

**Right of Women to Obtain Divorce under *Shari'ah* and Islamic Family Law of
Malaysia:
With special reference to *Ta'liq* and *Khulu'***

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Abstract: In Islam, marriage is expected to last until one of the spouses dies. However, if the spouses cannot live together in peace and harmony any more in the marital relationship, then its continuance is no longer considered desirable. Divorce is permitted as a matter of necessity for the avoidance of greater evil, which may result from the continuance of the marriage. The failure of marriage can be due to many reasons such as certain defects or faults in one or both of the spouses which give the right to apply for *khulu'* or *ta'liq* to the wife and *talaq* to the husband. When the wife's conduct is undesirable such as *nushuz* (marital discord) to her husband, the husband is permitted to divorce her. When the husband becomes a transgressor, for example, the husband is incapable of maintaining the wife or he ill-treats the wife, Islam also grants women the right to dissolve the marriage. Men and women have similar rights and obligations to one another. For that reason, Islam provides some grounds for women to obtain divorce. This article focuses on two grounds of divorce that are available in Islam i.e., *khulu'* and *ta'liq*. It also discusses cases decided at the *Shari'ah* court and the procedure provided under the Islamic family law for women to exercise these rights of divorce i.e., *ta'liq* and *khulu'* in Malaysia.

Keywords: *Talaq*, Islamic Law, Right of Women, Family Law

INTRODUCTION

Islam takes a realistic view of human affairs and therefore, it attaches great importance to the happiness of both the spouses in marriage. It provides that every attempt should be made to preserve a marriage, but once it is established that marriage has broken down (*shiqaq*), Islam allows the parties to separate from each other. *Talaq* (divorce) is permitted in Islam, but it is, as mentioned by Prophet Muhammad s.a.w, the most abominable of all legitimate acts. Divorce does not generate merit; therefore, it should be prevented from taking place. The marriage is expected to last until one of the spouses dies. However, if the spouses cannot live together any more in peace and harmony in the marital relationship, then its continuance is no longer considered desirable. In other words, divorce is permitted as a matter of necessity for the avoidance of greater evil, which may result from the continuance of a marriage. The failure of marriage can be due to many reasons. It may also be due to certain defects or faults in one or both of the spouses, which may trigger the right to apply for *ta'liq* or *khulu'* on the part of the wife. In Islam, when the wife's conduct is undesirable such as, *nushuz* (marital discord) to her husband, the husband is permitted to divorce her. When the husband becomes a transgressor, for example, the husband is incapable of maintaining the wife or he ill-treats the wife, Islam also grants women the right to dissolve a marriage through *khulu'*, *fasakh* and *ta'liq*. It is stated in the Qur'an that: "And women have rights similar to those against them in a just manner". This verse shows that men and women have similar rights and obligations against one another. For that reason, Islam provides some grounds for women to obtain divorce. Thus, this article examines the right of women to apply for *ta'liq* and *khulu'* under Islamic law as well as the Islamic family law in Malaysia.

Right of Women to Ta'liq Divorce:

Ta'liq or conditional or delegated divorce refers to the type of divorce where the wife includes a condition in her marriage contract that allows her to divorce on her own initiative under certain specific circumstances. Under a *ta'liq* divorce, a woman has the right to divorce her husband if he violates one of the conditions listed in the *ta'liq* agreement agreed upon at the time of the marriage. These conditions may include desertion, failure to pay maintenance, and harm caused to the wife. Upon a woman's petition, a court will make an inquiry into the validity of the divorce and, if satisfied, the court will confirm and record the divorce.

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There is another form of conditional divorce called *ta'liq al-talaq* where the husband proclaims a divorce under certain conditions and it comes into effect immediately when the condition has been fulfilled (Kazi Nasir-ud-Din Ahmed, 1978). This type of divorce is effected without intervention of the court. The condition may refer to the occurrence or non-occurrence of a certain specified future event or it may refer to a certain time or place.

The condition subject to which a divorce is pronounced may relate to a specified place. Thus, he may say to his wife, "If you enter your father's house or the house of 'A' then you are divorced." A divorce shall take effect in that case only when she enters her father's house or A's house but till then the divorce remains in suspense.

The Pakistani jurist, Kazi Nasir-ud-Din Ahmed mentions *ta'liq al-talaq* in his work '*The Muslim Law of Divorce*,' one of the most comprehensive and detailed works in Islamic law on the matter of divorce written in English, covering all of the four Sunni law schools and Shi'ism. He explains it as follows:

"A condition can be attached while pronouncing a divorce so that the divorce takes effect only upon the fulfilment of the condition to which it is subject. The condition may refer to the occurrence or non-occurrence of a certain specified future event or it may refer to a certain place or time. A conditional divorce remains in suspense and the marriage subsists till the condition, subject to which it was pronounced, is fulfilled. A divorce is effected as soon as the condition is fulfilled. If, however, the condition becomes impossible of fulfilment then the declaration of the husband, that is, the conditional divorce becomes ineffective, and the marriage continues to subsist as before. If the divorce is made contingent on a default on the part of the husband in the performance of certain condition or conditions agreed upon between the parties, a divorce would be effected on the occurrence of the breach of the condition".

This form of divorce very rare occurs in Malaysian community. However, it was a widely acknowledged form of divorce in classical Islamic law and supported by jurisprudence in classical Islamic law. *Ta'liq al-talaq* seems to have enhanced the unilateral power of the husband in pronouncing the repudiation of his wife in the historical reality of the Middle East and North African Muslim societies. Furthermore, it seems to have been generally pronounced only in anger or excitement and not the result of cool deliberation or, as a general practice, intended to be effected. (Kazi Nasir-ud-Din Ahmed, 1978)

As a husband, he has the right to divorce his wife without the intervention of the court. He can either exercise the right of dissolving the marriage by him or appoint an agent to exercise this power on his behalf or, in other words, he can delegate his power of divorcing his wife to another person who may be the wife herself. This delegation of power of divorce to the wife is called *Tafwid* and is well recognized in Islamic Law. (Kazi Nasir-ud-Din Ahmed, 1978)

Delegated divorce is another way of divorce where the wife includes a condition in her marriage contract that allows her the right to divorce on her own initiative under certain specific circumstances. (Nik Noraini, 1998) For instance, upon the husband's breach of a condition agreed upon by the parties in the *ta'liq* agreement. In other words, if the husband breaches the consent that he had pronounced, the wife could bring the case to the court to confirm that the divorce has occurred. In having *ta'liq*, it is hoped that husbands would give due care to the rights of the wife generally mentioned in the statutory agreement. It is a statutory regulation that *ta'liq* consent should be pronounced by the husband and signed by him after the marriage contract ceremony.

Authorities for Ta'liq:

The basis of this type of divorce is the stipulation agreed upon by the husband, that the wife would be entitled to a divorce under certain circumstances for instance, upon the spouse's breach of a condition agreed upon in the marriage contract. This type of divorce is also known as *tafwid at-talaq*. (Nik Noraini, 1998)

The husband is bound by his agreement, as Muslims are generally bound by their agreements, and are expected to fulfil their obligations. For instance, in the Qur'an Allah (s.w.t.) says to the effect: (al-Qur'an (5): 1) "O you who believe! Fulfil all obligations."

At another place, the verse refers to the honouring of commitments, when it states to the effect that: (Qur'an, 17: 34)

'And fulfil every covenant. Verily, the covenant will be questioned about.'

With regard to agreements or settlements made between a husband and wife, in Surah an-Nisa Allah (s.a.w.) says to the effect: (Qur'an, 4: 128)

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such agreement is best; even though men's souls are swayed by greed. But if you do well, and practice self-restraint, Allah is well-acquainted with all that you do.

The Prophet (s.a.w.) himself was asked to give his wives an option to obtain a divorce from him as Allah (s.w.t.) says to the effect:

O Prophet! Say to thy consorts: "If it be that you 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". (Qur'an, 33: 28).

Regarding conditions or stipulations in marriage contracts, there are Traditions of the Prophet (s.a.w.) to that effect, for instance:

Uqbah b. Amir reported the Messenger of Allah (May peace be upon him) as saying: The condition worthier to be fulfilled by you is the one, which you made the private parts (of your wives) lawful (for you). (Sulaiman bin As'as, 2002)

In Ahmad Hasan's explanatory English translation of Sunan Abu Dawud, it is elaborated in the footnote to this Hadith that:

The condition imposed by the wife at the time of marriage or the word a man gives before his marriage must be fulfilled. For instance, a woman marries on condition that the husband will not take her outside the place she wants to stay. The husband should fulfil this condition. He cannot legally take her outside the city where she has her residence. He can do so with her consent. The condition, it should be noted, laid down at the time of marriage must be lawful such as dower, residence, maintenance and good living. (Ahmad Hasan, 2000)

Views of Muslim Jurists:

In Islamic Family Law, all the Sunni schools recognize the doctrine of the delegation of the power of divorce to the wife. The injunction regarding the Prophet (s.a.w) and his wives referred to in Surah *al-Ahzab* 33:28 cited above is also put forward by some jurists as a basis for this doctrine. It is explained by the jurists that the Prophet (s.a.w) had, in obedience to the Qur'anic injunction, empowered his wives to choose between living with him or a separation; the wives chose the Prophet (s.a.w) and so the marriages were not dissolved. It is inferred that a husband can lawfully delegate to his wife the power to dissolve the marriage, if she so chooses. (Tanzil-ur-Rahman, 1978)

It is based on the major texts like the Qur'an and *Sunnah* that the conditions in the *ta'liq* agreement are validated. All the Sunni schools recognize the doctrine of the delegation of the power of divorce to the wife, i.e., the basis of separation by *ta'liq*.

According to the majority of Muslim scholars, the power given by *tafwid* or delegation cannot be revoked, and the wife to whom the power is delegated exercises it in respect of her own person and has absolute right to exercise the power or not as she may choose.

However, there are some differences of opinions between the traditional scholars as to the validity of certain conditions that entitle the wife to a dissolution of marriage, e.g. the Hanbali view is that a husband who agreed in his marriage contract not to take another wife during the continuance of the marriage would be bound by such a stipulation so that the first wife would be entitled to a dissolution of marriage in the event of its breach, while the Hanafis and the Shafi'ishold the view that such a stipulation to be void.

The Hanbali approach is that any condition agreed between the parties, orally or in writing, must be honoured and given effect, and any party who made that condition shall retain the right of cancellation if the condition is broken, unless there is a *Shari'ah* proof of its being void. (Jamal J. Nasir, 2002) If a condition could be proven void under the *Shari'ah*, it must be deemed null and void, e.g. a condition by a wife to have a previous wife divorced.

With such given to the wife through the *ta'liq* pronounced by the husband, it is acknowledged that a few arising issues should be made clear. As previously highlighted, from the rules and regulations observed, it is obvious that a husband cannot avoid from pronouncing the *ta'liq* agreement. Not only it is a statutory requirement, but also the occasion in which it takes place obviously shows that a husband does not have any choice or say in the matter. Since *ta'liq* is usually pronounced after the *'aqad* ceremony. Once pronounced, the form of *ta'liq* agreement shall be signed by both husband and wife and attested by witnesses.

Thus, from the whole occasion an issue arises as to whether the husband consented to the agreement. It seems that there is an element of coercion present during the whole occasion. If such is the case, then the *ta'liq* agreement automatically becomes void. (Harun Din, 1990)

Under the Islamic Law of contract consent is one of the foundations to a contract. (Liaqat Ali Khan Nazi, 1991) The Quran says to the effect:

"...But let there be amongst you traffic and trade by mutual good-will..." (Qur'an, 4: 29)

Similarly, consent obtained by coercion, misrepresentation, deceit, or fraud cannot be valid as it is not free but brought about by external forces. (Liaqat Ali Khan Nazi, 1991) Even the Prophet (s.a.w) had also said that, 'Indeed, Allah (s.w.t.) has released my *Ummah* (from liability) mistake, forgetfulness and things done under coercion.' (Harun Din, 1990)

Thus, the consent of husband and wife is a vital element in order to be a valid contract. It is also arguable that although agreement is given for the performance of the *ta'liq* procedure, but lack of acknowledgment or ignorance of the effect of the contract will also affect the validity of the *ta'liq* pronounced. Hence, it is submitted that the procedure of *ta'liq* made by the prospective husband in this country might cause uncertainty to the validity of the *ta'liq* pronounced by spouse and would probably make the *ta'liq* and agreement signed invalid. (Nor Fadzlina, 2004).

The Legal Provision in Malaysia:

In Malaysia, *ta'liq* agreement seems to be an ideal means of protecting Muslim women's right in their marriage. Therefore, it is usual for the husband to pronounce the statutory *ta'liq* agreement in the prescribed form immediately after the marriage is solemnized. (Nor Fadzlina, 2004) According to Section 2 of the Islamic Family Law (Federal Territories) Act 1984 '*ta'liq*' means a promise expressed by the husband after solemnization of marriage in accordance with *Hukum Syara'* and the provision of the Act.

The prescribed agreement in the statutory form normally entitles the wife to apply for a *ta'liq* divorce in the event of the husband leaving or neglecting or not providing maintenance to the wife for a period of four months or more, or causing hurt to her person. (Nor Fadzlina, 2004)

In the Federal Territories the prescribed form of the *ta'liq* reads as follow:

"I do solemnly declare when I leave my wife for four months voluntary or involuntarily and I or my representative do not give maintenance for such period whereas, she is obedient to me or I cause hurt to her person, then she makes a complaint to the *Shari'ah* Court and if found by it to be true, and she gives to the *Shari'ah* Court for me a sum of one ringgit, then she is divorced by a *talaqkhul'i*."

Whereas, Section 22 of the same Act provides for the responsibility of the Registrar, amongst others:

- 1) Immediately after the solemnization of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other *ta'liq* of the marriage in the Marriage Register.
- 2) The entry shall be attested to by the parties to the marriage, by the wali, and by two witnesses other than the Registrar, present at the time of the marriage is solemnized.
- 3) The entry shall then be signed by the Registrar.

Section 26(2) of the act gives the Registrar the right to issue a *ta'liq* certificate in the prescribed form, upon payment of the prescribed fee. While Section 50 of the Islamic Family Law (Federal Territories) Act 1984 provides:

- 1) A married woman may, if entitled to a divorce in pursuance of the terms of a *ta'liq* certificate made upon a marriage, apply to the Court to declare that such divorce has taken place.
- 2) The Court shall examine the application and make inquiry into the validity of the divorce and shall, if satisfied that the divorce is valid according to *Hukum Syara'*, confirm and record the divorce and send one certified copy of the record to appropriate Registrar and to the Chief Registrar for registration.

Section 22 of the Act allows for additions to be made to the standard *ta'liq*, or for altogether different *ta'liq* to be registered. It is worth noting that the conditions that may be set are undefined by the Act except that they may not contradict *hukum syara'*. In other words, a married couple can add conditions to their existing *ta'liq* after the marriage is solemnized, so long as both partners agree to the addition of conditions to *ta'liq*.

It is noted that generally, the scope of protection provided by the prescribed *ta'liq* agreement is only based on matters of maintenance, desertion, and hurt caused to the wife. Although Section 22(1) of the Act provides for the entry of "the prescribed or other *ta'liq* of the marriage in the Marriage Register" it is not possible for additional or optional conditions to be included in the prescribed statutory *ta'liq* agreement. (Nor Fadzlina, 2004)

Application for Ta'liq at the Shari'ah Court:

From the cases involved, it is observed that *ta'liq* divorces are those where the wife claims that she has not been paid maintenance. In some instances the husband attends the court; in others he is not present. There are also some cases where the wife applies for *ta'liq* divorce on the ground of assault by the spouse. In such cases the court the court will hear both the parties and the witnesses and then decide on the evidence.

In the case of *Salemawegam v Mohd Anuar*, (1983) 5 JH 109 the wife applied for *ta'liq* on the ground of the non-maintenance. The husband did not deny that he had not paid maintenance, but alleged that the wife had refused to consummate the marriage. Hence, he claimed that he was not bound to give support. The court asked both parties to take the solemn oath. His wife took the oath and said that there had been sexual intercourse between them. The husband however, had refused to take it as required by the court. It therefore gave judgment in favour of the wife and decreed a *ta'liq* divorce by one *talaq*.

In the case of *Aminah v Ahmad* (1971) 3 JH 81 the wife complained that the husband has deserted her and had not given her maintenance for over three months. The husband admitted that he had not lived with the wife and not had maintenance her but said that he had tried to take her back and to settle the dispute but this had failed. The wife called two witnesses to support her case. The *Kadi* give judgment for the wife and after ascertaining that she was in state of purity decreed that one *talaq* divorce had been affected. The appeal of the husband to the Appeal Committee was dismissed.

In *Aisny bt Mohd Daris v Haji Fahro Rozi bin Mohdi*, (1990) 2 MLJ xxvi the wife applied to the *Shari'ah* Subordinate Court for the confirmation of the *cerai ta'liq* under section 50(1) of the Islamic Family Law (Federal Territories) Act 1984. The parties had lived together for almost 20 years and had three children. Subsequently, however, when the husband married another woman, problems arose and the wife alleged that the

he had neglected to give maintenance to herself and her children. The wife made a report to the *Kadi* but efforts at conciliation were not successful and eventually she applied to the *Shari'ah* Court to confirm the *ta'liq*, which had been pronounced by the husband on the wife.

The learned that judge held that the wife was not *nusyuz* and was therefore entitled to maintenance. Although she had moved from the matrimonial home this had been done with the knowledge of the husband, and in fact he had acquiesced in the moving of the matrimonial home as he continued to live with her and their children in the new house for about six months before he deserted them. It was also held that the wife was justified in confiscating lands, which was registered in the husband's name, as they were properties jointly acquired during the marriage. However, the learned trial judge dismissed the wife's application of divorce as he held that she could have obtained the maintenance by selling the shares in her possession (which was owned by her).

The wife appealed to the *Shari'ah* Appeal Board. The Board allowed her appeal as there was no proof or evidence that the shares belonged to the husband and therefore, it would be wrong to expect the wife to maintain herself or own property. The Board distinguished this case from Hadith relating to Hendon and her husband Abu Sufian as in the Hadith, the lady was asked to take from her husband's property and spend for her needs ("Take from his property what is enough for your needs and those of your children"), not to maintain herself out. In this case as the husband had not given maintenance to his wife for over four months, she was entitled to the divorce in accordance with *ta'liq*.

In the Penang case of *Siti Zainab v Mohamed Ishak*(1976) 2 JH 323 the wife claimed that her husband had deserted her for over three months. Although a registered letter was sent to the husband and an advertisement inserted in the news papers he did not attend court. The wife then gave evidence and called two witnesses who could not support her story. Later she called two other witnesses who did so. The wife claimed that she had remained in matrimonial home and had not left it and in this she was supported by the witnesses. The court asked her to take an oath, *Yamin al-Istizhar*, to support her case and after she had taken it, judgment was given in her favour. The court confirmed the divorce by one *talaq*.

In the Kelantan case of *Piah v Muhammad Zainal*(1981) 4 JH 222, the wife applied for *cerai ta'liq* on the ground that the husband had deserted her for over two years and had not given her any maintenance. She gave evidence and called one witnesses to support her. She was then asked to take the oath. She was asked to pay RM1 to Kadi for the husband and after that the court declared that she was divorced by one *talaq khuli*.

In the Perlis case of *Hasnah v Saad*(1975) 3 JH 84, the wife claimed *cerai ta'liq* on the ground that her husband has assaulted her on her face near her right ear. She produced the *taliq* declared by the husband, and a medical certificate as evidence of her injuries. The husband denied that he had assaulted her and claimed that the injuries were self-inflicted. The court gave judgment for the wife and declared that she was divorced by one *talaq*.

Rights of Women to Khulu':

Khulu' is derived from *khulu'al-thaub* releasing or removing the dress from the body because a woman is a dress of a man and vice-versa. (*al-Baqarah*: 182) *Khulu'* literally means to pull out, to remove, to slip, to slide off. In technical sense it refers to a method of divorce in which the wife seeks release from marriage from her husband using the word *khulu'*.

In the Quran, it is enunciated in surah *al-Baqarah*, verse 229 that;

"And it is not lawful for you that you take from women whatever that has been given to them (as dower) except in the case where both fear that they may not be able to keep within the limits imposed by Allah. And if you fear that they may not be able to keep the limits of Allah, it is no sin for either of them if the woman ransoms herself."

This verse assures that a woman can dissolve the marriage if she is willing to make compensation for her release. However, the Qur'an has not prescribed any procedural requirements as guidelines and limitation, bearing in mind that divorce is morally condemned in Islam, though permissible.

During the time of the Prophet Muhammad (s.a.w.), Ibn Abbas narrated that: The wife of Thabit bin Qais came to the Messenger of Allah and said:

"O Messenger of Allah, I do not blame Thabit for any defects in his character or his religion but I dislike to behave in an un-Islamic manner." On that Allah's Messenger said to her: Will you give back the garden, which your husband has given you? She said: yes. Then the Prophet turned to Thabit: O Thabit! Accept the garden and divorce her."

(*Sahih al-Bukhari*, Vol. VII, Hadith 179)

In Islam, *khulu'* must only be asked in extreme circumstances. There is hadith of the Prophet Muhammad (s.a.w.), which warns women who asks for *khulu'* without any reasonable ground. Thus, *khulu'* should only be asked if there is a valid ground. The *hukum* of *khulu'* is *makruh* except that there is fear that the limits of Allah SWT will not be observed. Once *khulu'* is granted, the husband forfeits the right of reunion (*ruju'*) during the

'iddah period. The parties can only be reunited by new marriage and *mahr*. It is haram if the husband ill treats the wife with the aim of getting the payment of *khulu'* from her.

Payment of *Khulu'*:

In *khulu'*, the payment is the essence. As explained in the hadith, the basis for the payment is the return of the dower. The hadith also reports the willingness of Thabit's wife to give more than just the dower, but the Prophet Muhammad disapproved of it. (Najibah Mohd Zin, 2007) The incident is remarkable as it puts a stop to any unlawful dealings with regard to an actual payment by forcing the wife to pay more than is necessary to effect *khulu'*. It is morally condemned for the husband to receive more than the amount of *mahr* paid to the wife. As it is agreed by the Muslim jurists that it should not be more than the payment of *mahr*. In fact, the amount of payment for *khulu'* has not been specified under the *Shari'ah*. It is also agreed by the jurists that anything that is lawful to be given for a *mahr* can also be given as a payment of *khulu'*. In *Khurshid Bibi's* case, it is stated that it is *makruh* for the husband to take from the wife more than what he had given or settled upon her, namely, her dower.

The Legal Provisions and Practice of *khulu'*:

Section 49 of the Islamic Family Law Act (Federal Territories) 1984 provides where the husband does not agree to voluntarily pronounce a *talaq*, but the parties agree to a divorce by redemption or *cerai tebus talaq*, the court shall, after the amount of the payment is agreed upon by the parties, cause the husband to pronounce a divorce by redemption, and such divorce is *ba'in sughra* or irrevocable. This provision expressly states for an agreement be reached before a *khulu'* divorce could be granted in the *Shari'ah* Court.

The current practice in Malaysia shows that the husband's consent remains an essential requirement for *khulu'* divorce. In the case of *Rokiah v Abu Bakar*, Journal of Malayan Branch [Vol. XXI, Pt II, 1948] it was decided that the consent of the husband is necessary and he cannot be forced to give his consent. It has been observed that the judge inclined towards adopting a stricter procedure despite that fact that the applicant was more than qualified to be granted *khulu'*.

Previously, the practice in Malaysia was that the application for *khulu'* will only take effect if the husband agrees to divorce the wife with the payment of compensation for her release. If the husband still disagrees with the option, two *hakam* will be appointed to handle the case that is either to effect reconciliation or dissolve the marriage. The cases discussed below indicate that where *khulu'* has been sought by the wife, the judge has insisted on the appointment of *hakam* who have the power to pronounce a divorce if so authorised.

In the case of *Che Pah v. Siti Rahmah*, (1974) 2 JH 244, the plaintiff had applied for an order that his wife, the defendant, should return and cohabit with him. The defendant refused to do so, as she claimed the husband was a gambler and a drunkard and did not pray. She asked for a divorce from him and offered to pay compensation for a *tebustalaq (khulu')*. The court after hearing the parties ordered the wife to return to the husband and ordered the husband to pay her maintenance and provide a dwelling house for her. The wife refused to go back to her husband and the husband too did not give the maintenance as ordered. The judge thereupon ordered that *hakim* to be appointed under s 90A (1) of the Administration of Muslim Law Enactment 1963. Section 90A (1) of the Enactment states:

"Whenever any misunderstanding arises from any decision of the court, as for example, where the husband is asked to divorce his wife but refuses to do so, the court has the power to order both parties to appoint their representatives to find ways of solving the misunderstanding."

In this case the court on 6 February 1975 had confirmed the appointment of *hakam* of each of the parties. The court then had briefed the two *hakams* as to the conduct of the reconciliation process and reminded them that they should try to effect reconciliation between the parties. On 9 July 1975, both *hakams* had reported to the court that they were not able to solve the case. The court, therefore, on 11 January 1976 appointed another *hakams* under s 90 A (2) of the Enactment. In this case, the *hakams* finally were able to get the agreement of the parties for a *khulu'* divorce on the payment of RM 100 to the husband. This case shows that the court has the power to remove the *hakams* if they are unable to agree, or if the court is not satisfied with their conduct of the arbitration. The decision of the newly appointed *hakams* will be enforceable by the court.

In the case of *Talib bin Salleh v. Sepiah*, (1979) 1JH (1) 84 where the facts were that the parties had been married since 1964. In 1976 the respondent brought an action for divorce against the husband, as she alleged he had not been just and had treated her unfairly. Subsequently she agreed to withdraw the action and to go back to live with the appellant, as he promised to act with justice towards her. However, the respondent alleged that the appellant continued to neglect her and did not give her sufficient maintenance. She said she did not want to go on staying with the husband and she applied for divorce under s 69 of the *Shari'ah* Court and Matrimonial Causes Enactment 1966. The learned judge after hearing the witnesses found that there were differences between the parties, which amounted to *shiqaq* (marital discord) and as the appellant refused to divorce the respondent or to agree to *tebustalaq*, he appointed *hakam* under s 69 (4) of the Enactment. The *hakams* took over five months to consider the matter but could not reach agreement, as the *hakam* for the appellant did not

agree to a divorce. The learned judge then took steps to appoint a *hakam* for the husband with power to divorce the wife, under the powers given by s 74 (4) of the Enactment. Subsequently the *hakams* agreed on a *khulu'* divorce and as the *hakam* for the husband was appointed according to the minority opinion of the Shafi'i School and was given power to pronounce a divorce, he pronounced the '*tebustalaq'* (*khulu'*) on payment of RM 100. On appeal, the Board of Appeal dismissed the appeal and confirmed the order of the judge.

Another case where *hakam* was appointed is *Nerat bt. Musa v. Ahmad bin Kancil*.(1965) 3JH 101. In this case there was a dispute between the husband and the wife. The wife applied for *khulu'* divorce but the husband refused to accept. The court decided based on s 90 (1) and (2) of the Administration of the *Shari'ah* Enactment (Perlis) (No. 3) of 1964 to appoint arbitrators from each parties to settle the matter. The *hakam* for the husband agreed that there should be a *khulu'* divorce on the wife paying RM150 and when the wife paid this amount to the husband, he pronounced *talaq* on her.

The above provision is in line with the opinion of the Muslims jurists that *hakams* have the authority to order for a separation of the parties either through *talaq* divorce or *khulu'*. This provision is important as it gives authority to *hakams* to order for a divorce in the case where the husband is reluctant to pronounce it whereas the state of *shiqaq* (marital discord) is persisting. With this power to order for a divorce given to *hakams* it is hoped that hardship and injustice in the relationship of the husband and the wife can be avoided. It is important that if the limit of Allah cannot be observed there is no reason for the relationship to be continued.

In Pakistan, the courts have decided in several cases that the wife may obtain *khulu'* even if the husband does not agree to it. For example, in *Balqis Fatima v. Najm-al-Ikram Qureshi*, PLD 1959 Lah. 366, the High Court of Lahore held that if the court arrived at the conclusion that the couple would not be able to maintain the limits set by Allah SWT, it could get *khulu'* effected even without the consent of the husband. The decision in *Balqis Fatima* was endorsed by the Supreme Court of Pakistan in *Khurshid Bibi v Muhammad Amin*, PLD 1967 S.C. 97. In 1985, in the case of *Abdul Rahim v Shahida Khan* [1985] 1 MLJ cxxvii, the Supreme Court was again affirmed the view that *khulu'* may be effected by the court without the consent of the husband. It was stated that "it would be more consistent with the letter and spirit of the Qur'an which places the husband and the wife on an equal footing to construe the classical incident of Sabit bin Qais as meaning the person in authority, including the judge, can order separation by *khulu'* even if the husband is not agreeable to that course."

Conclusion:

In Malaysia, in the case of *khulu'*, the Islamic Family Law Act/Enactments do not expressly state that *khulu'* without the consent of the husband will be effected however, it may take place after the couples have gone through a lengthy and elaborate procedure at the Syariah Court. Thus, it is viewed that by giving the power to the judge to decree the divorce it would help the parties who could no longer live together as husband and wife and perform their marital obligations. So that *khulu'* can serve as one of the effective remedies available to the Muslim women. In the case of *ta'liq* divorce, the Muslim jurists who see no objection in the granting of absolute power of divorce by the husband to the wife have considered the matter from the point of *tamaluk* or transfer of right and agency. It is viewed that the practice of *ta'liq* should be reformed, by either giving more freedom of right to stipulate or draw a carefully drafted prenuptial agreement in order to protect their rights in the marriage. A prenuptial agreement would be a better solution in order to protect the rights of both spouses if difficulties arise in their marriage. It is also capable of granting a wider range of protection to both sides, instead of limited ones under the *ta'liq* agreement.

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