a belong. It is the only country in which Shi'ism is the state religion, and also the only Muslim country in which all marriage contracts carry divorce stipulations. This was introduced in 1967 as part of reforms enacted by the Family Protection law to broaden the grounds on which women could initiate divorce proceedings. In order to avoid a break with the divorce provisions of Shi'a law, which are reflected in the Iranian Civil code, codified between 1928 and 1935, the 1967 law required the inclusion in *all* marriage contracts of stipulations specifying situations in which a divorce certificate could be requested from the court.

In *ithna 'ashari* law a man cannot delegate (*tafwiz*) the power of divorce; instead he can authorize, that is grant agency (*tawkil*) to, his wife or a third person to act on his behalf. Although some Shi'a jurists (*fuqaha*) allow a woman to acquire an absolute (not tied to any conditions) and irrevocable mandate (*vekalat-e bela 'azl*) from her husband either to pronounce *talaq* on his behalf or to authorize

someone else (*vekalat dar tawkil*) to do so,¹³ the majority of jurists tie such a right to a specific condition. It is this latter opinion that is reflected in the Iranian Civil Code (Article 119) and the 1931 Marriage Law (Article 4). These articles allow the insertion in the marriage contract or any other binding contract of any stipulation that 'is not against the essence of the marriage', such as the husband's remarriage or absence; this empowers a wife to divorce herself on behalf of her husband after recourse to the court, where she has to establish one of the inserted conditions.¹⁴ Before enactment of the Family Protection Law in 1967, however, it was left to the wife (in effect her family) to negotiate the stipulation of such a condition in the contract; this seldom happened and then only among the property-holding classes. Under the Family Protection Law, insertion of a divorce stipulation became mandatory in all marriage contracts; accordingly new contracts were issued carrying a stipulation conferring on the wife the right to divorce herself on behalf of her husband after recourse to court and establishing one of the listed grounds.¹⁵

13. Ayatollah Khomeini seem to have belonged to this group, as evident from two of his fatwas on the issue. The first, given long before the Revolution, is to be found in his Treatise and reads: "Whenever a woman in the course of an '*aqd* [contract] stipulates with her husband that if he travels or, for instance, if he does not provide for her for six months, the right to *talaq* be with her, this stipulation is void; but if she stipulates that if the man [husband] travels, or for instance, he does not provide for her up to six months, she is *vakil* (proxy, agent) on his behalf for her *talaq*, if after the man's travel or his not providing for her, she *talaq* herself, this [divorce or stipulation] is correct." See Question 2539, *Resaleh Tawzih al-Masa'el* (Tehran: Reja' Press, 2nd edition, 1987), p. 380. Khomeini is more explicit in expressing his opinion in the second fatwa, prompted by a question on the eve of the Revolution. Dated 7/8/1358 (28/11/1979), it reads: "For esteemed women, the Divine Law Giver has shown a way to take control of their divorce; this means that during the contract and marriage [note he refers to each separately] they [women] can stipulate to be *vakil* in *talaq* in an absolute way, that is to say they obtain a *talaq* whenever they desire, or in a conditional way, that is to say if the husband starts bad conduct or for example if he takes another wife, the [first] wife is *vakil* to *talaq* herself." See *Payam-e Zan* 11, 1371, p. 9.

14. The articles read: "The two parties to the marriage contract can stipulate any condition that is not contrary to its essence, either in the marriage contract or in another binding contract ('*aqd-e lazem*), such as if the husband becomes absent for a specified period or fails to pay maintenance or threatens her life or maltreats her to the extent that the continuation of marital life becomes unbearable for her, the wife is *vakil* and is *vakil dar tawkil* (i.e. has to power to appoint another person) to divorce herself in an irrevocable (*ba'in*) way after establishing the fulfilment of the condition in the court." The wording of the two articles is identical, except that the Civil Code Article 119 did not contain the word *ba'in*.

15. Insertion of stipulations thus became a legal device which empowered the Family Protection Courts to by-pass the mandate of *talaq*, enabling their judges (some of whom were women) to withhold a divorce requested by a man or to issue one requested by women only if they deemed that the marriage had irrevocably broken down (i.e. if one of the grounds stipulated in the marriage was established by one party), or when both parties agreed to divorce.

After the 1979 Revolution, despite the partial dismantling of the Family Protection law and abolition of its courts, this aspect of reform was retained and further expanded to provide women with financial protection in the event of an unwanted divorce.¹⁶ Since 1982, marriage contracts in Iran have carried two stipulations, referred to as *shorut-e zemn-e 'aqd* (conditions stipulated during the contract). The first enables a wife, in the event of an unwanted divorce (that is, should the divorce not be initiated by her or caused by her fault) to claim half the wealth acquired by the husband during marriage.¹⁷ The second stipulation grants the wife the irrevocable delegated right to divorce on behalf of the husband after recourse to the court,¹⁸ where she needs to establish one of the following conditions:¹⁹

- husband's failure to support her or to fulfil other compulsory duties for at least six months;
- husband's maltreatment (of the wife) to the extent that the continuation of the marriage has been rendered untenable for her;
- husband's affliction with any incurable disease that may endanger her health;
- husband's insanity, in cases where the annulment of marriage is not possible;

16. For a discussion, see Ziba Mir-Hosseini, 'Women and Politics in Post-Khomeini Iran: Divorce, Veiling and Emerging Feminist Voices', in Haleh Afshar (ed.) *Women and Politics in the Third World* (London: Routledge, 1996), and 'Powers and Limits of Negotiations: Women's Strategies in Marriage and Divorce', in Nouchine Yavari-d'Hellencourt (ed.) *Strategies des Femmes en Iran* (Paris: Harmattan, 1996).

17. The stipulation reads: "In the course of the marriage contract ('*aqd-e nekah*) or binding outside contract ('*aqd-e kharej-e lazem*) the wife stipulates that if the divorce (*talaq*) is not requested by her and if the court recognizes that the demand for divorce is not caused by the wife's negation of her marital duties or by her bad temper and conduct, the husband is obliged to transfer to her without any conditions up to half of the wealth and assets (*dara'i*) that he has acquired during marriage, or its equivalence as determined by the court.

18. The stipulation reads: "In the course of the marriage contract or binding outside contract the husband had given the wife the irrevocable mandate (*vekalat-e bela'azl*) with right to appoint another as her agent (*haq-e tawkil-e gheir*) that under the following situations, after recourse to the court and obtaining the court's permission, after choosing the type of divorce, to divorce herself and also [he] has given the wife the irrevocable mandate and the right to transfer this mandate to another that in the case of his *bazl* on his behalf to accept it." [The last condition is relevant only to *khul'* and *mubarat* divorce where the husband has the option of forgoing (*bazl*) the compensation offered by the wife, which is usually her *mahr*.]

19. These conditions which constitutes the grounds upon which a woman can now obtain a divorce, are almost the same as those available to women under Family Protection Law.

- husband's failure to comply with a court order to abstain from an occupation which is repugnant to the wife and her position;
- husband's sentence to a prison term of five years or more, or failure to pay a fine which results in his imprisonment for a period of five years or more;
- husband's addiction to anything harmful, which according to the court's judgement is detrimental to family life and renders the continuation of marital life difficult for the wife;
- husband's desertion of marital life without just cause for more than six months (the court decides on the question of his desertion and on the acceptability of the excuse);
- husband's conviction for any offence or sentence including *hadd* (fixed Islamic punishment for certain crimes) and *ta'zir* (discretionary punishment warded by *hakem-e shar'*) that is repugnant to the family and position of the wife;
- husband's failure to father a child after five years of marriage;
- husband's disappearance and the failure to find him within six months of the wife's application to the court;
- husband's second marriage without the consent of the first wife, or his failure to treat co-wives equally.

These stipulations, which are now printed in every marriage contracts, are not valid unless they bear the signature of the husband under each clause.²⁰ The husband retains the right to refrain from signing anything that he perceives as unacceptable. This is in conformity with the *talaq* mandate: a man is free to divorce, to delegate or to refrain from delegating this right. But in practice, as I saw in the courts (during the 1980s), the presence or absence of the husband's signature under each clause has no effect on the wife's right to obtain a court divorce, as the decision lies with the judge, who is now empowered to withhold or grant a divorce requested by a wife. He can compel the husband to pronounce *talaq*, or effect it on the husband's behalf if he considers that the continuation of marriage would entail hardship (*'usar va haraj*) for the wife.²¹ As to the stipulation concerning the wife's share in her husband's wealth, I have not come across a single case in which she received any portion of it.

20. This was not the case under the Family Protection Law. Although the latest Amendments to Divorce Laws, enacted in 1992, reinstate almost all elements of the Family Protection Law, both the legal logic and the court procedures have been radically altered; for a discussion, see Mir-Hosseini, 'Women and Politics' and 'Power and Limits of Negotiations'.

21. In 1982, Article 1130 of the Civil Code was amended to give the judge this power.

In the 1980s, during my attendance at courts, I came across many instances in which the court helped women to negotiate the grant of agency (*vekalat*) to effect a *talaq*, if the condition which led to her requesting a divorce was not already in her marriage contract (i.e. one of the above). As part of the reconciliation process, and in order legally to oblige the husband to comply with assurances made in court, he was often required to grant his wife an unconditional right to divorce herself in the case that he resumed his previous conduct. This was done through a sale contract, which was referred in the court notes as '*aqd-e kharej-e lazem* (binding outside contract), that is a binding contract which is made between spouses in the court, but is outside the marriage contract. The court clerk carried it out in the following manner. He first prepares a document containing all the conditions that have been agreed upon by the disputing couple. He then takes something that belongs to the husband, such as a cigarette, and gives it to the wife while repeating the following formula: "I am selling this cigarette to you on behalf of your husband; during this transaction, he agrees to the following conditions and authorizes you to divorce yourself on his behalf should he breach the conditions stated in the document signed by him." In return, the wife gives the court clerk a coin (or any nominal token) which he hands to the husband to complete the transaction; and he asks the disputing couple to sign the prepared document. The conditions in this document then become binding for the two parties; should the wife establish that the husband has breached any of its conditions, she can acquire a divorce.²²

This symbolic transaction is one way in which women whose marriage contracts do not contain a divorce stipulation can set new conditions or contain some of the rights to which their husbands are entitled by virtue of a marriage contract. As already stated, two such rights that can have adverse effects on women are the husband's rights to polygamy and divorce. Although neither can be removed, both can be contained or modified through insertion of stipulations in the marriage contract.

What can women do?

The comparison between Morocco and Iran is instructive, showing not only how Maliki and Shi'a law differ in their construction of women's legal right to delegated *talaq*, but also how this option has relevance for Muslim women today, even in those countries where family law is codified and where divorce is judicial.

In Iran, where the *ithna 'ashari* school of Shi'a law does not allow the option of delegated divorce (*talaq al-tafwiz*), women are not only aware of the existence of such an option but in practice they have better access

22. See Mir-Hosseini, *Marriage on Trial*, pp. 54-83.

to it in a different legal guise, that is by means of irrevocable agency (*tawkil bela-'azl*). Iran, where stipulations are now inserted in every marriage contract, clearly illustrates the potential of this Shari'a device, not only for giving women better access to divorce, but also for protecting them against *talaq* and compensating them in the face of it.

In Morocco, on the other hand, where Maliki law allows *tafwiz*, it is ironic that women are not only in general less aware of its existence, but in practice the option has been distorted to the extent that now men are its beneficiaries. *Mumalik* divorce, as now defined and registered by the '*adul* in Morocco, clearly illustrates how an option which was intended, under classical Maliki law, to give women easier access to divorce, in time could become distorted to make it even easier for men to dispose of their wives.

One way for Muslim women to counter such distortions is for them to inform themselves about their legal rights under Shari'a law, and to demand to have lawful stipulations inserted in their marriage contracts. That religious functionaries such as '*adul* are reluctant to insert conditions in marriage contracts, and that they regard such stipulations as harmful to marriage, is not peculiar to Morocco. The same attitude is to be found among mullahs in Iran, and among their counterparts elsewhere in the Muslim world. This reluctance stems, in part, from their narrow legal knowledge and their incompetence in working out the formula correctly, both to meet Shari'a requirements and to accommodate agreements between the spouses. But it also has its roots in a belief and a strong desire, often articulated, to retain men's arbitrary powers in marriage unchecked. I know of a number of cases (in both Iran and Morocco) in which the bride's request to have an stipulation giving her equal rights to terminate marriage was not met, the marriage notaries arguing that it was not possible to do so. There is also a great use of double standards. In 1989 a deputy head of the Court of Notaries in Rabat told me that his daughter, the first woman pilot in Morocco, would not contract a marriage without having the option of divorce. He found this appropriate for her, while holding to his general view that the fate of marriage cannot be left to the whims of women.

Even in Iran, where today all marriage contracts come with printed stipulations and every mullah who registers a marriage is by law required to read them out and ask the husband whether he wants to sign them or not, it is not uncommon to see a mullah openly discouraging the groom from putting his signature under each clause. In one '*aqd* ceremony (when the marriage contract is signed, usually at the home of the bride prior to the wedding celebration) in 1995 in Tehran, before reading out the stipulations, the mullah told the groom to think carefully before signing, as 'no man in his right mind should give such powers to his wife.' To this the bride's mother replied, 'how do you expect my daughter, who

is in her right mind, to enter a contract which gives all powers to one party.²³

In the absence of legislation granting women equity and security in their marriages, the insertion of stipulations in their marriage contracts could put them in a better bargaining position in negotiating the terms of either the continuation or the termination of their own marriages. Women who are already married - happily - without such stipulations, have no need for them; they should consider having them included in the marriage contracts of their junior unmarried relatives, their daughters, sisters, cousins and so forth. If, God forbid, a woman should have a dispute with her husband, as the Iranian case shows, in the course of the reconciliation process she can get the right to delegated divorce, as a separate contract, in the form of either *tafwiz* or *tawkil*. Here the Shari'a law is on their side, and can be resorted to in order to gain better access or equal rights to divorce, which most modern codes deny them.²⁴

23. In this particular case, the groom signed underneath each clause in the marriage contract; the matter had obviously been the subject of intense negotiations between the families and was a strong determinant in setting the amount of *mahr* or dowry. As I have argued elsewhere, in Iran one cannot examine divorce and woman's access to it without considering the central role of *mahr* or dowry. The way that *mahr* is practised in Iran can provide women with a strong negotiating card to secure their husband's consent for a *khul'* divorce. In fact one of the arguments put forward by those who are against women obtaining absolute and unconditional right to divorce is that women's interest in marriage can be best served by stipulation of a deferred *mahr*, which they argue can act as a deterrent to marital breakdown. For the role and practice of *mahr* in Iran, see Mir-Hosseini, *Marriage on Trial*, pp. 73-83.

24. The only two Muslim countries in which women have equal rights to divorce are Turkey, where Islamic family law was replaced by a code modelled on Swiss law under Atatürk; and Tunisia where Islamic law was substantially reformed under Bourghiba.

فرموده و این خود بسیار ک را و سپید تقای نوع بشر قرار داد.
خاندان کریمش باد که میان همسری را بدستور آسمانی اتوار
کو دوک معنا بخشید و درود خردوان بر دامن تابناک نیا سیر پاک و
مهر و بستگی را شیرازه زانوشنی استوار کرده گلشن خانواد را به لجنه
بستی نهاد و با منوچهر جانها بوستان زندگی را با درو ساخت
تائیش و ساس کرد و گامی را سزاست که بر تو گیتی ذرات خیا

(۱)

بسم الله الرحمن الرحیم
الحمد لله رب العالمین
والصلاة والسلام علی محمد و آله الطیبین

[illegible]

page 2

The National Marriage Registration Document of Iran

Translated by Homa Hoodfar

Pages 1 and 2

The cover is page one. Page two is a few sentences about marriage being a legitimate channel of love and procreation.

Page 3

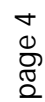
The number of the registry office.

The address of the registry office.

The number (reference code) of the document.

The date of actual marriage.

The date of registration [the date of legal marriage and registration normally is the same].



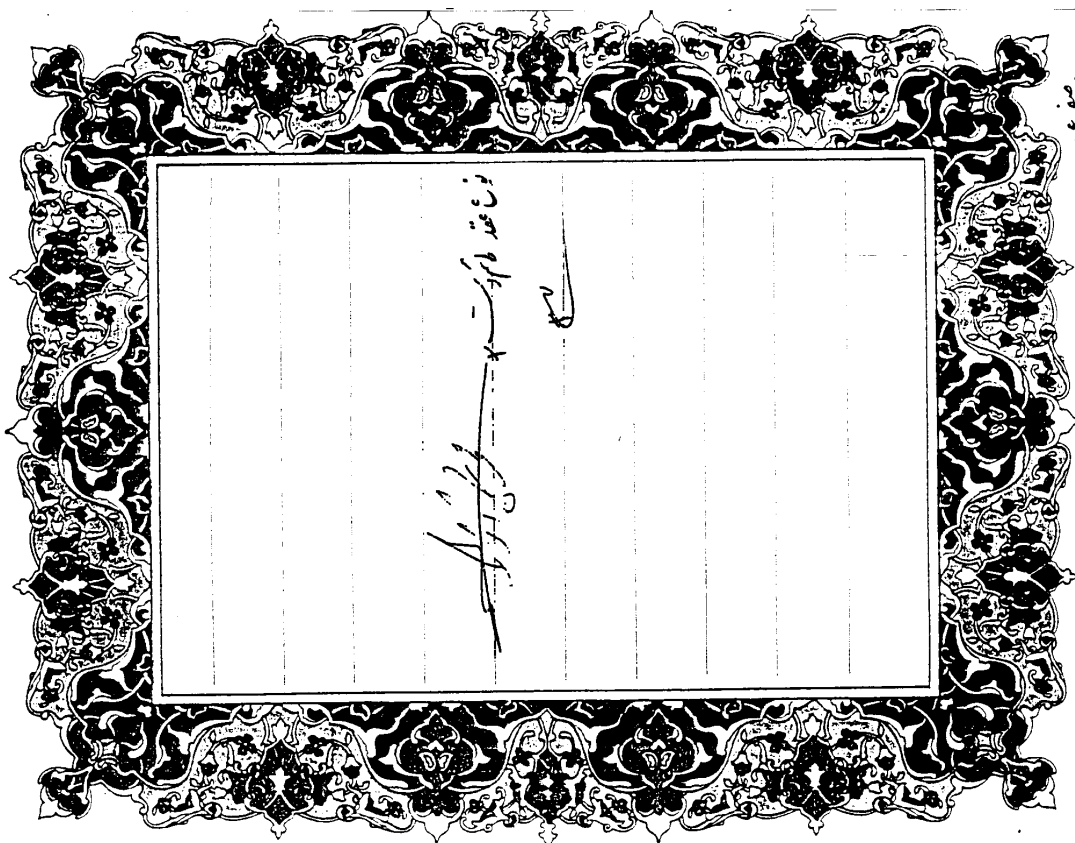
Page 4

The bride's complete personal information.

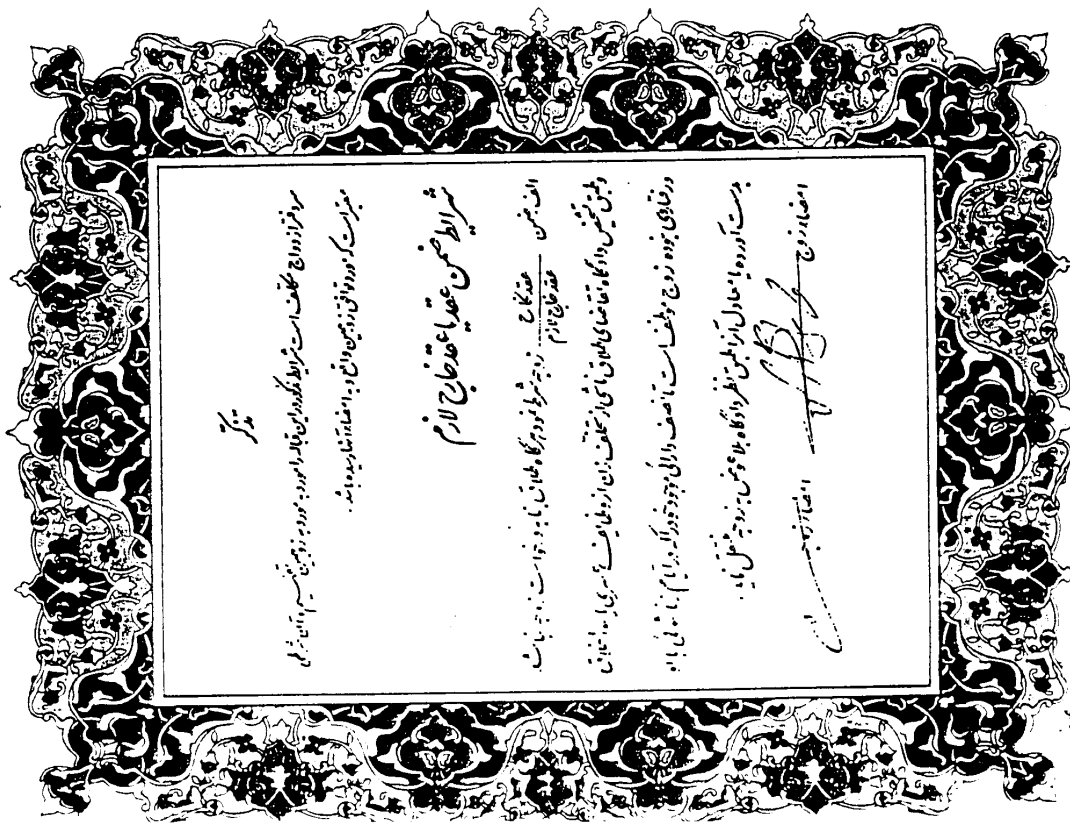
The groom's complete personal information including whether or not he has another wife.

Page 5

Mahr [which the husband pledges at the time of the marriage to pay to the bride] and other gifts [given to the bride and/or bridegroom by family and friends].



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page 6

Page 6

The kind of marriage: (whether it is permanent or temporary).

Page 7

[Translator's Note: the registrar is responsible for making the couple understand the marriage conditions and for getting their agreement and signatures.]

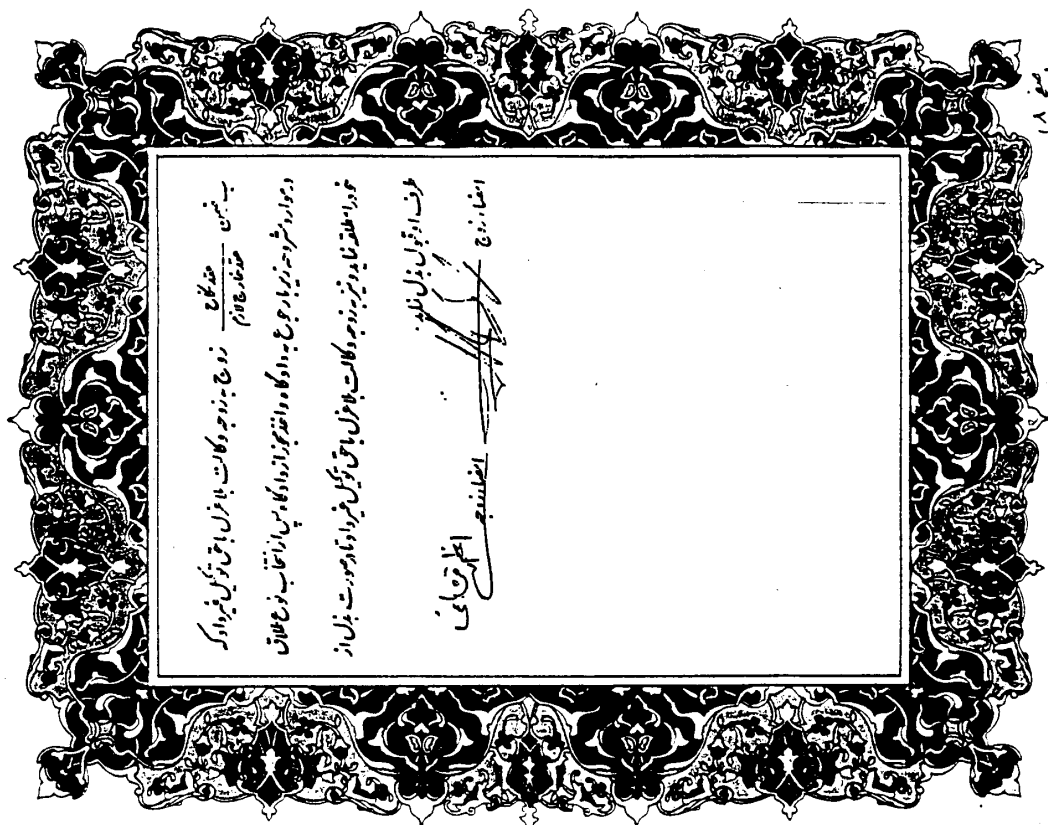
The conditions of marriage:

A- The bride has made it a condition that should her husband ask for a divorce and should the court decide that this request is not based on wife's failure in her ordinary "wifely duty", the husband is to transfer to her half the wealth accumulated during the marriage.

[Translators note: "wifely duty" is usually defined in terms of living harmoniously and obediently with the husband in the residence he selects.]

Signature of groom

Signature of the bride



page 9



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B- The husband gives the permanent power of attorney to the wife to divorce herself under the conditions mentioned below, by going through the court and choosing the kind of divorce, [e.g. *raj'i* or *bain*] to divorce herself.

[Translator's note: in Iran divorce, whether initiated by the wife of husband, has to go through the court, even if there is a mutual agreement].

Signature of the groom

Signature of the bride

Page 9

The conditions and situations under which the wife has the right to divorce herself are as follows:

1- If the husband has not paid *nafaqa* (maintenance) for six months for whatever reason, or has refused or failed to fulfil his "other obligations"

[Translator's note: e.g. sex, companionship, appropriate standard of living etc.]
towards her for six months.

Signature of the groom

Signature of bride

2- In case of maltreatment or disrespectful behaviour on the part of the husband towards the wife.

Signature of the groom

Signature of the bride



page 11



page 10

Page 10

3- If the husband contracts an incurable (or difficult to cure) disease which renders married life dangerous to the health of his wife.

Signature of the groom

Signature of the bride

4- If the husband becomes insane and cancellation of the marriage is not possible under other *sharia* law.

Signature of the groom

Signature of the bride

5- If the husband continues with an occupation which the court has ruled is detrimental to the social and economic welfare of the family.

Signature of the groom

Signature of the bride

Page 11

6- If the husband is sentenced to five or more years of imprisonment, even if as a result of a monetary fine or financial debt that he has been unable to honour.

Signature of the groom

Signature of the bride

7- If the husband has an addiction which the court considers threatens the foundation of family life and makes the continuation of married life difficult for the wife. [e.g. addiction to opium, heroin, alcohol, or cocaine etc.].

Signature of the groom

Signature of the bride

page 13

page 12

Page 12

8- If the husband deserts the family without an acceptable reason or has disappeared for six months (continuous absence). It is up to the court to decide what reasons are acceptable.

Signature of the groom

Signature of the bride

9- If the husband is convicted for an offence which damages the wife's reputation and family honour. However, it is for the court to decide whether the wife's reputation and honour have been damaged by his criminal conduct.

Signature of the groom

Signature of the bride

Page 13

10- If the wife after the five years has not been able to conceive, either because her husband is *aghim* (infertile) or as a result of medical problems on his part.

Signature of the groom

Signature of the bride

11- Should the husband disappear and six months after the wife has referred the matter to the court, still can not be located.

[Translators note: This gives the wife a right to demand divorce on the grounds of the husband's disappearance.]

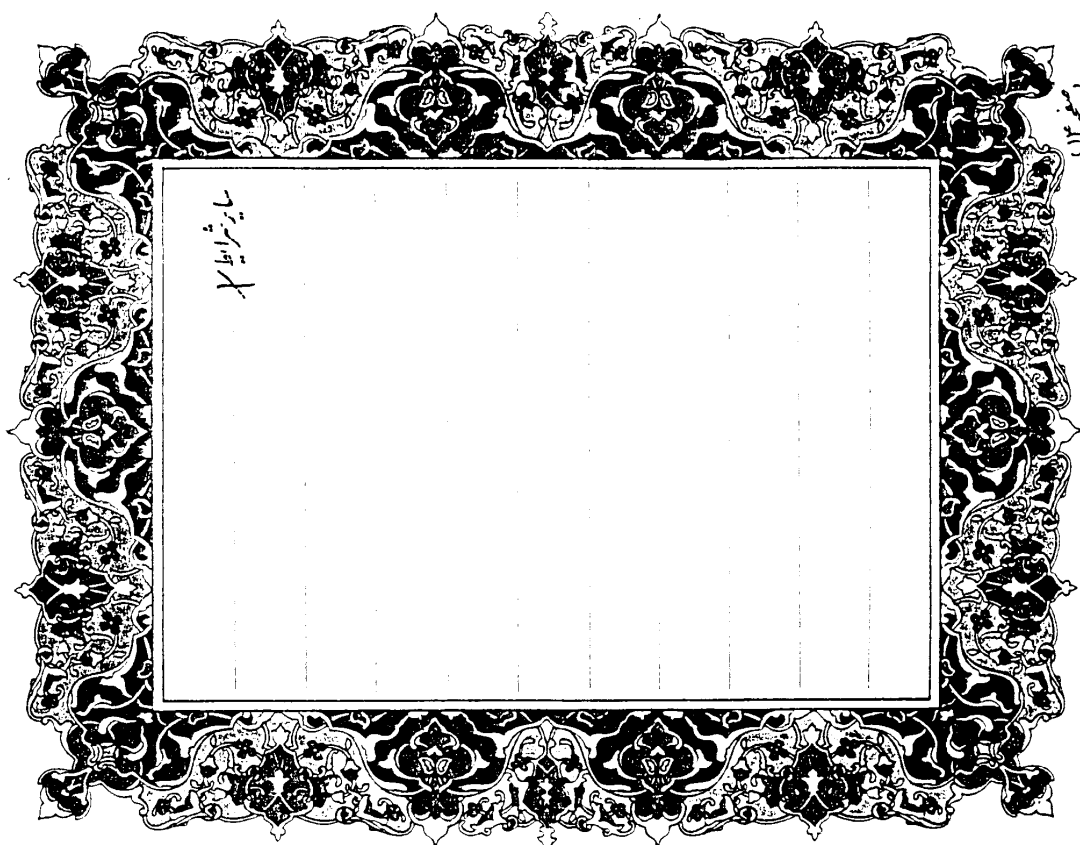
Signature of the groom

Signature of the bride

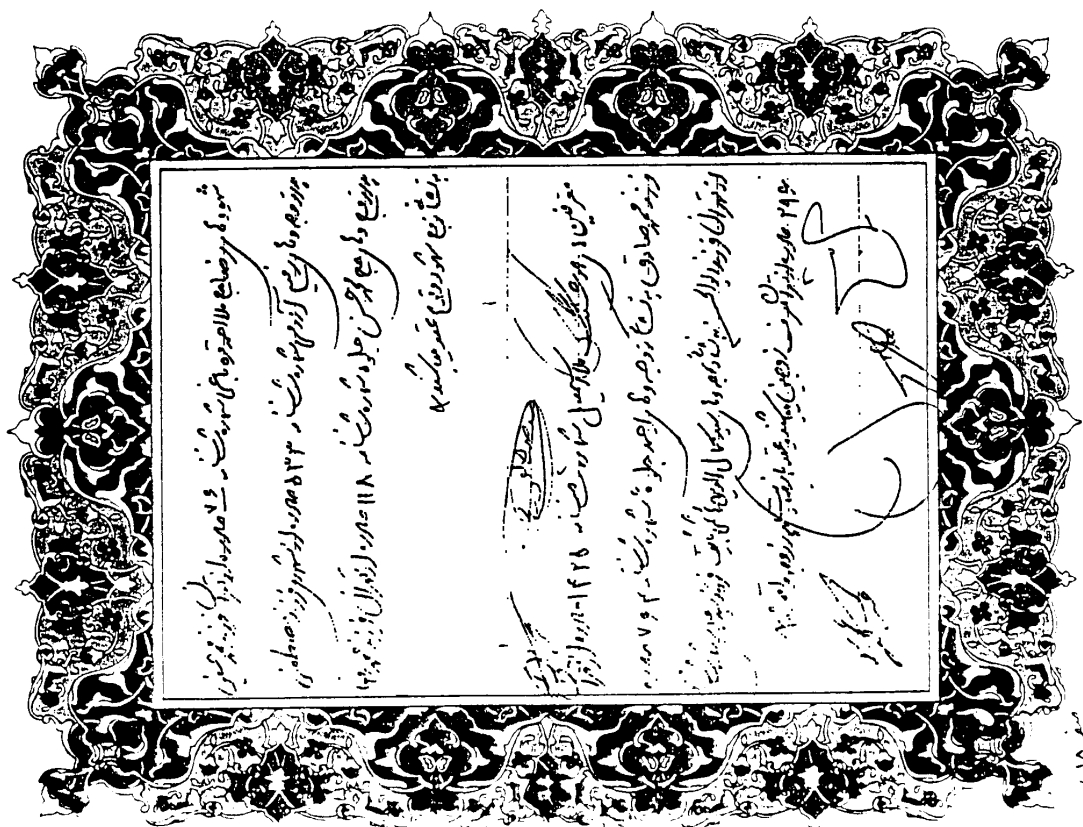
12- If the husband marries another wife without the permission of the first wife, or if, according to the determination of the court, the husband does not treat his wives fairly.

Signature of the groom

Signature of the bride



page 15



page 14

Page 14

Other conditions

[Translators note: On this page, usually the bride asks for the right to residence which includes the right to mobility and travel, the right to continue her education, and the unconditional right to continue with her job. A bride (also a groom) can stipulate other conditions to their marriage contract. The most common conditions stipulated by brides are: The right to place of residence and mobility. This would mean that the bride can choose the location of the nuptial home and that she would need the husband's permission to obtain a passport and travel or simply leave her residence. Many brides also put in their marriage contract the right to continue their education even though this right has never been taken away from them by marriage. Increasingly women are including the right to be gainfully employed in a profession. But technically any condition that is not contrary to the Muslim principles of marriage can be put here. For instance a husband can not ask his permanent wife not to have children, and a wife, so far, has not been able to ask for the guardianship over her children in case of divorce or death. The argument against the latter has been that according to the Ithna Ashari law the paternal grandfather (the father's father) has the right to guardianship over their grand children which is equal to that of their father; hence a husband/father can not give away a right that is not his. However, it is not clear whether legally there is a problem in regard to a stipulation entitling the mother to retain custody of the children beyond the age of hidanat in the event of divorce.]

Signature of the groom

Signature of the bride

Page 15

Personal information about the witnesses to the marriage (*aqd*).

page 17

page 16

Page 16

The person performing the ceremony of the *aqd* (marriage)

The date

The signature of the officials (the person performing the *aqd* or marriage ceremony, and the head of the registrar office)

We, the groom and bride, fully informed of the content of this marriage document have signed this document and we have also signed all the conditions that have been acceptable to us.

Signature of the groom

Signature of the bride

Page 17

[Translators note: This page reiterates the legal responsibility of the registrar to ensure that he has all the necessary personal information concerning the couple and their witnesses].

Having obtained all the necessary information from the couple and their witnesses, I, the registrar of office number ----, have registered this marriage and certify its complete legality.

Name and family name

Signature of the registrar and the stamp

This document of marriage registration, in accordance with the Article 14 of the Marriage Law, has been given to ---- (name of the bride).

Signature and stamp of the head registrar

[Translator's note: There are usually two copies of the marriage document. One is given to the bride or the mother of bride, even though it is the father who has to sign the marriage contract; the other one is kept at the office of the registrar.]

Legislation Concerning *Talaq* and *Talaq-i-Tafwid*

Unless otherwise indicated, the following extracts are reproduced with permission from Tahir Mahmood, Personal Law in Islamic Countries.¹ (New Delhi: Academy of Law and Religion, 1987.) Footnotes have been added by the editors.

Islam gives to the parties to an intended marriage freedom of mutually stipulating any condition that is not repugnant to its law or social policy. The basic policy of Islam is not to impose on the parties everything by the force of law; beyond prohibiting a few things specifically it follows the rule of contractual freedom. The contracting parties can mutually opt out of anything which the law permits but does not make obligatory. Similarly, they can opt for something special, which is neither prohibited nor imposed by the law. This is called *khiyar-al-shart* (option of stipulation). The doctrine of freedom of marital stipulation is specifically recognized by legislation in Jordan, Morocco, North Yemen, Syria and Tunisia. All lawful conditions mutually agreed upon at the time of marriage, as also an option reserved by the wife to dissolve the marriage if any such condition is violated, are judicially enforceable in these countries.²

A Muslim wife may derive from her marriage contract the right to pronounce a *talaq* (called *talaq-i tafwid*) on specified grounds or even at discretion. This enables married women to dissolve their marriage without the consent of the husband or the intervention of a court or another external agency. The basis of this power of the wife is its *tafwid* (delegation) to her by mutual agreement of the parties incorporated in

1. An expanded and revised second edition of this book was published in 1995. Tahir Mahmood. *Statutes of Personal Law in Islamic Countries: History, Texts and Analysis* (New Delhi: India and Islam Research Council) 1995, 320 pp.

2. Tahir Mahmood, *Personal Law in Islamic Countries*, pp. 272-273,

the contract of marriage. The personal law enactments in Bangladesh, Brunei, Iraq, Jordan, Malaysia, Morocco, Pakistan and Syria enforce the law on delegated divorce. In Morocco such a *talaq* is irrevocable and in Bangladesh and Pakistan, like a *talaq* by the husband it must be notified to a local official for the constitution of an 'arbitration council' which will explore the possibilities of avoiding it. In Brunei and Malaysia (where *talaq-i tafwid* prevails by the name *ta'aliq*) the court has the power to confirm that such a *talaq* has taken place.³

Extracts from Legislation Collected and Translated

by Tahir Mahmood

Egypt, Law on Personal Status 1929 (amended 1985)⁴

2. A conditional *talaq* which is not meant to take effect immediately shall have no effect if it is used only as an inducement to do some act or to abstain therefrom.⁵

11A. A man getting married shall declare his marital status in his application for registration of marriage. If he is already married, he shall disclose the name and address of his existing wife or wives. The registrar shall in that case inform them of the new marriage by registered post, acknowledgement due. A wife whose husband has married again can seek divorce on the ground of material injury caused by it, making it impossible to live with him -- *irrespective of whether or not the marriage contract incorporates a stipulation giving her such a right*.⁶ If the *qadi* fails to effect a reconciliation between the parties, he will grant an irrevocable divorce.

The wife's right to seek a divorce under this provision will lapse if she does not initiate action within one year from the date on which she comes to know of the second marriage, or if she has consented to it expressly or impliedly. She will, however, have this right each time her husband marries again.

If the new wife did not know at the time of the marriage the fact of the man being already married and comes to know of it subsequently, she can similarly seek a divorce.

3. *Ibid.*, p. 283. Actually *ta'aliq* refers to a stipulation in the marriage contract sanctioned by a suspended *talaq* pronounced by the husband, not a delegation to the wife of authority to pronounce *talaq*.

4. *Ibid.*, pp. 37, 39-40; emphasis added.

5. This clause would apparently render stipulations in a marriage contract sanctioned by a suspended *talaq*, in effect, unsanctioned.

6. Presumably, if the wife had been granted a right of *talaq-i-tafwid* exercisable if the husband should marry another woman, she could pronounce *talaq* and register it in the same manner that *talaq* is pronounced extra-judicially and registered by the husband.

Iraq, Code of Personal Status 1959 (amended 1980)⁷

6. (3) Lawful conditions stipulated in a contract of marriage shall be valid and must be complied with.

(4) The wife may claim dissolution of the marital contract on the ground of non-compliance by the husband with any such condition stipulated in the contract.

34. (1) Divorce terminates the bond of marriage when pronounced by the husband, or *by the wife who has been assigned or delegated an authority in that regard*, or by the *qadi*. No divorce shall be effective except when pronounced the legally prescribed formula.

(2) *An assignment shall be irrevocable* in regard to reconciliation proceedings, arbitration and *pronouncement of talaq*.

36. A divorce which does not take effect forthwith, or is conditional, or is used as an oath, shall not be operative.⁸

39.(2) The certificate of marriage shall remain valid till it is cancelled by the court.

Jordan, Code of Personal Status 1976⁹

19. Where in the contract of marriage has been stipulated a condition for the benefit of either party which is not prejudicial to the objects of marriage and requires no action forbidden by law, and which has been recorded in [the] certificate of marriage, compliance with it shall be obligatory as follows:

(i) Where the wife has stipulated for something that gives her a right not forbidden by law and not affecting a third person's right -- e.g., that she will not be required to go out of station, or that the husband shall not marry another woman, or *that she can divorce herself should she so desire*,¹⁰ or that she would live in a specified place -- the condition is valid and obligatory and if the husband does not fulfil it the wife can apply for a divorce on that ground without losing any of her rights resulting from marriage.

7. Tahir Mahmood, *Personal Law in Islamic Countries*, pp. 57, 62-64; emphasis added.

8. See fn. 4 above.

9. Tahir Mahmood, *Personal Law in Islamic Countries*, pp. 80-83; emphasis added.

10. This apparently refers to a blanket delegation of *talaq-i-tafwid*. "And it should be noted that the wife must expressly stipulate that her right of divorce, when exercised, would be final [i.e., irrevocable *talaq*] in order that it will not be subject to revocation by her husband against her will." (R.R. Dawwas Amin, "Compensation for Abusive Divorce Under the Law in Jordan," *Islamic & Comparative Law Review*, 14[1994]133-143, p. 140, fn. 11.)

(ii) Where the husband has stipulated for some thing that gives him a right not forbidden by the law and not affecting a third person's rights -- e.g., if he stipulates that she will not go out for work or that she will live with him at his place of work -- the condition is valid and obligatory, and if the wife does not comply with it the marriage may be dissolved at the instance of the husband who will be absolved of his liability for her deferred dower and maintenance of *iddah*.

(iii) Where the contract of marriage contains a condition which is repugnant to the object of marriage or requires an action forbidden by law -- e.g., where either party stipulates that they will not live together or that the other party must drink alcohol or must not meet either of his or her parents -- the condition will be void but the marriage will be lawful.

37. A wife who has been paid her prompt dower shall obey her husband and live in his house and go with him wherever he goes even if out of the country, *provided* that her safety is assured and *no condition to the contrary has been registered in the certificate of marriage*. Where she refuses to obey him, her right to maintenance will lapse.

89. An unintended divorce meant to persuade or dissuade the wife for or from something shall have no effect.

Lebanon, Law of Family Rights 1917-1962¹¹

38. Where a woman stipulates with the husband that he would not marry another woman and that *if he does so she or the second wife would stand divorced*, the contract of marriage shall be valid and the condition enforceable.¹²

Morocco, Code of Personal Status 1958¹³

25. (1) If any injustice between the wives is feared, plurality of wives is not permitted.

(2) Where a husband contracts a second marriage and *the wife has not stipulated against such an act in the marriage contract*, the *qadi* may consider whether the second marriage has caused any injury to the first wife; marriage with a second wife shall not be contracted unless she is informed that the husband is already married to another woman.

11. Tahir Mahmood, *Personal Law in Islamic Countries*, p. 98; emphasis added.

12. The terms of this clause do not refer to *talaq-i-tafwid* but to a suspended *talaq* pronounced by the husband and timed to come into effect either against the first wife or the second wife in the event of his remarriage.

13. Tahir Mahmood, *Personal Law in Islamic Countries*, pp. 121-123, 125; emphasis added.

31. A wife may stipulate in the marriage contract that he husband shall not marry a second woman next to her, and if the husband violates such a stipulation she will have a right to seek dissolution of marriage.¹⁴

38. If a marriage contract includes a condition opposed to the Shariah or to the essence or purposes of the contract, the marriage will be valid and the condition inoperative; it is not a condition opposed to the essence of the contract if the wife stipulates that she shall work in the interest of the country.

44. Divorce means dissolution of marriage by repudiation by the husband, or by his agent, or by a person having an authority delegated by the husband,¹⁵ or by the wife having an option to do so, or effected by the *qadi* under a decree of dissolution of marriage.

[48. (1) The divorce [*talaq*] must be witnessed by two just men who are authorized to witness by the Judge in whose area the marital home is located.

(2) The divorce must not be recorded except in the presence of the two parties and with the permission of the Judge. If the wife is asked to attend and declines, and the husband insists on going ahead with the divorce, her presence may be dispensed with .]¹⁶

52. A *talaq* suspended on the performance of or abstention from some act shall not be operative.¹⁷

67. Any divorce pronounced by the husband shall be *revocable*, except a third divorce, the one before consummation, a *khul'* and a *delegated divorce*.¹⁸

14. This apparently refers to a situation where the anti-polygamy stipulation was not sanctioned by conferring a right of *talaq-i-tafwid* to the wife.

15. This clause recognizes the validity of a delegation. A pronouncement of *talaq-i-tafwid* by the wife is apparently a completely extra-judicial divorce, just as is pronouncement of *talaq* by the husband.

16. The text of this clause was provided by Ziba Mir-Hosseini and translated from Arabic by Dr. M.A. Zaki Badawi. A *talaq* which has not been registered as required by this section is nonetheless valid, although the husband is subject to criminal penalties.

17. This clause would apparently void (e.g.) a *talaq* pronounced by the husband and timed to come into force, either against his present bride or against his new wife, should he marry again.

18. The delegated divorce, *talaq-i-tafwid*, is not pronounced by the husband, but by the wife. However, this clause makes it unambiguously clear that such a *talaq* is not revocable. In classical Maliki law *talaq-i-tafwid* pronounced by a wife whose marriage has been consummated is, by definition irrevocable.

Syria, Code of Personal Status 1953¹⁹

14. (i) Where a marriage contract incorporates a condition opposed to the essential nature or purpose of marriage or making obligatory something forbidden by the Shariah the condition shall be ineffective but the marriage shall be valid.

(ii) Where a contract stipulates a condition for the benefit of the wife it shall be valid and binding on the husband, provided that it is not forbidden by the Shariah, does not affect the rights of a third person and also does not take away from the husband any of his legal rights.

(iii) Where *a wife stipulates a condition* in the marriage contract which takes away any such right of the husband or adversely affects a third person's rights, the condition, although not binding on the husband, *shall be enforceable to the extent of giving to the wife a right to seek dissolution of her marriage if it is violated by the husband.*²⁰

[88. *The husband can delegate the right to divorce to a third party or may authorize the wife to divorce herself.*]²¹

90. A conditional divorce shall have no effect *if not actually intended* and used only as an inducement to do or abstain from doing something or as an oath or persuasion.²²

Tunisia, Code of Personal Status, 1956²³

11. *Stipulations in a marriage are permissible. If any stipulation is violated the aggrieved party may apply for dissolution of marriage.*²⁴ Such a dissolution shall not give right to a right of indemnity if it occurs before the consummation of marriage.

19. Tahir Mahmood, *Personal Law in Islamic Countries*, pp. 143-145; emphasis added.

20. This clause apparently refers to the situation where the stipulation was not sanctioned by a delegation of authority to pronounce *talaq* to the wife.

21. This clause, given by Tahir Mahmood in his 1972 rendering of the Syrian statute is omitted in his 1987 selection of provisions from the act. See Tahir Mahmood, *Family Law Reform in the Muslim World* (Bombay: N.M. Tripathi, 1972), p. 95; emphasis added.

22. As opposed to the wording in the Egyptian, Iraqi, and Moroccan legislation, this clause refers to the intention of the husband. Presumably, any statement made by the husband and incorporated in such a solemn document as a marriage contract, must be held to have been intended. See also the wording of the Jordanian legislation, section 89.

23. Tahir Mahmood, *Personal Law in Islamic Countries*, p. 156; emphasis added.

24. All divorces in Tunisia have to take place before the court.

North Yemen, Family Law 1978²⁵

4. Where the marriage is subject to a stipulation which is legally valid and relates to either spouse, the marriage shall be valid and the condition binding. *Such a condition cannot be cancelled except by the consent of the parties.*

Brunei Darussalam, The Religious Council, State Customs and Kathis' Courts Enactment 1955²⁶

[143. (1) Within seven days after the solemnization of any marriage it shall be the duty of the parties to the marriage and of the *wali* of the wife, if any, and of the person who solemnized the same to report to the Registrar of the *mukim* in which the marriage was solemnized the fact of such marriage and all necessary particulars concerning the same and to pay the fees specified in the Fourth Schedule, and the Registrar shall forthwith register such marriage.

(5) The Registrar shall also, upon payment of the fees specified in the Fifth Schedule, prepare a *surat ta'aliq*²⁷ in the form specified in that schedule, obtain the signature of the parties thereto, sign the same and deliver one copy to each of the parties to the marriage.]²⁸

146. (1) A married woman may, if entitled in accordance with Muslim law to a divorce in pursuance of *the terms of a surat ta'aliq [suspended talaq pronounced by the husband at the time of the marriage] made upon marriage, apply to a kathi to declare that such divorce has taken place.*²⁹

(2) The kathi shall examine the instrument and make such inquiry as appears necessary into the validity of the divorce and shall, if satisfied that the same is valid in accordance with Muslim law, confirm the divorce and, upon payment of the fees specified in the Fifth Schedule, register and issue certificate of the same in the manner aforesaid.³⁰

25. Tahir Mahmood, *Personal Law in Islamic Countries*, p. 172; emphasis added.

26. *Ibid.*, p. 202; emphasis added.

27. Document affirming that the husband has pronounced at the time of the marriage a suspended *talaq* which will come into force should certain circumstances occur.

28. This clause, given by Tahir Mahmood in his 1972 rendering of the Brunei statute is omitted in his 1987 selection of provisions from the act. See Tahir Mahmood, *Family Law Reform in the Muslim World* (Bombay: N.M. Tripathi, 1972), p. 207.

29. Examples of this procedure, which is quite distinct from *talaq-i-tafwid*, are provided in the extract from Ahmad Ibrahim, *Islamic Law in Malaysia* (Singapore: Malalysian Sociological Research Institute, 1965; reprinted Kuala Lumpur, 1975), found on pp. 158-160 of this volume.

30. One of the major disadvantages of sanctioning stipulations in South Asia by a suspended *talaq* is that if the stipulation is breached, the wife is automatically divorced whether, given all the circumstances, she so wishes or not. Because in South-East Asia the divorce on the basis of *ta'aliq* must be claimed by the wife and confirmed by the court, the wife is not automatically divorced without her consent.

Malaysia, Federal Territory, Islamic Family Law Act 1984³¹

[22. (1) Immediately after the solemnization of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other *ta'aliq* [stipulation sanctioned by suspended *talaq*] of the marriage in the Marriage Register.

26. (1) Upon registering any marriage and upon payment to him of the prescribed fees, the Registrar shall issue marriage certificates in the prescribed form to both parties to the marriage.

(2) The Registrar shall also, upon payment of the prescribed fees, issue a *ta'aliq* certificate in the prescribed form to each of the parties to the marriage.]³²

50. A married woman may, if entitled to a divorce in pursuance of *the terms of a ta'aliq certificate [establishing the terms of the suspended talaq pronounced by her husband] made upon a marriage*, apply to the court to declare that such divorce has taken place.³³

The court shall examine the application and make an inquiry into the validity of the divorce and shall, if satisfied that the divorce is valid according to *hukm shar'*, confirm and record the divorce and send one certified copy of the record to the appropriate registrar and to the chief registrar for registration.³⁴

31. Tahir Mahmood, *Personal Law in Islamic Countries*, p. 230; emphasis added.

32. These two sections were not provided by Tahir Mahmood in his selection of provisions from this statute and are taken from the official text of the statute published by the Government of Malaysia.

33. See fns. 29 and 30 above.

34. In Malaysia *talaq*, even by the husband, requires intervention of the court.

Cherai Ta'alik in Malaysia

The following extract is reproduced with permission from Ahmad Ibrahim, Islamic Law in Malaysia. Singapore: Malalysian Sociological Research Institute, 1965; reprinted Kaula Lumpur, 1975, pp. 208-210.

Cherai Ta'alik (Divorce by the Breaking of a Condition)

Where there has been a *ta'alik* (condition) in the marriage contract and the condition has been broken, the wife may make a complaint and if her complaint is substantiated she will be entitled to a *cherai ta'alik*, in accordance with the terms of the *ta'alik*. *This form of divorce is really a conditional divorce by the husband.* Any lawful condition may be included in the *ta'alik*. In Malaya the most frequent form of *ta'alik* is the condition which gives the wife the right to ask for the divorce if the husband has not maintained her for a period of three months. Another usual stipulation is that the wife will be entitled to a divorce if the husband absents himself for six months on land or a year at sea without sending any letter or money to the wife. [Emphasis added.]

The official form of the *ta'alik* in Indonesia deals in addition with desertion of the wife for a continuous period exceeding six months, physical cruelty to the wife and neglect of the wife for a period exceeding six months. It appears also that it is possible to include conditions to provide for cases where the husband is sent to prison for a long period or where he leaves the country or where he takes another wife without the permission of the existing wife. In Indonesia the practice is to include in the form of *ta'alik* a provision that the wife in making complaint of breach of *ta'alik* should pay a sum of money as compensation for the divorce. This has the effect of making the *talak* a *talak ba'in* which cannot be revoked by the husband.

The prescribed form of *surat ta'alik* in Trengganu provides, as an example of a *ta'alik*, the following: --

On every occasion that I am estranged from my said wife for a continuous period of four months, whether I leave her or she leaves me by will or by force and upon application by her to the *Kadzi* or *Naib Kadzi* and upon satisfaction by him of such estrangement my marriage to my said wife shall be dissolved by one *talak*.

The form of *ta'alik* prescribed in Selangor is as follows: --

Everytime that I fail to provide maintenance to my wife for a period of four months or more, she can make a complaint to the *Kathi's* Court and if her complaint is proved, then she is divorced by one *talak*, and everytime I revoke the divorce and my wife refuses to agree to it, she is divorced by one *talak*.

In Negri Sembilan the prescribed form of *ta'alik* is as follows: --

Everytime that I leave my wife or I am abroad and it is not known whether I am alive or dead or I am away at a place where I am unable to cohabit with my wife for a period of four months or more and my wife complains to a *Kathi* and her complaint is proved, then she is divorced by one *talak*.

In Selangor, Negri Sembilan and Melaka and (where the woman has been resident for not less than four months in the area for which the *Kathi* is appointed) in Penang and Kedah power is given to a *Kathi* having jurisdiction in that behalf to receive from a married woman an application for *cherai ta'alik*. Upon receiving the application, the *Kathi* shall serve a notice on the husband. The *Kathi* shall then record the sworn statement of the woman and at least two witnesses, and may then if satisfied that the provisions of the Muslim Law have been complied with make such order or decree as is lawful. The particulars and nature of the divorce shall be entered in the register and certificates of divorce shall be issued to the husband and to the wife, but where the divorce is capable of revocation no certificate of divorce shall be issued to the wife until the expiration of the period during which the divorce may lawfully be revoked.

In Kelantan and Trengganu it is provided that a married woman may if entitled in accordance with Muslim law to a divorce in pursuance of the terms of a *surat ta'alik* made upon marriage, apply to a *Kathi* to declare that such divorce has taken place. The *Kathi* shall thereupon examine the *surat ta'alik* and make such enquiry as appears necessary into the validity of the divorce and shall, if satisfied that the divorce is valid in accordance with Muslim Law confirm and register the divorce and issue certificates of divorce to the parties.

In Pahang it is provided that a married woman may, if entitled under the Muslim law to a divorce in pursuance of the terms of a *surat ta'alik* made upon marriage, apply to a *Kathi* and such *Kathi* shall examine the *surat ta'alik* and call the husband by delivering a memorandum to him. On the appointed day the *Kathi* shall enquire into the application to the extent he considers necessary and shall if satisfied declare that divorce

has taken place in pursuance of the *surat ta'alik* and register the divorce and issue a certificate of the same.

There are no statutory provisions as to *cherai ta'alik* in Perak, Johore or Perlis but in such states the *Kathi* has jurisdiction to register a *cherai ta'alik* in accordance with Muslim law.

In Singapore under the Muslims Ordinance, 1957, applications for *ta'alik* may be heard by the Shariah Court and it is provided that the procedure in applications for *fasah* shall apply *mutatis mutandis* to applications for *ta'alik*.

The form of *ta'alik* is usually to the effect: --

If I fail to maintain my wife for more than three months or if I assault her and she complains to the Shariah Court and the Court is satisfied of the truth of her complaint, my marriage shall be dissolved by one *talak*.

Suspended *Talaq* in South and South-East Asia

Lucy Carroll

South Asia

In South Asia, a suspended *talaq*, pronounced in advance by the husband and timed to come into effect should a particular circumstance arise or a certain event occur, is occasionally used to sanction stipulations in marriage contracts. The pattern of such a stipulation a 1949 Assam case is: --

If..., then my 1, 2, 3 *talak bain* upon [my wife] will be effective and she will be able to take another husband after the period of *iddat*.¹

If the condition set out in the "if" clause is fulfilled, the husband's *talaq* automatically and extra-judicially comes into force and the parties are irrevocably divorced (irrevocably because the husband in this case had pronounced an irrevocable triple *talaq*).

The pattern in a 1931 Lahore case was: --

I shall not... If I do, [my wife] is to be held to have been divorced by me, she will be *qatai haram* [absolutely forbidden] to my person and this divorce by me in her favor would be valid and legal.²

Again, breach of the husband's promise not to do something would automatically and extra-judicially bring the marriage to an end.

The alternative *tafwid* from is much more common in South Asia and much more beneficial to the wife. The wife empowered by such a delegation is in a position to consider the entire situation and to decide whether to effect a divorce or not in view of all the circumstances. If the stipulation is enforced by a suspended *talaq*, the Indian woman is automatically divorced, whether or not she may wish to be. The disadvantage to the Pakistani/Bangladeshi woman is, as a result of the

1. *Mirjan Ali v. Maimuna Bibi*, AIR 1949 Assam 14; see above p. 66.

2. *Muhammad Amin v. Mt. Aimna Bibi*, AIR 1931 Lahore 134.

Muslim Family Laws Ordinance, 1961, precisely the opposite: assuming that a suspended *talaq* could be fitted within the terms of the Ordinance,³ it would almost certainly be revocable by the husband (even if pronounced in irrevocable form) once the event on which it was contingent occurred and the *talaq* came into effect -- *unless* the terms of the Contract Act and the fact that the suspended *talaq* comprised a crucial ingredient of the marriage contract could be invoked to render it irrevocable.⁴

South-East Asia

In Shafi countries, there is a marked preference for the suspended *talaq* as a means of enforcing stipulations in marriage contracts.

The question of revocation by the husband of the suspended *talaq* that he himself pronounced may arise once the *talaq* has come into force (the suspended pronouncement itself cannot be retracted).⁵ There are two main ways of dealing with this issue. First, the husband may pronounce an irrevocable *talaq*, which Shafi law reprobates. Alternatively, it may be provided that the wife shall pay a token sum as compensation for the divorce; this converts the *talaq* into an irrevocable *khul*. An intriguing third manner of handling the question of revocability is found in the Selangor format reproduced by Ahmad Ibrahim above: the wife is initially divorced by one *talaq*, but if the husband revokes it and the wife objects, another suspended *talaq* comes into force. After two revocations to which the wife has objected, she has been effectively divorced by three individual *talaqs*, and the matter is definitively concluded.

The distinctive feature of the suspended *talaq* in Malaysia and Singapore, as the situation emerges from the extract from Ahmad

3. E.g., the Muslim Family Laws Ordinance requires that the pronouncement of *talaq* be notified "as soon as may be" after the words have been spoken, and provides that such a *talaq* will come into force ninety days after such notification. But a suspended *talaq* may not come into force, if at all, until years later. There is no provision for notifying a *talaq* that may not ever come into force, or may not come into force for months or years, and keeping the notice on file for the intervening period. Would the wife be able to notify the suspended *talaq* when the event on which it had been contingent occurred, using her marriage contract to prove the fact of the pronouncement? Or would the husband have to issue the notification? If the husband didn't want a divorce and refused to issue the notification -- thus, in effect, revoking the *talaq*, -- would the woman have any recourse at all?

4. The situation is problematic because neither lawyers nor the courts of South Asia are as familiar with the suspended *talaq* as they are with the much more common *talaq-i-tafwid*.

5. Although the distinction between the pronouncement of a suspended *talaq* and the actual *talaq* which eventually comes into force is unlikely to be made in the context of the Pakistan/Bangladesh Ordinance, which renders a *talaq* "in any form whatsoever" revocable.

Ibrahim, is that the terms of the pronouncement by the husband and/or the terms of the applicable legislation require the woman to bring the matter to the court before, and in order that, the husband's *talaq* will come into effect. If the woman refrains from taking any action, she is not divorced. The result is not only that the woman is not automatically divorced by the terms of a suspended *talaq*, but she is not divorced unless she takes the initiative herself. Thus the effect of the suspended *talaq* in South-East Asia, although dramatically different from the suspended *talaq* in South Asia, may closely approximate the effect of *talaq-i-tafwid* in South Asia: in both the initiative lies in the hands of the woman.

Frivolous and Serious (Intended) *Talaqs*

A suspended *talaq* that is used to sanction a stipulation in a marriage contract must be regarded as a serious undertaking in that the husband (and for that matter, the wife) intended that the *talaq* will come into force should the husband default on his undertaking.

In other circumstances, a suspended *talaq* may be used frivolously or as an oath, more or less in the same way as a person in another culture might say, "I'll be damned!" or "If that's true, I'm a dead man!" or "If that happens, I'm Bob's uncle." Of course, irrespective of the outcome of the event referred to in the "if" clause, damnation remains in the hands of the fates, life goes on, and blood lines are not altered.

But if the Muslim husband, equally frivolously, had said, "If that happens, my wives are irrevocably divorced," and the event comes to pass, the consequence invoked literally follows according to classical Hanafi law.

A case which reached the High Court of Peshawar (Pakistan) in 1952 (nearly a decade before the Ordinance of 1961) arose from an altercation between two brothers over a broken jar of honey; in the course of the argument one brother said that if he didn't get some honey from the other, his (i.e., the speaker's) wives would be divorced. He had two wives at the time. Having obtained a *fatwa* (opinion) from the imam of the local mosque affirming the effectiveness of the *talaq*, one of the man's wives left his house, believing herself divorced. She later married someone else, by whom at the time of the litigation she had a child. Her first husband denied the efficacy of the *talaq* and sued for restitution of conjugal rights.⁶

The High Court observed that the husband had not set any time limit within which he had to obtain the honey from his brother,⁷ and at any

6. Facts taken from *Muhammad Irfan v. Mst. Mahando*, PLD 1952 Peshawar 55.

7. I.e., he had not said, "If I don't get some honey from you today,... " or "within a week,..."

time before his death or the death of his brother it remained possible that he might get the honey. And, in any case, it appeared that he had in fact, at some point since the quarrel, obtained a jar of honey from his brother. The *talaq* had not come into force and the woman was still legally the wife of her first husband, whose suit was decreed.

The High Court also strongly condemned the frivolous use of *talaq* in this manner and implied that a *talaq* contained in such an oath could not take effect in the absence of real intention to dissolve the marriage:

The Mullas, the so-called religious heads of the Muslims, have introduced certain absurdities in the religion, which tend to make it ridiculous, and cause others to laugh at it... [I]n the matter of divorce, just as in other matters[,] [Islam] looks more to the intention of the people rather than the form or mere words[.] [I]f by taking an oath a party only wants to impress upon the other that a certain thing must be done . . . , he does not in fact mean to sever his connections permanently with his wives in the event of his failure to do that thing... [The Quran]⁸ makes it abundantly clear that it is the intention of the person which has got to be seen and the oath will not be taken at its face value.⁹

In a more recent case,¹⁰ a clique of electors bound themselves, on pain of the divorce of their respective wives, to vote for a particular candidate for the post of chairman of the local council. They apparently honored their oath; the litigation which ensued did not concern the marital status of the wives of the electors but the sanctity of the secret ballot. The Election Tribunal ordered a new election and the High Court refused to interfere.

In Pakistan and Bangladesh, under the Muslim Family Laws Ordinance, the frivolous, unintended suspended *talaq* would be, at least, revocable like any other *talaq* pronounced by the husband -- assuming that it were recognized as a valid *talaq* (which the 1952 Peshawar case implies it would not be). Nevertheless, more than three decades after that Ordinance came into force, the impact that it had in rendering all *talaqs* pronounced by the husband revocable is relatively unknown and unappreciated, and the frivolous suspended *talaq* can wrack havoc on women's lives. I was very recently told of a sequence of events which happened a few years ago in a well educated, urban family. The newly married uncle of the informant was dissatisfied with his new wife's preparation of a certain dish. The second time she prepared the dish, still not to his satisfaction, the enraged husband invoked a triple *talaq* to

8. See Quran, II:225: -- "Allah will not call you to account for thoughtlessness in your oaths, but for the intention in your hearts, and He is Oft-Forgiving, Most Forbearing." (Yusuf Ali, trans.)

9. PLD 1952 Peshawar 55, p. 58; Muhammad Shafi, J.

10. *Tej Muhammad Khan v. Ghulam Rehmani*, PLD 1986 Peshawar 86.

come into effect if she didn't get it right the next time. The woman was distraught; the families (who prided themselves on the absence of divorce in their lineages) were frantic. The storm eventually blew over, although the wife was for some time too terrified to go into the kitchen. Throughout the crisis, nobody was aware of the fact that even had the pronouncement come into effect on the wife's third failure to cook the dish to her husband's satisfaction, the *talaq* could have been revoked by the husband. The informant was himself quite surprised when I pointed this out to him.

Considering the misuse of the suspended *talaq* and the mischief that it can create for women, the moves of several countries to declare suspended *talaqs* ineffective can readily be appreciated. This legislation, with the exception of that of Jordan and Syria, would also appear to void the suspended *talaq* as a means of enforcing stipulations in marriage contracts.

The situation in South-East Asia is thus again in contrast with developments in these countries.

Distinctive Features of *Talaq-i-Tafwid* in South Asia:

Points for the Non-South Asian Women to Keep in Mind¹

Lucy Carroll

The contributions in this volume are heavily focused on *talaq-i-tafwid* in South Asia, where such delegations are relatively well known (at least among the better educated classes), and such divorces have a long and well-documented history of favorable treatment in the courts.

Therefore, it is worth commenting on some of the distinctive features of the South Asian experience which may not be replicated elsewhere and which thus constitute matters which non-South Asian women may have to investigate and be aware of in attempting to adopt, popularize, and facilitate the use of these procedures in their own countries.

I. In South Asia the process is extra-judicial

Just as the husband's pronouncement of *talaq* results in an extra-judicial divorce, so also does the pronouncement of *talaq* by the woman who has been delegated this power. The matter of a divorce by *talaq-i-tafwid* will only get to court on the initiative of one of the parties involved, usually because the husband disputes the fact of the delegation, or the validity of the delegation, or the fact/validity of the pronouncement by his wife. The man may sue, for example, for restitution of conjugal rights, or for an injunction preventing the woman from remarrying on the ground that she is still his wife. The woman may sue for a declaration of status, affirming that she is *femme sole*, on the ground that the marriage has been validly dissolved by her pronouncement of *talaq*; or she may sue for recovery of her deferred *mahr*, payable because of the divorce.

If the matter does get to court, the woman must be able to prove the fact of the delegation; the occurrence of the relevant circumstance if the

1. Much of the material in this essay has been extracted from chapters on The Muslim Family Laws Ordinance in volume III (divorce) of my forthcoming work on *Muslim Family Law in South Asia*.

delegation were in restricted terms; and the fact of her pronouncement of the *talaq* formula.

Regardless of how the matter gets to court, it is important to note that nothing the court does dissolves the marriage, or even permits or allows the *talaq* to take effect. The relevant facts having been proved, the court merely recognizes that the marriage has already been dissolved by the woman's pronouncement of the *talaq* formula.

The distinction between a divorce which is effected by the decree or act of the court, and the court merely recognizing as legally valid and effective the dissolution alleged by the woman to have already occurred by virtue of her recitation of the *talaq* formula is reflected in the fact that the divorce effected by the act of the woman and recognized by the court in subsequent legal proceedings, takes effect, not from the date of the court decree, but from the date of the act of the woman which resulted in the dissolution of the marriage². Further, the fact that the question concerning the validity of the exercise of *talaq-i-tafwid* by the woman was never taken to court has no effect at all on the validity of the divorce resulting from her action.

Pakistan & Bangladesh: Section 7, MFLO

Although what has been said above applies in full to India, an important caveat must be entered here concerning Pakistani and Bangladeshi women. The Muslim Family Laws Ordinance, 1961, introduced what amounts, in effect, to little more than a (far from perfect) registration procedure for *talaq* divorce³. Section 7 of the

2. This may be very important if in the meanwhile the woman has remarried. The second marriage would not be valid if it took place before the court decree in circumstances where the first marriage was dissolved by that decree; but it is valid if the divorce were by exercise of *talaq-i-tafwid* subsequently challenged by the husband and upheld by the court.

3. The MFLO rendered registration of all Muslim *marriages* compulsory; the Rules framed under the Ordinance deal in considerable detail with the manner in which registration will be effected and provide that registers will be preserved "permanently." Against this background, the total failure of the Ordinance to provide for compulsory and formal registration of *extra-judicial divorces* is particularly striking.

The husband is, of course, required to notify the local official of his pronouncement of *talaq* (see below). But this notification is not equivalent to a divorce, because the *talaq* it announces will not result in a legal dissolution of the marriage until ninety days after the receipt of the notification by the designated public official; even then the *talaq* will only ripen into a divorce if it has not been revoked by the husband during the ninety day interval. There is no provision requiring the husband to notify his revocation of a *talaq* pronouncement. Thus, it is probably immaterial that the Rules make no provision for the preservation either of the *talaq* notifications themselves, or of a register in which receipt of the notifications of *talaq* are duly noted.

(Continued on page 168)

Ordinance, dealing with pronouncement of *talaq* by the husband, reads: --

7. *Talaq*. -- (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman [of the unit of local government] notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.

(3) Save as provided in sub-section (5), a *talaq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time *talaq* is pronounced, *talaq* shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.

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

The main effects of the Ordinance on *talaq* divorces are to render *all talaqs* (regardless of the form of the pronouncement) revocable; to mandate notification of a local government official (and the wife) of the pronouncement; and to impose a mandatory "cooling off" period (during which the *talaq* may be revoked).

Given that section 7(2) provides criminal penalties for failure to comply with the provisions of section 7(1) concerning notification of the local official, it might appear that a *talaq* in violation of section 7(1) would be valid, although the husband in such circumstances would be rendered liable to criminal penalties. The courts, however, have interpreted these provisions otherwise. The criminal sanctions of section 7(2) have been ignored and the legal presumption is that failure to notify the pronouncement of *talaq* means that the husband revoked (all *talaqs*

The Rules do require that the proceedings of any Arbitration Council that might be formed be preserved for a period of five years. However, neither the formation of an Arbitration Council nor the holding of any proceedings by such a Council is essential for the validity of the divorce occasioned by the *talaq*. It may well happen that there was no Arbitration Council and no proceedings, and thus no records to be preserved for even five years. And, of course, the question of whether or not a marriage was dissolved may not arise until many years later, for example in the context of a succession dispute.

now being revocable) the pronouncement even before he got around to posting a notice to the local official. This is an extremely important point and was laid down by the Supreme Court as early as 1963:

If the husband himself thinks better of the pronouncement of *talaq* and abstains from giving notice to the Chairman, he should perhaps be deemed, in view of section 7, to have revoked the pronouncement and that would be to the advantage of the wife.⁴

In the result, it is impossible in law to effect a legally valid divorce by *talaq* in Pakistan or Bangladesh unless the appropriate official is notified; the criminal sanctions of section 7(2) are irrelevant and superfluous, since failure to notify the Chairman does not result in an "illegal" divorce, but in no divorce at all.

The requirement of notification of a *talaq* pronouncement to the local official is effectively sanctioned by section 7(3), which provides that the *talaq* pronouncement "shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman." A *talaq* which is never notified, can never become effective in law as dissolving the marriage.⁵

It is important to stress that nothing the local official or the Arbitration Council does or can do dissolves the marriage. Just as in the classical *ahsan talaq*, the marriage is dissolved by the pronouncement of *talaq* by the husband, although the actual dissolution is deferred for approximately three months (under the Ordinance, ninety days) following the pronouncement (under the Ordinance, following receipt of notification of the pronouncement by the local official). *Talaq* remains a completely unilateral and extra-judicial act of the husband. The only event which can prevent a properly notified *talaq* pronouncement from taking effect, in due course, as a divorce is the husband's exercise of his right of revoking the pronouncement during the time allowed him for reconsideration.

4. *Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf*, PLD 1963 Supreme Court 51, p. 75.

5. Compare with the totally unsanctioned provisions concerning arbitration attempts envisaged by section 7(4). The Ordinance confers virtually no authority on either the local official who functions as its Chairman, or on the Arbitration Council itself. The spouses can neither be compelled to appear nor to nominate their representatives to participate in any reconciliation attempts the local official may attempt to organize. The Ordinance details no consequences which will be visited upon either the local official who fails to carry out the responsibilities imposed upon him by the Ordinance in respect of reconciliation efforts, or the spouses who refuse to cooperate in the endeavors. The courts have held that whether or not reconciliation is even attempted is irrelevant; the divorce will occur automatically on the expiration of the ninety days, unless the husband himself revokes the pronouncement within this period.

Pakistan & Bangladesh: Section 8, MFLO

Section 8 of the MFLO, 1961, deals specifically with divorce by *talaq-i-tafwid*. This section reads: --

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

It is clear, that having pronounced *talaq*, the wife is required to notify the pronouncement to the appropriate public official (and to her husband); and that the pronouncement will not become an actual divorce until ninety days have passed from the date of receipt by the official of such notification.

During the intervening ninety days, the pronouncement is revocable; the question is by whom is it revocable? As previously explained,⁶ the question of whether the husband has foregone his right of revocation depends on the wording of the delegation itself. If the husband has conferred upon the wife not merely the right to pronounce a *talaq* or three *talaqs*, but to dissolve the marriage -- effectively, completely, and extra-judicially -- by means of the *talaq* procedure, he must be held to have renounced any right of revocation of the *talaq* or *talaqs* pronounced by her. (In South Asia, this would be a matter covered by the law of contract, and unaffected by the Muslim Family Laws Ordinance.) In these circumstances, the revocation possible under the Ordinance can only be revocation by the wife of the pronouncement she herself recited.

The immediately important point is that, just as a *talaq* pronounced by the Pakistani or Bangladeshi husband can never take effect as a legal dissolution of the marriage unless properly notified as required by section 7 of the Ordinance, a *talaq* pronounced by the wife under authority delegated to her by her husband will not take effect as a legal dissolution of the marriage unless notified in the same way.

It is also important to note that neither the local official nor any Arbitration Council that may be constituted has jurisdiction to pronounce on the legal validity of the *talaq*, whether pronounced by the husband or (under delegated authority) by the wife. The local official can merely note receipt of the notice of *talaq* on a particular date; the Arbitration Council can merely attempt reconciliation. If either party wants to contest the validity of the *talaq* on any ground, the dispute will have to be taken to court. If the court finds that the authority to pronounce *talaq* had been validly delegated and the *talaq* itself properly pronounced and

6. See above, pp. 40, 43-47.

notified, the divorce will be legally recognized from the date ninety days following the notification required by the Ordinance. The divorce is not decreed by the court, nor is the divorce subject to the approval of the court; the court merely examines whether the *talaq* has been properly pronounced and properly notified; and in the case of *talaq-i-tafwid*, whether the authority had been properly delegated; and, in the case of a restricted delegation, whether the relevant circumstances giving rise to the woman's right have in fact occurred.

Because notification of the pronouncement to the local official as required by the Ordinance does not provide formal registration of the divorce which can be relied upon years later,⁷ and because the woman's act of divorcing herself on behalf of her husband may be questioned after some considerable time (e.g., on the occasion of her remarriage), she should carefully preserve documents, etc. establishing the delegation; the occurrence of the relevant circumstance in the case of a restricted delegation; the actual pronouncement of the *talaq* formula; a copy of the letter to the local official notifying him of the events; the postal receipt proving dispatch of the notification; and any correspondence from the official. If local provision for registration of Muslim divorces exists (e.g., Bangladesh, Bengal, Bihar, Assam, Orissa), she should register the divorce under such statute. Alternatively, she may have recourse to the Registration Act, 1908.

II. In South Asia unsanctioned stipulation is unenforceable

If the husband's promise (e.g., not to marry polygamously) in the marriage contract is not sanctioned by a clause in the same document entitling the wife to exercise *talaq-i-tafwid* in case of its breach, the wife (in the absence of a blanket delegation which she may resort to) is not only unable to dissolve the marriage extra-judicially by *talaq*, but she cannot even claim judicial divorce from the court on the ground of the breached stipulation.⁸ Her position, in law, is identical to that of her sister whose contract contained no such stipulation and who finds herself in the same situation.

If the woman is Pakistani or Bangladeshi and the husband's polygamous marriage took place in violation of the Muslim Family Laws

7. See above fn. 2.

8. The woman might sue for damages for breach of contract if she could prove pecuniary loss. A couple such cases did occur in the nineteenth century and the woman was awarded only very nominal damages. This is not really a viable course, and leaves her still married to the man who betrayed her.

Ordinance,⁹ she is entitled to divorce on that ground, whether or not there were an anti-polygamy stipulation in her marriage contract. If the husband's second marriage took place with the requisite permission as required by the Ordinance, the woman, as also her Indian cousin, can sue for judicial divorce under the Dissolution of Muslim Marriages Act, 1939, on the ground that the husband failed to treat her equitably *vis-a-vis* his new wife -- *if* she can prove such inequitable treatment -- or any other ground available under that statute.

Non-South Asian Women

To various degrees, legislation in several Muslim countries has provided for bureaucratic or judicial involvement in even the husband's exercise of the traditionally extra-judicial *talaq*. While enhancing the wife's access to divorce, modern legislation has tended to maintain close judicial control over the wife's action in terminating the marriage without her husband's consent. At the very least, the wife's resort to *talaq-i-tafwid* will be subject to the same bureaucratic or judicial procedures applicable to the husband's *talaq*.

Also in some countries, breach of an unsanctioned stipulation in a marriage contract in itself provides the wife with grounds for divorce. Proving the fact of the stipulation and the fact of its breach will usually be much easier than proving one of the other grounds (e.g., cruelty, ill-treatment, etc.) on which she is entitled to sue for judicial divorce.

The non-South Asian women needs to inform herself of any legislation in her own country that is relevant to her situation, keeping in mind that statutory lacunae will undoubtedly be filled by reference to the terms of the classical law.¹⁰ Where a particular procedure recognized by the classical law has fallen into disuse or has been corrupted to the disadvantage of women, women have every right to demand its restoration to them. At the same time, the fact that a particular procedure may not be recognized by a particular school of law (or by the dominant opinion within that school of law) does not mean that the door is closed. According to legal theory, each recognized school represents an equally valid interpretation of the law, and recourse may

9. The Ordinance requires that a man already married obtain the prior permission of an Arbitration Council before marrying another wife. The Ordinance also amended the Dissolution of Muslim Marriages Act, 1939, by adding an additional ground on which the wife may sue for judicial divorce: -- "That the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961."

10. Here it is relevant to note that, contrary to the situation in South Asia, the classical texts appear to require recourse to the court on the part of the wife, at least in the circumstances of a restricted delegation, where she is required to prove the event giving rise to her right.

be had to the doctrines of another school if such a course would be more conducive to the achievement of justice. Borrowing of legal doctrine from other schools has been a regular feature of the reform movement and codification activities in the Muslim world. A prominent example from South Asia is the Dissolution of Muslim Marriages Act, 1939, which is largely based on Maliki doctrine, although there are very few, if any, Malikis in South Asia.

III. The South Asian Contract Act

In South Asia, the Contract Act, 1872, continues to have three important effects on stipulations in Muslim marriage contracts.

Pre-nuptial grant of talaq-i-tafwid

As previously noted, under the classical law, a straightforward delegation of the right to pronounce *talaq* to the wife cannot be made before the *nikah*, because before the parties are actually husband and wife, the man has no authority to pronounce *talaq* against the woman and thus no authority that he can delegate to anyone. Classical Hanafi law provides a way around this problem by allowing the man to make the delegation in a particular form of words which renders the delegation conditional upon the subsequent marriage. Alternatively, the form of words actually used in the offer and acceptance of the contract of marriage may effect a delegation, provided that the woman speaks first, proposing marriage on the condition that she will possess delegated authority to dissolve the marriage by *talaq*, either unconditionally or in specified circumstances.

In South Asia, as a result of the Contract Act, the pre-nuptial contract (including the *tafwid* clause) is valid *as a contract* once the marriage (which constitutes the consideration for the husband's promises) has taken place. The Contract Act overrides the rules of Muslim law concerning the precise time at which, or the particular words by which, the delegation must be made.

Terms of delegation

The wording in which the wife is given authority to act in the matter of dissolution of her own marriage may confer upon her a non-revocable delegation (*tafwid*), which allows her to act autonomously and independently (either generally or should specific circumstances arise) in effecting a *talaq*; or it may confer upon her merely a commission of agency or *vakil*-ship, which is revocable at will by the husband at any time before it has been acted upon.

In South Asia, again because of the Contract Act, the distinction between these different kinds of grants is irrelevant. Whatever the effect, in the classical law, of the terms used in making the delegation/grant, the fact remains that in the marriage contract the husband conferred upon the wife authority to dissolve the marriage, and consideration having been received (i.e., the marriage have taken place), the contract is complete and binding; it is not open to one of the contracting parties to revoke unilaterally one of the terms of the contract. That is, the South Asian Contract Act renders the commission of agency or *vakil*-ship irrevocable.

Sunni/Shia differences

Some interpretations of Ithna Ashari doctrine deny to the husband competence to confer upon his wife a delegated right to pronounce *talaq* and recognize only the conferral of a revocable commission of agency or *vakil*-ship. In South Asia this distinction is obliterated because, under the Contract Act, the commission of agency or *vakil*-ship in the matter of *talaq*, when incorporated in the marriage contract, is as irrevocable as the delegation (*tafwid*) of the right to pronounce *talaq*.

Non-South Asian Women

In countries where there is no legislation comparable to the South Asian Contract Act which can be relied upon to validate pre-nuptial delegations of the right to pronounce *talaq*, Sunni women should take care either to have the delegation worded in the conditional form so as to come into effect only after the marriage; or to have the delegation encompassed in the exchange of offer and acceptance at the *nikah* itself (with the woman or her representative speaking first and making the offer of marriage on condition of a delegation); or to have the pre-nuptial document containing a grant of *tafwid* attested and confirmed after the actual *nikah*.

Similarly in countries where there is no legislation comparable to the South Asian Contract Act overriding the terms of Muslim law, Sunni women must pay particular attention to the actual terms of the delegation to ensure that an irrevocable *tafwid* has been conferred, not mere authority to act as agent or *vakil* of the husband, which the husband can revoke at will.

The Ithna Ashari woman must investigate whether, under the local law, or the locally enforced interpretation of Ithna Ashari law, a grant of *tafwid* would be void, and if so, whether there is any way in which the grant of agency or *vakil*-ship might be rendered irrevocable.

Women are likely to find that the major stumbling bloc in their way is ignorance -- not simply the lack of information among their peers, but prejudices and blind ignorance among strategically-placed men, particularly those who claim to speak with religious authority. The prejudices of the Pakistani Maulana on the Marriage and Family Laws Commission outstripped his rational faculties.¹¹ The Moroccan notary at least acknowledged the legitimacy of empowering the wife to act in the matter of the dissolution of her own marriage, but again his prejudices operated to foreclose such an option for any woman except his own daughter!¹²

11. See above, p. 34-35.

12. See above, p. 132.

Marriage Certificate and Delegation form designed for use by Muslims in the United Kingdom

The following marriage certificate and delegation form are issued by Muslim Law (Shariah) Council, U.K.. Copies were provided by Dr. M.A. Zaki Badawi

Certificate of Marriage

It is hereby certified that the Nikah was solemnised according to Shariah (Muslim Law) between

Particulars of the Bridegroom.....	Particular of the Bride
Name	Name
Address	Address
Status.....Date of Birth.....	Status.....Date of Birth.....
Father's Name	Father's Name
Signature of Groom.....	Signature of Bride
with their consent at .....	.....
Wakil (Agent) of	Wakil (Agent) of
Bridegroom (if Any)	Bride (if Any)
Address	Address
Signature of Wakil	Signature of Wakil

Witnessed by

1.) Name	Address
Signature	

2.) Name	Address
Signature	

Amount of Dowry (Mahar)	Amount in Cash
	Amount Deferred

Particulars of Civil Marriage:

Solemnised at	Dated
	Entry No

Name of Minister of Religion (Qadhi) who conducted the ceremony

.....

Signature	Date
-----------------	------------

Form for the Delegation of Power of Divorce

It is hereby confirmed that we:

Name of Bridegroom

Address

.....

Name of Bride

Address

.....

married according to Islamic Law on (date).....

at.....

have mutually agreed that Ms
will be entitled to divorce herself. She will have the right to exercise this
power as and when appropriate and required.

signed Bridegroom

signed Bride

Witness 1 (Name)

Signature

Witness 2 (Name)

Signature

Stop Press

Stop Press

An important decision from Bangladesh on *mataa*¹

(maintenance/provision for divorced Muslim women)

One decade after the Indian Supreme Court, in the famous (or infamous) *Shah Bano* case² upheld the award of maintenance under the provisions of the (secular) Criminal Procedure Code, 1974, to a divorced Muslim woman, against the (totally irrelevant) argument that such post-iddah maintenance was contrary to Muslim law, and the (hopelessly untenable) argument that the uncoded Muslim law took precedence over legislation passed by Parliament;

Nine years after the Government of Rajiv Gandhi (in India) capitulated to the demands of fundamentalist spokesmen and forced through Parliament the Muslim Women (Protection of Rights on Divorce) Act, designed and intended to reverse the Supreme Court judgment in *Shah Bano* and to deny to Muslim divorced women (simply on the basis of their religion) the limited protection against destitute conferred on all women by section 125 of the Criminal Procedure Code in 1974;

the High Court Division of the Bangladesh Supreme Court, of its own volition, took up the question of the interpretation of Quran II:241 and handed down the extremely important decision which is reproduced below.

1. Not to be confused with *Mut'a* or temporary marriage.

2. *Mohammad Ahmed Khan v. Shah Bano Begum*, All India Reporter 1985 Supreme Court 945; see further below.

Shah Bano: Bangladesh Shows the Way

(A.G. Noorani in *The Statesman*; reprinted in *Communalism Combat*, April 1996.)

On January 9, 1995, the High Court Division in Bangladesh ruled that a Muslim husband is bound, after divorcing his wife "to maintain her on a reasonable scale beyond the period of *iddat* for an indefinite period; that is to say, till she loses the status of a divorcee by remarrying another person."

The judgement was delivered by Justices Mohammed Gholam Rabbani and Syed Amirul Islam, both devout Muslims, as is obvious from their respectful treatment of Quranic verses. Incidentally, their judgement was brief, to the point, and was free from the kind of florid prose that marred the judgement of our Supreme Court in the Shah Bano case.

They went straight to the relevant Quranic verses (240-242, second Sura Baqara). They provide *inter alia* that "for divorced women maintenance (should be provided) on a reasonable (scale). This is a duty of the righteous."

But this is not what Digests of "Mohammadan" law prepared during the British Raj said. What we had was not Muslim law (*shariah*) but Anglo-Mohammadan law. The Privy Council made matters worse still. It ruled in 1987 [sic; should read 1897] that "It would be wrong for the court ...to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority."

Both the Supreme Courts of Pakistan and Bangladesh departed from this view. In 1960 the Lahore High Court held that "these commentaries cannot be the last word on the subject" or else "the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time."

The Bangladesh ruling goes so far as to hold that a woman who is divorced "is entitled to house-hold stuff, utensils, goods, chattels, provision." There is no reason why Indian courts should consider themselves bound to follow antiquated commentaries on Muslim law.

They can consider the Quranic provisions in the light of modern translations and modern writings on the Quran. Properly construed, not only the Muslim law of maintenance of divorced women but the entire law on polygamy and divorce will be shown to be devoid of Quranic authority.

47 (1995) Dhaka Law Reports 54
High Court Division
(Civil Revisional Jurisdiction)

Before Justice Mohammad Gholam Rabbani
and Justice Syed Amirul Islam

**Md. Hefzur Rahman (Petitioner) v. Shamsun Nahar Begum and
another (Opposite Party)**

Judgment

Mohammad Gholam Rabbani J: The petitioner and the two opposite parties, Nos. 1 and 2, in this Rule are respectively named Md. Hefzur Rahman, Shamsun Nahar Begum and Shaon Mia, a minor. The petitioner married the first opposite party on 25.3.85. The dower money was fixed at Taka 50,001.00. Second opposite party, a son, was born out of this wed-lock on 15.12.87. Subsequently, the petitioner divorced the first opposite party on 10.8.88.

2. On 2.11.88 first opposite party for herself and on behalf of her minor son, the second opposite party, instituted Family Court Suit No. 60 of 1988 in the Family Court and the Court of Assistant Judge, Daudkandi, claiming the said dower money and maintenance at Taka 1,000.00 per month for each of them.

3. The Family Court decreed the suit directing the petitioner to pay Taka 48,000.00 as the balance dower-money, to pay Taka 3,000.00 to the first opposite party as the maintenance for the iddat-period of three months and to pay Taka 1,000.00 each month for the maintenance of the second opposite party.

4. On appeal preferred by the petitioner being Family Appeal No. 2 of 1991, the learned District Judge, Comilla, reduced the amount of maintenance to Taka 600.00 per month for each of the opposite parties.

5. This Rule under section 115 of the Code of Civil Procedure was issued at the instance of the petitioner as to why the amount of maintenance should not be further reduced.

6. No one appears to support the Rule. Heard Mr. Md. Abdul Jabbar for the opposite parties and perused the records. It appears that none of the Courts below has given its reasoning for the amount fixed by them as the maintenance per month. Neither of the parties adduced any evidence upon which amount monthly maintenance can be determined and fixed. Nevertheless we are not precluded from determining the amount. It is in the record that the petitioner is a typist in the Ministry of Finance. Neither in his deposition nor in his written statement the petitioner, we find, refuted the claim of maintenance at Taka 1,000.00 per month for each of the opposite parties as made in the plaint. We can, under the circumstances, call in aid of our personal knowledge. We, therefore, hold that each of the opposite parties is entitled to get from the petitioner an amount of Taka 1,000.00 per month as maintenance commensurate with the status and means of the petitioner. We further hold that the learned District Judge acted illegally in reducing the amount abruptly without assigning any reason whatsoever.

7. Now we address ourselves to a *suo motu* legal query as to whether the first opposite party could have claimed maintenance beyond the period of iddat. The relevant materials are as hereunder:

Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence; but if they leave (the residence), there is no blame on you for what they do with themselves. Provided it is reasonable. And God is Exalted in Power, Wise.

For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous.

Thus doth God make clear His Signs to you, in order that ye may understand.

Quran, Second Sura Baqara, verses 240-242. (These and the other verses to be quoted subsequently are quoted from *The Holy Quran: Text, Translation & Commentary* by Abdullah Yusuf Ali.)

Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her edit... Maintenance is not due to a woman after her husband's decease.

Hedaya, translated by Charles Hamilton, Book IV, Chapter XV, Section 3, p. 145.

A woman revocably repudiated is entitled to maintenance, clothing, and a place to reside in during her iddat, day by day... It would seem, however, that after the death of her husband she has no right to a residence except in the single case of her being pregnant.

Digest of Mohammudan Law (compiled and translated from authorities in the original Arabic) by Neil B.E. Baillie, Part Second, Book II, Chapter VII, Section Sixth, pp. 169-170.

8. Quran is the text book of Islam. It is the Words of God revealed to the last Prophet Mohammad (peace be on him) in Arabic language from time to time during the period of twenty-three years of his last part of life. The word "Quran" means "This is the Book which is read". It has one hundred and fourteen "Sura", maybe termed as "Chapter", each having a particular name and containing unequal number of "ayat" or verses. To quote Quran:

"This Quran is not such as can be produced other than by God." (Tenth Sura Yunus, verse 37.)

9. In fifty-fourth Sura Qumar God repeats four time, the same verse: "And we have made the Quran easy to understand and remember: then is there any that will receive admonition?"

Quran itself prescribes its rule of study: "He it is who has sent down to the Book: in it are verses basic or fundamental. They are the foundation of the Book: others are allegorical. But those in whose hearts is perversity follow the part thereof that is allegorical, seeking discord searching for its hidden meanings, but no one knows its hidden meanings except God and those who are firmly grounded in knowledge say 'We believe in the Book, the whole of it is from our Lord': and none will grasp the Message except men of understanding." (Third Sura Al Imran, verse 7.)

10. Thus, according to Quran as quoted above, its verses are "easy to understand." That is to say, Quran prescribes rule of literal construction of its verses. This rule is a universal one. The first and elementary rule of construction is that it is to be assumed that the words and phrases have been used in a statute in their ordinary meaning and that every word in a statute is to be given a meaning.

11. Then there is a proviso or exception. Quran says that its verses are of two qualities (a) basic and fundamental and (b) allegorical. Quran allows study of its verses of the quality in (a) in accordance with the aforesaid rule of literal construction. But it disallows application of this rule in respect of its verses of the quality in (b) on the ground, "no one knows its hidden meanings except God" warning that searching for their hidden meanings shall be treated as "seeking discord."

12. This literal study of the Quran is discouraged by a section of Muslims. They insist that the readers should follow any of the interpretations given by the recognised early scholars. They go further by saying that the door of interpreting Quran is now closed.

13. This view was echoed and accepted by the Privy Council in a case reported in ILR 25 Cal. 9 (*Aga Mahomed Jaffer Bindanim vs. Koolsoom Beebee and others*). In this case the Privy Council did not follow the clear text of Quran as quoted above first by us, "Those of you who die and leave widows should bequeath for their widows a year's maintenance

and residence", as against the law in the subject stated in Hedaya and by Baillie and quoted above by us on the reasoning that their Lordships "do not care to speculate on the mode in which the text quoted from the Koran, which is to be found in Sura II, verse 240, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imameea. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority."

14. This dictum of the Privy Council quoted above pronounced about one hundred years ago in 1897 AD cannot be followed on three grounds.

15. Firstly, the learned Judges in the Privy Council were non-Muslims and they were anxious to decide such issues in accordance with the laws as propounded by the Muslim jurists rather than independently, disregarding the Muslim jurists.

16. Secondly, Article 8(1A) of the Constitution of Bangladesh, contained in Part II under the heading "Fundamental Principles of State Policy", states that absolute trust and faith in the Almighty Allah shall be basis of all actions. It indicates that Quranic injunctions shall have to be followed strictly and without any deviation.

17. Thirdly, Quran urges: "Those to whom we have sent the Book study [it] as it should be studied; they are the ones that believe therein." (Second Sura Baqara, verse 121.) This verse directs continuous study of the Quran which is in conformity with the dynamic, progressive and universal character of Islam.

18. We now like to quote an observation from a decision of the Lahore High Court reported in PLD 1960 Lahore 1142 (*Mst. Rashida Begum v. Shahan Din & others*) in support of our above views as hereunder:

Thus it is quite clear that reading and under-standing the Quran is not the privilege or the right of one individual or two. It is revealed in easy and understandable language so that all Muslims if they try may be able to understand and act upon it. It is thus a privilege granted to every Muslim which cannot be taken away from him by anybody, however highly placed or learned he may be, to read and interpret the Quran. In understanding the Quran one can derive valuable assistance from the commentaries written by different learned people of yore, but then that is all. Those commentaries cannot be said to be the last word on the subject. Reading and understanding the Quran implies the interpretation of it and the interpretation in its turn includes the application of it which must be in the light of the existing circumstance and the changing needs of the world...

If the interpretation of the Holy Quran by the commentators who lived thirteen or twelve hundred years ago is considered as the last word on the

subject, then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time. It will then cease to be a universal religion and will remain a religion confined to the time and place when and where it was revealed...

19. We, thus, come to the conclusion that a civil Court has the jurisdiction to follow the law as in the Quran disregarding any other law on the subject, if contrary thereto, even though laid down by the earlier jurists or commentators, maybe of great antiquity and high authority, and though followed for a considerable period. Under the Hindu Law clear proof of usage can outweigh the written text of law. But it is not in the case of Islamic law. For it is an article of faith of a Muslim that he should follow without questioning what has been revealed in Quran and disobedience thereof is a sin.

20. Now let us consider the literal meaning of the first part of verse no. 241 of Sura Baqara as quoted above. The Arabic text may be written in English letters hereunder:

Wa lil-mootalla kate mataaon bil-maarof.

21. The dictionary meaning of these words are as follows:

"mootallakat" -- a woman who is divorced.

"mataaon" -- house-hold stuff, utensils, goods, chattels, provision, convenience.

"maarof" -- known, recognised, honourable, good, befitting, a kindness.

(See respectively page 91, 136 and 96 of *The Dictionary and Glossary of the Koran* by John Penrice.)

22. So we find that a woman who is divorced is entitled to house-hold stuff, utensils, goods, chattels, provision, convenience which is known, recognised, honourable, good, befitting, a kindness. Abdullah Yusuf Ali is, therefore, correct in translating the expression "mataaon bill maarof" as "maintenance should be provided on a reasonable scale." One of the meanings of the word "maarof" is "recognised". But for this one should not be confused. This meaning is to be considered with regard to the amount of maintenance and not with regard to the period of maintenance. This is apparent in view of the fact that Quran directs a woman who is divorced to undergo a period of iddat elsewhere (Second Sura Baqara, verse 228) and herein Quran directs a man to give maintenance in case he divorces his wife. These two legal provisions are, therefore, independent of each other and are addressed to two persons of different status.

23. Considering all the aspects we finally hold that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period, that is to say, till she loses the status of a divorcee by remarrying another person.

24. In the result this Rule is disposed of without cost on the terms that the judgment and decree dated 20.4.92 passed by the learned District Judge, Comilla, in Family Appeal No. 2 of 1991 are set aside and those dated 30.10.90 passed by the learned Judge of the Family Court and the learned Assistant Judge, Daudkandi, in Family Court Suit No. 60 of 1988 are restored with the modification that the plaintiff-opposite party No. 1 Shamsun Nahar Begum and the plaintiff-opposite party No. 2 Shaon Mia shall get maintenance at Taka 1,000.00 each per month from the defendant-petitioner Md. Hefzur Rahman till respectively she remarries and he attains majority.

Divorced Muslim Women in India:

Shah Bano, the Muslim Women Act, and the Significance of the Bangladesh Decision¹

Lucy Carroll

For divorced women maintenance [or provision] (should be provided) on a reasonable (scale). This is a duty on the righteous.²

There can be no dispute concerning the fact that the Muslim husband is legally liable for the maintenance of his wife; indeed, it is the economic responsibility imposed upon the husband which is urged to justify his dominance in the matrimonial relationship.³ Yet for Hanafi women, the right to maintenance is particularly difficult to enforce. This for two reasons: (1) The Hanafi jurists regard arrears of maintenance as forfeit in the absence of a court order directing the husband to pay a specified regular sum as maintenance for his wife, or an agreement between the parties concerning the wife's maintenance.⁴ (2) In common with the other schools of Muslim law, the Hanafis do not recognize any concept of alimony, payable for an indefinite period to the divorced wife.

Thus when a Hanafi wife takes proceedings against her husband for maintenance, the odds are very high that he will respond to her summons by cutting his losses and promptly divorcing her (exactly as Shah Bano's husband did). The woman will only be able to recover maintenance for the period from the date of the institution of her suit (because Hanafi law does not countenance recovery of arrears of

1. Much of the material in this essay has been extracted from chapters on "Reform in India: Maintenance for Divorced Women, 1974," and "Reaction in India: The Muslim Women (Protection of Rights on Divorce) Act, 1986," in volume III (divorce) of my forthcoming work on *Muslim Family Law in South Asia*.

2. Quran, II:241 (Yusuf Ali, trans.).

3. See Quran, IV:34: -- "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and *because they support them from their means*. Therefore, the righteous women are devoutly obedient... ." (Yusuf Ali, trans.; emphasis added.)

4. The problem of arrears of the wife's maintenance is a peculiarity of Hanafi law; the other Sunni schools and Shia law regard arrears as recoverable from the date the failure to maintain commenced.

maintenance) until the conclusion of her *iddah* (because dissolution of the marriage brings to an end the husband's liability for maintenance beyond the *iddah*), i.e., a matter of only a few months.

While a Muslim wife or a Muslim child may sue for maintenance in a civil suit (in which the uncodified Muslim law would be applied), the expense and delays of such a course rendered that option meaningless to women and children in urgent and immediate need. The most important provisions concerning maintenance for well over a century have been those found in the Code of Criminal Procedure, 1898, and its predecessors. These provisions authorize the magistrate, in summary proceedings, to order a husband to maintain *his wife during the subsistence of the marriage*, and a father to maintain his minor (legitimate and illegitimate) children. The object is simply to prevent vagrancy and destitution, to prevent women being forced into prostitution and children into crime or begging in order to survive. The wife (or child) applying for maintenance under the Code must be unable to maintain herself (itself) and the amount the magistrate can award as maintenance is limited by statute. The Criminal Procedure Code is a secular statute applying to Indians of all religions or denominations; its provisions concerning maintenance do not necessarily coincide with the rights available to the parties under their personal law, rights which they could pursue in a civil court.⁵

The maintenance provisions of the Criminal Procedure Codes, including the Code of 1898, did not permit recovery of arrears of maintenance for any period prior to the date of the woman's institution of her petition, and only authorized maintenance orders in favor of *married* women and children. The divorce ploy, therefore, exonerated the Muslim husband whether his wife pursued her claim for maintenance in the civil court or in the magistrate's court.⁶

5. E.g., a Muslim wife does not have to be impoverished and unable to maintain herself in order to sue her husband for maintenance in the civil court; she must be unable to maintain herself in order to pursue the remedy under the Criminal Procedure Code. An illegitimate child cannot claim maintenance from his Muslim father in a civil suit (since Muslim law does not recognize the putative father's obligations toward his offspring), but may obtain a maintenance order from the magistrate under the Criminal Procedure Code.

Ironically, the law applicable to Christians in British India was the English common law, which imposes upon a father only a moral, not a legal, obligation to maintain his children. Thus a Christian child could not obtain maintenance from his father in a civil suit; the magistrate could, however, issue a maintenance order against the father. See Lucy Carroll, "'Justice, Equity and Good Conscience' and Maintenance for Children of Christian Parents," *All Pakistan Legal Decisions (Journal)*, 45(1993):13-15.

6. Even if the husband did not *talaq* his wife immediately and suffered a maintenance decree or order to be issued against him, he retained the right to divorce her at any time and bring the maintenance payments to an end. A maintenance decree or order in favor of a Muslim wife did not survive the dissolution of the marriage.

When in the early 1970s India undertook the task of replacing the old Criminal Procedure Code, 1898, with a new and up-dated statute of the same name, women's organizations in general and Muslim women in particular organized petitions to bring to the attention of Parliament the necessity of altering the terms of the old section 488 of Chapter XXXVI⁷ in order to offer protection and succour to divorced women. They succeeded in convincing the Joint Parliamentary Committee which was considering the Bill, and an amendment was introduced by the Committee in section 125 of the Bill (the section equivalent to section 488 of the 1898 Code) which added a new definitional clause defining the word "wife" as used in the chapter concerning maintenance. "'Wife,'" declared the Bill as thus amended, "includes a woman who has been divorced by or has obtained a divorce from, her husband, and has not remarried." Under this provision, the magistrate would be authorized to order an ex-husband to pay maintenance (not exceeding Rs. 500 a month) to his impoverished ex-wife who was unable to maintain herself; the extra-judicial, unilateral *talaq* would no longer suffice to exonerate a Muslim husband from his responsibilities.⁸

The proposed change in section 125 of the new Code, although opposed by Muslim members, was accepted by both Houses of Parliament. The Muslim spokesmen took their objections to the Prime Minister. Curiously, and in a procedure totally unprecedented, the Code of Criminal Procedure was, in December 1973, brought again before the Parliament which had already passed it, in order that the government might propose an amendment of section 127, which deals with alterations in a maintenance order. The relevant portion of the new clause proposed to be added to this section read:

127...

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that: --

7. S. 488(1) and (2) from the Code of 1898 read as follows: -- "(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself,... a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding... rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs. (2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance."

8. Although after the Hindu Marriage Act of 1955, the Hindu woman divorced in judicial proceedings could be awarded maintenance (alimony) by the matrimonial court, the magistrate's jurisdiction under the new section 125 of the Criminal Procedure Code would assist the Hindu woman whose husband did not comply with the civil court's decree and defaulted on his alimony payments. It also could assist Hindu women of those castes which prior to 1955 had customs of extra-judicial divorce, which customs were explicitly recognized by the Hindu Marriage Act.

...(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said [maintenance] order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, --

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband of the woman;

(c) the woman has obtained a divorce from her husband and that she voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

There can be little doubt that clause 127(3(b) was designed to exclude Muslim divorcees who had been paid their *mahr* or dower ("the sum which under any customary or personal law applicable to the parties, was payable on divorce") from the minimal protection afforded to divorced woman of all other communities. There was obviously a reluctance to make the clause more specific and to identify Muslim women by reference to their religion, since such express wording would render the clause liable to impeachment on constitutional grounds, as violative of Article 14⁹ and/or Article 15(1)¹⁰ of the Indian Constitution.

The Indira government's amendment of section 127 was rubber stamped by the Parliament it controlled.

The immediate factor influencing the government's dramatic about face and its capitulation to the objections of Muslim communalists was clearly the forthcoming election in the Prime Minister's home state of Uttar Pradesh, where the Muslim community represents an important factor in any political calculations and where Congress was wont to regard the Muslim electorate as a "vote bank" whose loyalty it commanded. It is indicative of the political powerlessness of women that even such minimal protection as was sought to be provided by the new section 125 of the Criminal Procedure Code, 1974, should be bargained away by male politicians (whose actions were overseen and endorsed by a female Prime Minister).¹¹

9. Article 14: -- "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

10. Article 15: -- "(1) The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them... (3) Nothing in this Article shall prevent the State from making any special provision for women and children."

11. The unseemly bargaining was also indicative of the tenuous commitment of politicians of the ruling party to the ideals of the secular state, ideals enshrined in the Indian Constitution and essential for the peace, security, and stability of the Indian union. The intensified Hindu communalism of the 1980s and 1990s was nurtured on the communal politics of the Congress party.

The Code of Criminal Procedure, 1974, and the Courts

Although it might have appeared -- as it clearly did both to the Muslim parliamentarians who supported the amendment of section 127 and to those leftist parliamentarians who opposed the amendment -- that the effect of the revised section 127(3) would be to exempt Muslims from the provisions of section 125 as they applied to divorced women once payment of the *mahr* outstanding on termination of the marriage and maintenance for the period of *iddah* were proved, the matter did not end here. It is the duty of the Courts to interpret the meaning and scope of legislation and the lurking ambiguity in the terms of the statute virtually guaranteed that the question would arise in litigation.

The controversies arose when a husband, who had paid his divorced wife's *mahr* and *iddah* maintenance, claimed exception from a magistrate's maintenance order on the basis of section 127(3)(b). The central question was thus whether *mahr* constituted a sum "under any customary or personal law applicable to the parties payable on divorce," remittance of which (regardless of how minuscule the amount) would absolve a Muslim husband from his liabilities, and negate the rights of a Muslim divorcee under section 125. Not surprisingly, the various High Courts arrived at different and incompatible conclusions when faced with the necessity of construing the provisions of the new Code in regard to maintenance applications by divorced Muslim women.

The question inevitably reached the Supreme Court in 1979: *Bai Tahira v. Ali Hussain Fissalli Chothia*.¹² Giving judgment on behalf of the three-member Bench, Justice Krishna Iyer emphatically, and in a highly quotable judgment written in his distinctive style, found in favor of the divorced woman. A second case reached the Supreme Court a year later: *Fuzlunbi v. Khader Vali*.¹³ The High Court (against whose decision the woman appealed) had sought to distinguish the case before it from the binding judgment of the Supreme Court in *Bai Tahira*, *inter alia*, on the ground that the husband in the 1979 case "did not raise any plea based on Sec. 127(3)(b)." Whether or not this plea had been explicitly raised in 1979, the question certainly had been emphatically answered by the Supreme Court -- a fact which the Supreme Court was not reticent in pointing out in the course of overruling the decision of the High Court and finding again in favor of the divorced woman. Again the decision of the three member Bench was written by Justice Krishna Iyer.

12. All India Reporter (hereinafter "AIR") 1979 Supreme Court 362; Krishna Iyer, Tulzapurkar, & Pathak, JJ.

13. AIR 1980 Supreme Court 1730; Krishna Iyer, Chinnappa Reddy, & A.P. Sen, JJ.

Shah Bano¹⁴ and the Supreme Court

Shah Bano, the third case involving the rights under section 125 of the 1974 Code of a Muslim woman divorced by *talaq* to reach the Supreme Court, gave rise to controversy that was to shake the nation. The case initially came before a two-member Bench of the Supreme Court, which was bound to follow the previous decisions in the 1979 and 1980 cases, each of which had been decided by a Bench of three judges. Alternatively, if the smaller Bench did not prefer to follow the existing precedent and believed that the question involved required reconsideration, the judges could request the Chief Justice to constitute a larger Bench to hear the case.¹⁵ This was the course the initial Bench chose to follow.

This unfortunate referring opinion, delivered in 1981 (four years before the case was heard and decided by the larger Bench -- a Bench of five members, chaired by the Chief Justice himself) intimated to Muslim religious and communal spokesmen that the earlier decisions might be overturned, and they hastened to involve themselves in order to share the glory as defenders of Islam. Several Muslim communal organizations (including the Muslim Personal Law Board) applied for and were granted permission to address the Bench which would hear the *Shah Bano* case and busily prepared their arguments. When the decision went against them, they refused to accept the authority of the Supreme Court to supersede their (self-assumed) position as the sole authoritative interpreters of Muslim law, and the Supreme Court's rejection of their (untenable) argument that Muslim law superseded the secular law of the Indian State. Without the advance notice, and the aroused hopes and expectations, provided by the unfortunate opinion of the two-Member Bench referring the case to the Chief Justice with the request that he assign it for hearing before a larger Bench, the *Shah Bano* decision would have undoubtedly passed as peacefully as had its predecessors.

Civil Suits for Maintenance: The Family Courts

Prior to the establishment of the Family Courts, the major disadvantage of civil proceedings for maintenance was that a suit for maintenance is unlikely to be filed unless the wife has been deserted and is in serious need. Civil litigation may be very protracted; if the situation is immediate and urgent, the delays involved in obtaining relief through the civil courts may render this course totally impractical. The paucity of reported decisions in which a wife claimed maintenance in a civil suit as

14. *Mohammad Ahmed Khan v. Shah Bano Begum*, AIR, 1985 Supreme Court 945; Chandrachud, C.J.; Desai, Chinnappa Reddy, Venkataramiah, & Ranganath Misra, JJ.

15. I.e., a Bench of more than three members, which would have authority to overrule the 1979 and 1980 judgments.

opposed to the plethora of decisions concerning applications for maintenance orders filed in the magistrate's court underlines the point in a very striking manner.

For more than a century, in everyday practical terms, the most important law concerning maintenance was that found in the provisions of the Criminal Procedure Code entitling destitute and deserted wives and children to obtain maintenance orders in summary proceedings before magistrates. The statute itself precludes the award of arrears accumulated prior to the institution of the proceedings and the 1898 Code (repealed and replaced in India, but still applicable in Bangladesh) only encompasses the lawfully married wife, not a divorcee.

As long as practical considerations dictated that maintenance claims would be pursued in the magistrate's court, and as long as the applicable statute explicitly ruled out both arrears of maintenance and post-*iddah* maintenance, there was no scope for either question to be agitated.

One of the effects of the (Pakistan/Bangladesh) Muslim Family Laws Ordinance, 1961, was to provide a new, convenient, and expeditious forum (the *ad hoc* Arbitration Council) before which the question of arrears of maintenance could be agitated. The result was that -- the question having been raised before a forum competent to answer it and that answer having been endorsed first by the Lahore High Court and eventually by the Supreme Court of Pakistan -- the Hanafi wife in Pakistan is legally entitled to obtain (in civil proceedings before a civil court or in proceedings under the Muslim Family Laws Ordinance before an Arbitration Council) arrears of maintenance from the husband who has failed or refused to maintain her. This extremely welcome conclusion was founded upon a reconsideration of the classical Hanafi position.

However, since the Muslim Family Laws Ordinance (like the Criminal Procedure Code, 1898) only deals with married women, it did not provide a forum before which the question of post-*iddah* maintenance could be agitated. Theoretically, the Family Courts, established in Pakistan in 1965 and in India and Bangladesh two decades later, did provide such a forum. The advantage does not appear to have been pressed by women (or more accurately, perhaps, by the lawyers advising them).

Nevertheless, in 1995 a Divisional Bench of the Bangladesh High Court took up the question *suo motu* in the course of dealing with a civil revision from a Family Court and laid down as law binding on all subordinate courts (including, of course, the Family Courts) that under Muslim law the husband is obliged to maintain his divorced wife until she dies or remarries.¹⁵ It reached this conclusion on the basis of Quran II:241 and the reference there to the "*mataa*" due a divorced woman.

***Mataa*: the classical interpretation**

The word "*mataa*"¹⁷ which appears in the Quran II:241, is translated "maintenance" by Yusuf Ali.¹⁸ The usual word for maintenance is "*nafaqa*." Several other translations of this verse were cited to the Supreme Court in *Shah Bano* and quoted in that judgment. E.g.:

For divorced women also there shall be *provision* according to what is fair. This is an obligation binding on the righteous. [Muhammad Zafrullah Khan, trans.; emphasis added.]

And for the divorced woman (also) a *provision* (should be made) with fairness (in addition to her dower); (this is) a duty (incumbent) on the reverent. [Dr. Allamah Khadim Rahmani Nuri, trans.; emphasis added.]

For divorced women a *provision* in kindness: A duty for those who ward off (evil). [Marmaduke Pickthall, trans.; emphasis added.]

The Hanafis interpret "*mataa*" very narrowly. The same word appears in verse 236 of chapter II of the Quran, which (together with verse 237) deals with divorce before consummation of the marriage:

There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means -- *a gift of reasonable amount* is due from those who wish to do the right thing.

And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it or (the man's half) is remitted... and the remission (of the man's half) is the nearest to righteousness...¹⁹

Reading the injunction contained in II:241 against the background of these verses, the Hanafi jurists concluded that the *mataa* (provision; gift) is only obligatory when the woman has been divorced before consummation in circumstances where no *mahr* has been set (i.e., in circumstances where, had the marriage been consummated, she would have been entitled to the proper *mahr* or the *mahr* of her equals). It is, however, "laudable" to give the divorced woman a "present" in other cases as well.²⁰ I.e., it is not contrary to, or prohibited by, Muslim law, even as narrowly interpreted by the Hanafi jurists, that the husband

16. *Mohammad Hefzur Rahman v. Shamsun Nahar Begum*, 47 (1995) Dhaka Law Reports 54; Mohammad Gholam Rabbani & Syed Amirul Islam, JJ. The decision is reproduced above, pp. 184-189

17. Not to be confused with the very similar word referring to the temporary marriage recognized by Ithna Ashari law.

18. Yusuf Ali's translation of this verse is given at the commencement of this essay.

19. Quran, II:236-237 (Yusuf Ali, trans); emphasis added.

20. Burhanuddin al-Marginani, *Hedaya* (trans. by Charles Hamilton, 1790; Grady edn. 1870), pp. 46-47.

should make some "consolatory offering" to his divorced wife. The mandatory *mataa* or gift due to the woman divorced both before consummation and before an amount of *mahr* had been settled, is defined by the classical Hanafi jurists in terms of three items of clothing, the fabric of which depends on the economic position of the husband.²¹

The other Sunni schools and the Shias regard *mataa* as something (in addition to her *mahr*) that the husband is obliged to provide to his wife in every case of divorce by *talaq*.²² The fourteenth century Shafi jurist, Ibn Katheer (as translated and quoted by Daniel Latifi),²³ said of *mataa* in his commentary on the Quran:

Said Abdur Rahman bin Zaid bin Aslam: -- "When God revealed the Ayat 'reasonable provision is due from the kindly [II:236],' someone said, 'If I wish to be kind I may pay and otherwise not.' Then God revealed this Ayat: -- 'And for divorcees reasonable provision is due from the righteous [II: 241].'"

And because of this Ayat a group of scholars hold *mataa* obligatory in all cases whether of divorce by delegation [*talaq-i-tafwid*] or of *mahr* paid or of those divorced before consummation or those [divorced] after consummation. So held Imam Al Shafi. God bless him and his.²⁴

In Malaysia, where Shafi law is followed, the divorced wife is entitled to *mataa* in addition to *iddah* maintenance and her *mahr*. The amounts awarded under this head are not large, but the Malaysian wife is also entitled to a division of matrimonial property on divorce. The latter derives from Malaysian customary law and has been incorporated into Malaysian Muslim law.²⁵

In Egypt, where generally Hanafi law is followed, the codified law dealing with marriage and divorce was amended in 1979 to provide that the wife divorced without fault and without her consent would be entitled to obtain (in addition to her *mahr* and *iddah* maintenance) *mataa*, defined as an amount equivalent to not less than two years' expenses and subject to no maximum limit. The amount of *mataa* shall be determined with reference to the means of the husband, the circumstances of the divorce, and the duration of the marriage. If

21. N.B.E. Baillie, *A Digest of Moohummudan Law* (2nd edn., London, 1875) vol. I, pp. 97-98.

22. Alexander Russell & Abdullah Suhrawardy, *A Manual of the Law of Marriage* [trans. of *Mukhtasar* of Sidi Khalil; n.d.], p. 215. F.H. Ruxton, *Maliki Law, Being a Summary from the French Translation of the Mukhtasar of Sidi Khalil*, 1916 (reprinted, Hyperion Press, Inc., Westport, Connecticut, 1980), p. 133. Nawawi, *Minhaj-et-Talibin* (trans. by E.C. Howard from the French edn. of L.W.C. Van Den Berg; reprinted Lahore, 1977), p. 313.

23. The Senior Advocate who appeared on behalf of the woman in the *Shah Bano* case.

24. The Arabic and Daniel Latifi's translation are set out below, p. 204.

25. See Ahmed Ibrahim, "Ancillary Orders on Divorce in the Shariah Courts of Malaysia," *Islamic & Comparative Law Quarterly*, 7(1987): 185-216.

necessary or convenient, the *mataa* may be paid by installments. The Explanatory Note to the amendment observes that in the classical law payment of *mataa* was not obligatory (except in the case of a woman divorced before both settlement of the amount of *mahr* and consummation). It then explains:

In these days when the morality of persons have declined... the divorced wife might find herself in need of assistance beyond what she can get from the maintenance for the period of *iddah* to enable her to overcome the effect of divorce. The payment of *mata'ah* can help in this respect and... the necessity for such payment can act as a deterrent to hasty divorce.²⁶

During the course of the *Shah Bano* furor, a Pakistani *alim* who authors a regular column in the *Pakistan Times*, took occasion to address the topic of *mataa* and Sura II, verse 241, remarking that in the early days of Islam --

Muslims... always paid a handsome amount to their divorced wives so that someone may contract marriage with them for the sake of this money. Servants were provided to those divorced women who had passed the limit of marriageable age. The expenses of this servant were always borne by the divorcing husband. If the husband is expected to pay the expenses of a servant [for his ex-wife], he can do so in respect of maintenance allowance for her.²⁷

Mataa and Shah Bano

The Bangladesh decision, with its unambiguous endorsement of *mataa*, brings us full circle, back to the (Indian) *Shah Bano* decision and the (Indian) Muslim Women (Protection of Rights on Divorce) Act.

The *Shah Bano* litigation concerned only the interpretation of section 127(3)(b) of the *Indian Criminal Procedure Code*, 1974. The Indian Supreme Court on two previous occasions had interpreted that section and held that the remittance of customary or personal law sums "payable on divorce" did not automatically indemnify the husband against a maintenance order under section 125 unless the sum so paid constituted an adequate substitute for the maintenance allowance otherwise

26. Quoted in Ahmad Ibrahim, "Provision for Divorced Women Under Islamic Law," PLD 1986 Journal 234-239, p. 238. Ahmad Ibrahim is actually quoting the Explanatory Note issued with the Egyptian statute of 1985, but this was virtually (if not completely) identical to the Note issued in 1979. (In 1985 the Act of 1979 was declared unconstitutional due to procedural irregularities in the manner in which it had been brought upon the statute book. The Act was immediately re-enacted with a couple minor changes and the 1985 Act was declared of retrospective effect from the date of the striking down of the 1979 statute.)

27. Rafiullah Shahab, article from *Pakistan Times*, reprinted in *Times of India*, 3 March 1986.

available under section 125. The *Shah Bano* case merely provided an opportunity for this position to be summarily confirmed.

The husband in *Shah Bano* claimed to be exempt from the operation of section 125 on the ground that Muslim law excused him from any responsibility toward his divorced wife beyond payment of any *mahr* due her and an amount to cover maintenance during the period of *iddah*, and argued that section 127(3)(b) conferred statutory recognition on this rule of Muslim law. In retrospect, it is easy to remark that the Indian Supreme Court should not have permitted itself to be drawn into an argument concerning Muslim law, which was irrelevant in the circumstances; all the Supreme Court needed to do was to endorse the interpretation of section 127(3)(b) which had already been twice declared by that same court.

The argument based on Muslim law, so vehemently urged by the appellant husband, supported by the Muslim Personal Law Board, the Jamaat-i-Islami, and the Jamat-Ulema-Hind (which had been granted permission to appear before the Supreme Court as interveners), was countered by counsel appointed to represent Shah Bano, Daniel Latifi. This rejoinder raised the matter of *mataa* (provision) and the wording of the Quran, II:241: "For divorced women maintenance [or provision] (should be provided) on a reasonable (scale). This is a duty on the righteous."

The Supreme Court concluded that "These Aiyats [verses of the Quran] leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran." Having already held that section 127(3)(b) did not indemnify the Muslim husband against a maintenance order under section 125 if his ex-wife were in need and unable to maintain herself, and that the provisions of the Criminal Procedure Code would take precedence over the rules of Muslim law if the two were in conflict, the conclusion that Muslim law obliged the husband to maintain his ex-wife merely meant that there was no conflict between the terms of the Code and the rules of Muslim law.

The Muslim Women (Protection of Rights on Divorce) Act, 1986

The self-appointed spokesmen of Muslim opinion were not pleased and, having girded their loins to fight the battle in the court house, they immediately took the agitation to the streets. The Congress government of Rajiv Gandhi wavered and manoeuvred and eventually capitulated; the Muslim Women (Protection of Rights on Divorce) Act was forced through Parliament with a three line whip and the obvious intention of

overruling the *Shah Bano* decision and preserving Muslim votes for Congress.

But the Act itself is very curiously and ambiguously drafted. The important section is section 3, which declares that the divorced woman is entitled to obtain from her former husband "maintenance," "provision," and *mahr*, and to recover from his possession her wedding presents and dowry (*jahez*); and authorizes the magistrate to order payment and/or restoration of these sums or properties. The crucial provision is found in section 3(1)(a), which states that the divorced woman "shall be entitled to"

(a) a reasonable and fair provision *and* maintenance to be made and paid to her within the *iddat* period by her former husband. [Emphasis added.]

The wording appears to imply that the husband has two separate and distinct obligations: (i) to make a "reasonable and fair provision" for his divorced wife; and (ii) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance," but on the time by which an arrangement for payment of "provision" and "maintenance" should be concluded, i.e., "within the *iddat* period."

On this reading, the Act only excuses from liability for post-*iddah* maintenance a man who has already discharged his obligations of "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's *mahr* and restored her dowry, etc. as per sections 3(1)(c) and 3(1)(d). The whole point of *Shah Bano* was precisely that the husband had not made "a reasonable and fair provision" for his divorced wife, even if he had paid the amount agreed as *mahr* half a century earlier and provided *iddah* maintenance; he was therefore ordered to pay a specified sum monthly to her under section 125 of the Criminal Procedure Code.

Rather than reversing the Shah Bano decision, it could be argued that the Muslim Women (Protection of Rights on Divorce) Act codified it!

That the phrase appearing in section 3(1)(a) of the Muslim Women Act -- "a reasonable and fair *provision* and *maintenance*" -- encompasses two different things is indicated, firstly, by the use of two different verbs -- "to be *made* and *paid* to her within the *iddat* period." Clearly, "a fair and reasonable provision" is to be "made," while "maintenance" is to be "paid." Secondly, section 4 of the Act, which empowers the magistrate to issue an "order for payment of maintenance" to the divorced woman against various of her relatives contains no reference to "provision." Obviously, the right to have "a fair and reasonable provision" made in her favor is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as "maintenance."

Thirdly, the interveners on behalf of the husband in *Shah Bano* could not refute the words of the Quran, II:241; all they could do was to contend that Yusuf Ali's translation of *mataa* as "maintenance" was incorrect and to point out that other translations employed the word "provision." This the Supreme Court termed "a distinction without a difference" -- as indeed it was on the facts of the case before it: whether *mataa* was rendered "maintenance" or "provision," there was no pretence that the husband in *Shah Bano* had provided anything at all by way of *mataa* to his divorced wife. In the Lok Sabha debates after the judgment, Ibrahim Sulaiman Sait (speaking in support of overruling the *Shah Bano* decision by statute), while apparently conceding that a divorced Muslim woman was entitled to *mataa*, argued that *mataa* "is a single or one time transaction. It does not mean payment of maintenance continuously at all."²⁸ This concession supports the argument that the word "provision" in section 3(1)(a) of the Muslim Women Act incorporates *mataa* as a right of the divorced Muslim woman distinct from and in addition to *mahr* and maintenance for the period of *iddah*.

Thus, even assuming (without conceding) that the "maintenance" referred to in section 3(1)(a) is confined to maintenance for the period of *iddah*, there still remains the question of "provision." This "provision" (*mataa*) is neither defined by the Act nor subjected to a statutory maximum. The determination of what constitutes, on the facts of any given case, "a reasonable and fair provision" rests completely in the discretion of the magistrate. Section 3(3) of the Act instructs the magistrate to determine what would constitute "reasonable and fair provision and maintenance" with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage.

There is no reason why "reasonable and fair provision" could not take the form of the regular payment of alimony to the divorced woman. *Again, rather than reversing the Shah Bano decision, it could be argued that the Muslim Women (Protection of Rights on Divorce) Act codified it!*

However ironic it may appear, there is an interpretation of the Muslim Women Act which -- to the dismay of its backers and the surprise of many of its opponents -- may actually do what the title suggests it was intended to do: protect the interests of the divorced Muslim woman. Of necessity (and in the hope of avoiding obvious constitutional hurdles) the Muslim Women Act was dressed up to look like a piece of "reformist" legislation, codifying part of Muslim law in the interest of a class of

28. Lok Sabha Debates, 23 August 1985, col. 406. Of course, a woman would ordinarily prefer a lump sum settlement; allowing payment to be made in installments is an indulgence granted to the husband, not a favor to the wife. Few husbands possess sufficient financial liquidity to be able to make "fair and reasonable provision" for an ex-wife in the form of a lump sum divorce settlement.

disadvantaged Muslim women, whose rights required definition and protection. The disguise, in the result, might prove too convincing.

Perhaps the Supreme Court of India will be fortified by the Dhaka decision when it faces -- as it eventually must; the conflicting judgments emanating from the various High Courts require resolution and fundamental constitutional questions must be answered -- the task of interpreting the Muslim Women Act. Perhaps so fortified, the Indian Supreme Court will see its way clear to preserve that part of the Muslim Women Act which, by means of an enlightened approach, can be construed so as to confer a real boon on Muslim women.

Imam Shafei on Al Quran II:241

**Commentary on the Holy Quran by Ibn
Katheer (d. 1373 A.C. Damascus),**

Translated by Danial Latifi

وقوله
"والمطلقات متاع
بالمعروف حقاً
على المتقين"

قال عبد الرحمن
بن زيد بن أسلم
لما نزل قوله تعالى

"متاعاً بالمعروف
حقاً على المحسنين"

قال رجل: إن شئت
أحسنيت ففعلت و
إن شئت لم أفعل "

فأنزل الله هذه الآية

"والمطلقات متاع
بالمعروف حقاً
على المتقين "

وقد استدل بهذه الآية

من ذهب من العلماء

إلى وجوب المتعة

لكل مطلقة سواء

كانت مفوضة أو مفروضة

كلاً أو مطلقة قبل المسيس

أو مدخولاً بها

وهو قول عن الشافعي

رضي الله عنه

wa qaola huu
"WA LIL MUTALLAQAAATI
MATAAUN BIL
MA'AROOFE
HAQQAN ALAL
MUTTAQEEN"

qaala 'Abdur Rahman
bin Zaid bin Aslam
lamma nazala
qaola huu Ta'ala

"MATAAUN BIL
MAROOFE
HAQQAN ALAL
MOHSINEEN" (II. 236)

qaala rajulun
"in sheto ahsanto
fafa 'alato wa
in sheto lam af'al"
fa anzala Allaaho
haaza hil aayaha
"WA LIL MUTALLAQAAATI
MATAAUN BIL
MAAROOFE
HAQQAN ALAL
MUTTAQEEN" (II. 241)

wa qad istadalla
ba haaza hil ayaha
man zahabe min al
ulamaae
ila wujuub il mata'ata
likulle mutallaqaatin
sawaan
kaanat mufawwazatan
aw mafruzan laha
aw mutallaqatan
qabl al masiis
aw madkhoodan bihaa
wa hua quaolun
'an AL SHAFEI
razi Ullaah alaeh.

Regarding the Ayat
"AND FOR DIVORCEES
REASONABLE PROVISION
IS DUE FROM
THE RIGHTEOUS"

Said Abdur Rahman
bin Zaid bin Aslam
"When God revealed
the Ayat

'REASONABLE PROVISION
IS DUE FROM
THE KINDLY (II. 236)

someone said
'If I wish to be kind
I may pay and
otherwisze not'.

Then God revealed
this Ayat:
'AND FOR DIVORCEES
REASONABLE PROVISION
IS DUE FROM
THE RIGHTEOUS"' (II. 241)

And because
of this Ayat
a group of scholars
hold MATAA obligatory
in all cases
whether
of divorce by delegation
or of Mahr paid
or of those divorced
before consummation
or those after
consummation
so held
IMAM AL SHAFEI
God bless him and his !