

LAW OF DIVORCE & KHULA IN PAKISTAN

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Introduction

A Muslim Marriage is a civil contract which can be executed and dissolved like any other contract, however it is automatically dissolved on the death of either spouses. Additionally spouses legal right to dissolve marriage contract is also recognized in Islam and hence both are entitled with a religious rights to dissolve a marriage. Husband has an inalienable legal right of divorce by way pronouncement of Talaq on the other hand wife can only exercise the right of divorce if the same is granted to her in her marriage contract or nikkhanama. If in the event the right of divorce is not granted to the wife then she has recourse of filing for khula before the family courts of law to obtain judicial divorce.

It is critically important to note that whether the marriage has been dissolved through talaq or khula, it must be legally recognized failing which serious doubts may arise about the effectiveness of the divorce, such as a case of bigamy or zina against a woman who later remarries, or difficulties in settling issues related to the divorce such as past maintenance or claiming deferred haq mehr. The paternity of children can also be dispute. Therefore as per Pakistani Law it is vital to obtain dissolution of marriage certificate from concerned government office as a documentary proof of dissolution of marriage. However it is also important to note that as per Islamic scholars, divorce once pronounced by the husband and khula once obtained from the court of law is effective and binding.

Husband's Right of Divorce or Talaq and the Legal procedure

A husband has the unilateral right of Divorce or talaq and he cannot be alienated from this right but can but can be restricted through the marriage contract also known as nikkahnama. As per Muslim Personal Law and under section 7 of the Muslim Family Law Ordinance the husband can pronounce talaq orally as well as by way of Deed of Divorce.

Husband is duty bound to send written notice by registered post to the Union Council or concerned government office in charge for issuance of divorce certificates. In the said notice the husband must mention the address of his ex- wife, thereby enabling the government office to issue notices to her by registered post and it shall constitute arbitration Council within 30 days of receipt of notice for the purpose of reconciliation and settlement if possible.

This legislation was introduced to protect women from an instant and unrecorded divorce. Earlier cases were recorded where woman who was not properly divorced and who later remarried could be punished for bigamy and sentenced up to 7 years (or up to 10 years if she concealed the previous marriage) and only on the complaint of her first husband as there was no proof of dissolution of marriage. Therefore, this legislation was enacted to protect a woman who re-marries from a frivolous criminal case and sentencing. hence it is vital for a woman to be absolutely clear about her marital status and to have documentary proof that she is properly divorced.

Notice of talaq can be served on a wife with permission of concerned government office through her father, mother, adult brother or sister – but no other relatives. If this is not possible because her whereabouts are not known and notice cannot be served on her through her immediate family, the husband can still serve notice through a newspaper approved by the concerned government office.

It is important to receive a notice from the concerned union council, whereas it has been reported that in some cases families have refused to receive notices, fearing that it is a notice of talaq and hence talaq will not become effective. This practice could lead to unfavorable results as service of notice can be done by way of publication in the newspaper hence refusal to receive notice of talaq is merely an attempt to act like an ostrich.

Once the iddat period which is 90 days from the date the concerned government office receives the talaq notice is over, the office will issue a certificate of Talaq being effective to the husband and wife. Please note that talaq is not effective until the expiry of iddat period and failure to abide by law will cause a simple imprisonment for up to one year and/or a fine of up to Rs. 5000/-, hence the Importance of Registered notice of Talaq

A verbal talaq is not recognised by law and the husband's failure to send written notice to the government office is treated as no divorce in law. However it is also important to note that as per Islamic scholars, divorce once pronounced by the husband and khula once obtained from the court of law is effective and binding.

Talaq-i-Tafweez and Mubarat (Mutual Divorce)

In both of these forms of divorce, there is no need to approach the courts, meaning that the marriage can be dissolved rapidly, cheaply and with few procedural problems. In this case both husband and wife may sign a Mutual Divorce Deed and send a written notice under section 8 of the Muslim Family Law Ordinance to the concerned government office, however the government office is duty bound to follow the procedure of issuance of notices before issuance of dissolution of marriage certificate.

Wife's Right of Divorce or Talaq

A wife can dissolve her marriage unilaterally only if the right of divorce has been unconditionally delegated to her by the husband in the marriage contract or the nikahnama. If such right of divorce is not delegated then in such circumstances wife can dissolve her marriage by apply for Khula from the Family Courts of Law, which is also known as dissolution of marriage by way of judicial divorce.

Therefore if the wife is not delegated the right of Divorce in her nikahnama then she would need to apply for Khula. Khula, which literally means 'untying the knot', is the dissolution of marriage initiated by the wife and is granted by the court. To apply for Khula the wife would need to file a suit for Khula in the Family Court under the West Pakistan Family Courts Ordinance, on the grounds that she feels she can no long live with her husband "within the limits prescribed by Allah' and such a statement on oath made in her suit would be sufficient to establish her case for Khula.

Dissolution of Muslim Marriages Act 1939

Judicial khula may also be granted without the husband's consent if the wife is willing to forgo her financial rights.

Grounds for Judicial Divorce

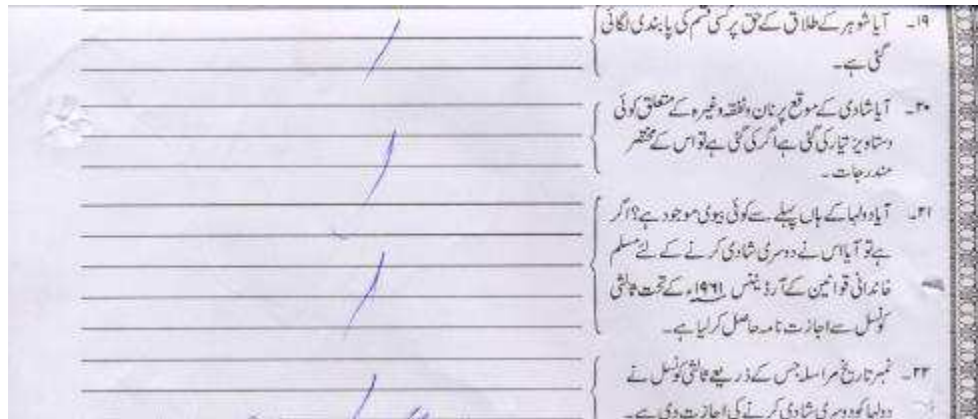
Grounds on which a woman may seek khula include:

- Desertion by husband for four years,
- Failure to maintain for two years
- Husband contracting a polygamous marriage in contravention of established legal procedures,
- Husband's imprisonment for seven years,
- Husband's failure to perform marital obligations for three years,
- Husband's continued impotence from the time of the marriage
- Husband's insanity for two years or his serious illness
- Wife's exercise of her option of puberty if she was contracted into marriage by any guardian before the age of 16 and repudiates the marriage before the age of 18 (as long as the marriage was not consummated),
- Husband's cruelty (including physical or other mistreatment, unequal treatment of co-wives),
- Any other ground recognised as valid for the dissolution of marriage under Muslim law

The Family Court will issue decree and send notification to Union Council which proceeds as if it received the notice of Talaq and once the iddat period of over the khula becomes effective.

At the time of filing of Khula suit the wife usually has to return haq mehr and other benefits received from husband as zar-ikhula, gifts received from husband's family do not have to be returned court decides how much & what is to be returned on the facts of the case wife's failure to pay zar-i-khula does not render khula ineffective; husband has to file separate suit for recovery of zar-i-khula.

Commonly Right of Divorce is deleted in Nikkahnam



It is a common practice that the delegated right of divorce is deleted before the nikahnama is presented to the bride for signatures. The Law of Pakistan entitles a woman to exercise right of divorce as oppose to file for Khula before the Family courts of Law but as a common practice, the marriage contract is prepared in advance, in manner to defeat the purpose of the legislation. Therefore it is hoped that this article and dissemination of legal information may educate many in our society to change the practice and secure their legal rights. If Islamic scholars are of the opinion that the said practice is valid and legal, then in such circumstance it is urged that it should be debated in the parliament and necessary legislation should be enacted to remove such clauses from the Nikanama. Whereas as of now the Divorce Laws of Pakistan states that a woman has a delegated right of divorce and hence her right should not be removed or deleted without her consent in the nikhanama prior to obtaining her signatures and therefore it is further urged that all the clauses should be read and understood by the bride before signing the Nikanama.

Steps to consider before Divorce in Islam

Narrated Abdullah ibn Umar: The Prophet (peace_be_upon_him) said: Of all the lawful acts the most detestable to Allah is divorce¹.

Islam and Quran has stressed both partners to live in peace and harmony, however it is a natural process of life that some disagreements between spouses arise during the course of marriage, especially during early years of marriage. It is always encouraged in Islam to resolve such disagreements by acting fairly and kindly, however if in the event such disagreements cannot be resolved then in such circumstance the following procedure is prescribed in Islam before termination of marriage.

1. The two parties must try to settle their differences on their own. It is understood by family counselors commonly intervention of third parties, such as parents, siblings, friends or cousins are common cause of non-settlement of disputes. As it is documents by many family consultants all over the world that adults are capable of resolving their disputes amicably by conversing and expressing their grievance. It is always a process of give and take. Therefore it is recommended that couple should attempt to talk their difference with the intervention of others in any form and should always keep in mind that happy life always means give and take.

Narrated AbuHurayrah: The Prophet (peace_be_upon_him) said: Anyone who incites a woman against her husband or a slave against his master is not one of us².

2. In the unlikely event of non-settlement between the couple, two impartial personalities/ arbitrators, one from the husband's relatives, and one from the wife's relatives, must be appointed to try to make peace and to settle their differences.
3. If this attempt also fails, then the husband or the wife may seek a divorce.
4. In case divorce is notice served through the concerned government office, a reconciliation period of ninety 90 days time or three months is

¹ 'Divorce (Kitab Al-Talaq)' of Sunan Abu-Dawud, No.2173

² 'Divorce (Kitab Al-Talaq)' of Sunan Abu-Dawud, No.2170

available (except if the parties have divorced each other for the third time), also known as iddat period.

5. The two parties can reconsider their views and reunite during this waiting time. However, if the above time limit expires and no reconciliation occurs, then the divorce becomes effective and marriage is terminated.
6. If in the event the wife is pregnant then the waiting period is till delivery of her child plus iddat period. Hence divorce is pronounced by the husband but the same will not become effective during pregnancy.

Revocation of Divorce by a Husband

It is commonly noted by us that most families, especially husbands exercise their right of divorce with proper thought process and thereafter approach various counselors and lawyers for revocation of divorce. The common problem is that most lawyers or draftsmen prepare divorce deeds without allowing the opportunity to revoke the divorce by causing the husband to pronounce triple divorce.

A divorce can be revoked by the husband without intervening marriage as long as the same is done up till three pronouncements!

Therefore a Divorce Deed should always be prepared in the form and manner to suggest that it shall be treated as one single divorce, if the divorce deed is prepared with a triple divorce then the same cannot be revoked without intervening marriage and hence the said act should be exercised with caution.

In most cases the client is not informed of his legal rights of triple divorce and their divorce deed is prepared with triple divorce. Limited scholars believe that with full knowledge of triple divorce is treated as single divorce, whereas majority are of the opinion that ignorance of basic Islamic Law is no excuse and therefore pronouncement of triple divorce is final and binding until intervening marriage.