



## Divorce and the law of *Khul*: A type of no fault divorce found within an Islamic legal framework

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### 1 INTRODUCTION

“Treat your women well and be kind to them for they are your partners and committed helpers”.<sup>1</sup> Generally, Muslims (men and women) believe that asking perplexing questions about Islam is frowned upon. A few believe that it is shameful to ask pertinent questions or to express a degree of doubt. This, however, is not according to the tenets of Islam. Islam permits the raising of

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<sup>1</sup> From the Farewell Address of the Holy Prophet Muhammad (PBUH), see Warren CS “Lifting the veil: Women and Islamic law” (2008) 15:1 *Cardozo Journal of Law and Gender* 33 at 34. The name of the Prophet is spelt by many scholars as either Mohammad, Mohammed or Muhammad. In this article Muhammad will be used. In addition, it is customary to insert the following salutation after the name of Prophet Muhammad: “Peace and Blessings Upon Muhammad” (PBUH). These salutations will be inferred in the course of this article.

questions and debates about pertinent issues. The manner of inquiry is referred to as *ijtihad* or personal reasoning.<sup>2</sup> Kamali rightly points out that *ijtihad* is a continuous process of development of a person, whereas sacred revelation and Prophetic narrations terminated upon the departure of Muhammad.<sup>3</sup> According to traditional Islamic scholars, it was not an impropriety to raise difficult questions about Islam or to highlight one's doubts; rather, it would be a sin not to do so. In fact, one of the responsibilities of scholars was to prepare cogent answers in response to inquiries from the Muslim community.<sup>4</sup>

## 2 DIVORCE IN THE SOUTH AFRICAN LEGAL CONTEXT

According to South African law marriage may be terminated either by divorce or the death of one of the parties. Should the marriage be terminated by divorce, then the Divorce Act of 1970 will apply.<sup>5</sup> The provisions of the Divorce Act do not, however, apply to persons married according to the tenets of Islam.<sup>6</sup> South African courts have in the past on numerous occasions held that Muslim marriages are potentially polygynous and thus invalid. The non-recognition of Muslim marriages goes back as far as the case of *Seedat's Executors v The Master (Natal)*<sup>7</sup> in 1917 where the Court expressly stated that "[w]ith us marriage is the union of one man with one woman, to the exclusion, while it lasts, of all others".<sup>8</sup>

It has been argued that polygamy goes against the fabric of society and thus a Muslim marriage was viewed as morally reprehensible.<sup>9</sup> South African courts have accentuated the fact that Muslim marriages are potentially polygamous, and had little difficulty in declaring such unions invalid.<sup>10</sup> This legal position is aptly illustrated in *Amod v Multilateral Motor Vehicle Accident Fund*.<sup>11</sup> In this instance the Court granted relief to the plaintiff by acceding to the consequences flowing from a contract where the

<sup>2</sup> Saleh MI *Dictionary of Islamic words & expressions* (2011) at 94. *Ijtihad* or informed reasoning, is reasoning carried out by a Muslim based on his knowledge of the *Qur'an* and teachings of the Prophet (PBUH), in a manner not specified by either.

<sup>3</sup> Kamali MH "Ijtihād, or personal reasoning" *Principles of Islamic Jurisprudence* (1991) at 366. See, in particular, Codd A "A critical analysis of the role of Ijtihad in legal reforms in the Muslim world" (1999) 14 (2) *Arab Law Quarterly* 112 at 115.

<sup>4</sup> Abd-Allah UF "Living Islam with purpose" (2008-2009) 7 *UCLA Journal of Islamic and Near Eastern Law* 17 at 34.

<sup>5</sup> Act 70 of 1979. See also the Divorce Amendment Act 95 of 1996.

<sup>6</sup> Gabru N "Dilemma of Muslim women regarding divorce in South Africa" (2004) 7:2 *Potchefstroom Electronic Law Journal* 44 at 46.

<sup>7</sup> Per Innes CJ in *Seedat's Executors v The Master (Natal)* 1917 (AD) 309.

<sup>8</sup> Per Innes CJ. See also *Ishmail v Ishmail* 1983 (1) SA 1006 (AD).

<sup>9</sup> Mbatha L, Moosa N & Bonthuys E "Culture and religion" in Bonthuys E & Albertyn C (eds) *Gender, law and justice* (2007) 158 at 161.

<sup>10</sup> Mbatha, Moosa & Bonthuys (2007) at 161. Although the term "polygamy" is gender neutral and a generic expression which includes the institution of "polygyny" (meaning a plurality of wives), only polygyny is permissible in Islam. See, in particular, Moosa N "Polygynous marriages in South Africa: Their potential impact on the incidence of HIV/AIDS" (2009) 12:3 *Potchefstroom Electronic Law Journal* 65. See also *Ishmail v Ishmail* 1983 (1) SA 1006 (AD) at 1025 para E-G.

<sup>11</sup> See *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA).

parties were married according to the tenets of Islam. The Court refused to recognise the union of the parties as a valid marriage.<sup>12</sup> South African courts would thus only grant a decree of divorce if the marriage was solemnised in terms of the law of the land. This would mean that parties married according to the tenets of Islam would in effect have to marry twice. Whereas the first marriage would be in terms of religious rites, a further (civil) marriage would have to be concluded in accordance with the law of the land.

In view of South Africa's particular history, the framers of the South African Constitution sought to entrench a compromise in the Bill of Rights.<sup>13</sup> Section 15 of the South African Constitution does not prevent the state from recognising or supporting religion, but does require it to treat religions equally.<sup>14</sup> This section, together with section 31, also firmly entrench the right of the individual (and communities) to the free exercise of religion. When read together with section 9, section 15 prohibits the state from discriminating against any particular religious group.<sup>15</sup>

Although the possibility of converting a religious or traditional union into a civil marriage has always existed, the legal requirement that such a marriage be monogamous has, however, remained.<sup>16</sup> Faced with a choice between non-recognition of a marriage by the state and compliance with a "foreign" legal system instead of their own, many Muslims opted for the former. This meant that Muslim couples were not considered legally married, their children were considered to be illegitimate and they had to rely on religious authorities, such as the Muslim Judicial Council (MJC),<sup>17</sup> and not on the courts to enforce the consequences of their union.

Section 15(3) of the South African Constitution provides for the recognition of religious marriages and empowers the state to give effect to such marriages in terms of a system of religious law. However, any such recognition must be consistent with both section 15 and the South African Constitution as a whole.<sup>18</sup> The compatibility of religious law within this constitutional framework has been highly problematic and the potential for conflict immense. The gender specific discriminatory practice of polygyny

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<sup>12</sup> Van Niekerk GJ "Legal pluralism" in Rautenbach C, Bekker JC & Goolam NMI *Introduction to legal pluralism* 3ed (2010) 1 at 11.

<sup>13</sup> Constitution of the Republic of South Africa, 1996. See also the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution).

<sup>14</sup> Motale Z & Ramaphosa C "Freedom of expression, Assembly, Association, and Religion" in Motale Z & Ramaphosa C *Constitutional law: Analysis and cases* (2002) 397 at 381.

<sup>15</sup> In a South African constitutional context, freedom of religion, therefore, has both a free exercise component as well as an equal treatment component. See, in particular, ss 9 and 15 of the Constitution of the Republic of South Africa.

<sup>16</sup> *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 309.

<sup>17</sup> The Muslim Judicial Council (MJC) is a non-profit organisation or a faith based organisation which was established in 1945. It is one of the oldest, most representative and most influential religious organisations in South Africa enjoying local, national and international credibility. The MJC decides questions relating to marriage, divorce, maintenance and other religious issues. A case in point is the *Halaal* certificate issued to restaurants and food outlets, indicating to Muslims that it will be acceptable to eat at those establishments: see <http://www.mjc.org.za> (accessed 20 March 2012).

<sup>18</sup> S 15 of the Constitution of the Republic of South Africa.

is a case in point;<sup>19</sup> so too are the practices whereby it is easier in terms of Muslim personal law for men to divorce women than for women to divorce men, where Muslim widows inherit less than they would under civil law, and where Muslim women have a very limited entitlement to maintenance if their husbands leave them.<sup>20</sup> South Africa has started the process of addressing those issues by the introduction of the Draft Muslim Marriages Bill (hereinafter referred to as the Muslim Marriages Bill or the Bill).<sup>21</sup> The Bill makes provision for the recognition of existing Muslim marriages, including monogamous and polygynous marriages, as well as an existing civil marriage to a second wife, all of which become imperative within a constitutional framework that seeks to protect women against harmful and sometimes discriminatory religious and cultural practices. The Bill defines *khul* or *khul'a* as follows: "*khul'a*, means the dissolution of the marriage bond at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic law."<sup>22</sup>

This article will examine whether divorce according to the tenets of Islam has the potential to address the particular needs of women. To this end, the following will be discussed: the status of women in Islam, Islamic law on marriage and divorce, and the law of *khul* and its consequences. The law of *khul*, which is a type of divorce found in Islam, will be explored in detail to ascertain whether it has the potential to enhance the protection of women's rights within an Islamic framework.

### 3 ISLAM AND THE STATUS OF WOMEN

The period before the introduction of Islam is generally referred to as the *jahiliya* period, characterised by ignorance and barbarism.<sup>23</sup> During this period women were treated as an "object of sale", which led to them being exploited by their own fathers and, subsequently, by their husbands.<sup>24</sup> Women were forced to accept the primary role of being wife and mother which was a product of a patriarchal society.<sup>25</sup> The father possessed the right to sell his daughter in marriage to the highest bidder. The husband, in turn, exploited the wife by possessing the right to terminate the marriage at any time and for any reason.<sup>26</sup>

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<sup>19</sup> Kaganas F & Murray C "Law, women and the family: The question of polygyny in a new South Africa" in Bennet TB *et al* (eds) *African customary law* (1991) 116 at 119.

<sup>20</sup> Cachalia F "Citizenship, Muslim family law and a future South African constitution: A preliminary enquiry" (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 392 at 402.

<sup>21</sup> Muslim Marriages Bill (as approved and recommended by the South African Law Reform Commission and adapted by the Department of Justice and Constitutional Development) 2010. The South African government initiated the proposed Muslim Marriages Bill as far back as 1993.

<sup>22</sup> Of interest, see also South African Law Reform Commission Project 106 – *Islamic marriages and related matters* (July 2003).

<sup>23</sup> Barlow R & Akbarzadeh S "Women's rights in the Muslim world: Reform or reconstruction?" (2006) 27:8 *Third World Quarterly* 1481 at 1484.

<sup>24</sup> The exploitation of women before the introduction of Islam would also extend to the brother(s) if the father was deceased.

<sup>25</sup> Esposito JL "Preface" *Women in Muslim family law* (1982) ix at x.

<sup>26</sup> Pearl D "Historical Foundations" in Pearl D *A Textbook on Muslim personal law* 2ed (1987) 1 at 2-3.

Islam was revealed in the early seventh century to Muhammad by the angel Gabriel.<sup>27</sup> The *Qur'an* was disclosed to Muhammad, who spoke only of what was revealed to him and not from imagination.<sup>28</sup> Therefore, Muhammad's mission was the spread of Islam as a religion. Kamali rightly argues that the *Qur'an* consists of a manifest revelation which, in turn, is defined as the communication from God to Muhammad.<sup>29</sup> Therefore, the *Qur'an* is considered by both scholars and Muslims generally as the "literal" word of God.<sup>30</sup> Islam is thought to have introduced significant reforms to the rules of succession and family law.<sup>31</sup> One of the major reforms contained in the *Qur'an* is, for example, to be found in the area of family law relating to the status of women. Pearl correctly states that one of the aims of the *Qur'an* was to alleviate the deprived status of Arabian women.<sup>32</sup> The advent of Islam thus set in motion a new course and introduced new standards concerning the rights and duties of women.

One of the standards introduced by Islam was the transformation of a woman from being an "object of sale" and directing the husband to pay a dower (*mahr*) to his wife.<sup>33</sup> The importance of the *mahr* is acknowledged in the *Qur'an* as a requirement preceding the marriage.<sup>34</sup> By ordering the husband to pay his wife a *mahr*, Islam introduced the wife as a contracting party in her own right to her own marriage. The practice that existed during the pre-Islamic period whereby the husband could terminate the marriage at any time and for any reason was also curtailed.<sup>35</sup> To this end, Islam introduced *iddat* (a waiting period). This meant that although the husband still possessed the unilateral right to terminate the marriage at any time, the *iddat* at least sought to temper this right.<sup>36</sup>

The length of the *iddat* is three months or three menstrual cycles.<sup>37</sup> The *iddat* differs from case to case.<sup>38</sup> Furthermore, it may also be interpreted as providing a

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<sup>27</sup> Pearl (1987) at 2 - 3. The primary sources of Islam are the *Qur'an* and the *sunnah* of Prophet Muhammad. Whilst the *Qur'an* gives Muslims a primary rule of life, there are many matters where guidance for practical living is necessary but about which the *Qur'an* is silent. In such cases it was then necessary to follow the custom or usage of the Prophet. The custom and usage of the Prophet is also referred to as the *sunnah*.

<sup>28</sup> Doi AR "The sunnah: Second primary source of Shari'ah" *Shari'ah: The Islamic law* (1984) at 45.

<sup>29</sup> Muhammad is seen as the messenger of Allah's word which has been delivered to him for the spreading of Islam. According to the Divine revelations, Muhammad is seen as the last of all Prophets.

<sup>30</sup> Kamali (1991) "The first source of shari'ah: The Qur'an" *Principles of Islamic jurisprudence* (1991) at 14.

<sup>31</sup> Pearl (1987) "Historical foundations" at 2. It falls beyond the scope of this article to explore the various changes that Islam brought to the laws of succession.

<sup>32</sup> Pearl (1987) "Historical foundations" at 2.

<sup>33</sup> Yusuf AA "Chapter IV, verse 19" *The Holy Quran: Text, translation and commentary* (1938) 178 at 184.

<sup>34</sup> Yusuf (1938) "Chapter IV, verse 3" at 179.

<sup>35</sup> Before the advent of Islam, the practice of divorce varied in different parts of the world and would result in unfair treatment of women. The husband could divorce his wife for any reason and the woman had no legal recourse nor receive any maintenance nor claim any other right from the husband.

<sup>36</sup> Doi AR "Divorce in the Shari'ah" *Women in Shari'ah (Islamic law)* (1989) 81 at 100.

<sup>37</sup> Yusuf (1938) "Chapter II, verse 228" at 89.

<sup>38</sup> The term "waiting period" or "*iddat*" refers to the period of waiting for the woman before remarrying after her divorce or death of her husband. However, the waiting period or *iddat* differs from case to case. In the case of a divorced woman who menstruates, the waiting period is three menstrual cycles. The

reconciliation period for the husband and wife, the rationale being that although the husband has the right to terminate the marriage at any time, the termination may have been exercised in haste or in anger. Nadvi correctly points out that the reconciliation period can save the family from being divided and protects the children from the trauma of a broken home.<sup>39</sup> It could, however, also be argued that if the marriage relationship has irretrievably broken down, the reconciliation period will be of no value. However, even under such circumstances the three monthly cycles will still have to be observed as the possibility could exist that the wife may be pregnant at the time that the marriage is terminated. Doi avers that in the event that the wife is pregnant, the *iddat* will prevent any confusion as to who is the father of the child.<sup>40</sup> As soon as the mother has given birth the *iddat* comes to an end.

Thus, inferences can be drawn from the abovementioned, that one of the core principles of Islam was the improvement of the status of women within the context of the family. Furthermore, advocates of women's equality groups argue that women during the time of Muhammad were actively involved in many spheres of society.<sup>41</sup> Areas that women were particularly involved in included business, literature, religion, law and, surprisingly, warfare.<sup>42</sup> In addition, the prevailing attitude was that women were individuals and not dependent persons.

## 4 THE ISLAMIC LAW OF MARRIAGE AND DIVORCE

### 4.1 The concept of marriage in Islam

In this section, the institutions of marriage and divorce will be addressed. These institutions are seen as a process within an Islamic framework. The institution of marriage in Islam is regarded as one of the most virtuous and approved acts.<sup>43</sup> Unlike some other religious faiths which consider celibacy as a means of salvation and a virtue, Islam does not adhere to the theory of celibacy.<sup>44</sup> Muslim men and women are expected to marry unless there are cogent reasons not to do so, such as, monetary constraints or physical frailties.<sup>45</sup> Marriage is not seen as a sacrament, as in Christianity; however, the

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waiting period for a woman who has passed the age of menstruation is three lunar months, and in the case of a woman whose husband is deceased the period is four months and ten days respectively.

<sup>39</sup> Nadvi SHH "Muslim Personal Law" *Islamic legal philosophy and the Qur'anic origins of Islamic law (A legal-historical approach)* (1989) 47 at 63.

<sup>40</sup> Doi (1989) at 100. See also Yusuf (1938) "Chapter II, verse 2:228" at 178-179.

<sup>41</sup> Entelis J "International human rights: Islam's friend or foe? Algeria as an example of the compatibility of international human rights regarding women's equality and Islamic law" (1997) 20 *Fordham International Law Journal* 1251 at 1286.

<sup>42</sup> Entelis (1997) at 1286-1287.

<sup>43</sup> Doi (1989) "Marriage and sexual relations" at 31.

<sup>44</sup> Doi (1989) at 31. Celibacy is practised widely in Christianity, Buddhism and Jainism. Muslims consider the institution of marriage an important aspect of being a Muslim.

<sup>45</sup> Reiss M "The materialization of legal pluralism in Britain: Why Sharia Council decisions should be non-binding" (2009) 26 *Arizona Journal of International & Comparative Law* 740 at 747.

marriage contract does possess spiritual and moral overtones and undertones.<sup>46</sup> Therefore, based on *Qur'anic* injunctions and the narrations of Muhammad, marriage is compulsory for all Muslims.

And among His signs is this, that He created for you mates from among Yourselves, that you may Dwell in tranquillity with them, And He has put love And mercy between your hearts. Verily in these are Signs for those who reflect.<sup>47</sup>

Furthermore, it is provided that “And Allah has made for you your mates of you own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best”.<sup>48</sup> Before the parties may enter into marriage certain requirements must be fulfilled. These requirements are: “both parties must be sane and have reached puberty, neither party may have been breast-fed from the same women, men are not allowed to marry antecedents or descendents of his wife to be nor the descendents of any women with whom he has committed adultery.”<sup>49</sup> Muslim women are prohibited from marrying non-Muslim males, whereas Muslim men may marry non-Muslim women.<sup>50</sup> Once all the conditions have been met the parties are now free to negotiate the conclusion of the marital contract.<sup>51</sup> The Muslim marriage ceremony is referred to as the *nikah*. The *nikah* consists of an offer (*ijab*) and acceptance (*qabul*), before Muslim witnesses (either two males or one male and two females).<sup>52</sup> The reason for having witnesses is to give the marriage publicity and to differentiate it from fornication, according to Pearl and Menski.<sup>53</sup> A Muslim marriage is seen as a contract, not a sacrament, between a man and a woman.<sup>54</sup> It is advisable that the prospective husband and wife consent to the union in a written contract.<sup>55</sup> Upon marriage a Muslim woman does not lose her identity.<sup>56</sup>

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<sup>46</sup> Thompson E & Yunus F “Choice of Laws or choice of culture: How Western nations treat the Islamic marriage contract in domestic courts” (2007) 25 *Wisconsin International Law Journal* 361 at 363. In addition, Islam considers the family (the result of a marriage) to be the “nucleus of Islamic society”.

<sup>47</sup> Yusuf AA “Chapter XXX, verse 21” *The Holy Quran: Text, Translation and Commentary* (1984) 1049 at 1056.

<sup>48</sup> Yusuf (1984) “Chapter XVI, verse 7 ” at 675.

<sup>49</sup> Reiss (2009) at 746.

<sup>50</sup> Reiss (2009) at 746.

<sup>51</sup> Reiss (2009) at 746. According to Reiss, two schools of Islamic thought have emerged regarding the issue of whether witnesses should be present. One of the schools of thought requires that there be two male witnesses, or one male and two female witnesses present, while the other school of thought is of the opinion that witnesses are not necessary.

<sup>52</sup> Pearl (1987) “Marriage: Form and capacity” at 41. The requirement of witnesses who must be present during the ceremony is dependent on the school of thought to which the couple belong. Within Islam, there exist four dominant schools of thought, namely, *Hanafi*, *Shafi*, *Maliki* and *Hanbali*. There are also other schools of thought found in Islam.

<sup>53</sup> Pearl D & Menski W “Muslim marriage: Form and capacity” *Muslim Family Law* 3 ed (1998) at 139.

<sup>54</sup> Pearl & Menski (1998) at 139.

<sup>55</sup> Oman NB “Bargaining in the shadow of God’s law: Islamic Mahr contracts and the perils of legal Specialization” (2010) 45 *Wake Forest Law Review* 579 at 589.

<sup>56</sup> Oman (2010) at 589. Within an Islamic framework, there is nothing similar to community or marital property. Any or all assets that are brought into the marriage by any of the spouses remain the exclusive property of the person who acquired that property. Therefore, upon divorce, there is no equal distribution of assets. The parties upon divorce walk away with only their own assets which were brought into the marriage.

In the case of a woman who is a “virgin” or a woman who has not been married previously, the marriage negotiations are concluded by her guardian (*wali*), generally the women’s closest male relative.<sup>57</sup> The guardian acts as the representative of the bride, and, in addition, protects the interests of the bride.<sup>58</sup> The participation of the guardian has led to heated debates. Proponents of women’s rights are of the opinion that the bride should be allowed to negotiate her own contract without the aid of the guardian, and there are those who prefer the guardian to act on their behalf. This debate is far from being settled. Of note, Middle Eastern countries, such as Morocco, have embarked on reforms allowing the woman to contract a marriage without the aid of the guardian (*wali*).<sup>59</sup> In Morocco, the bride is now given a choice to accept guardianship, or not.

There is an obligation on the husband is to give the prospective bride a dower known as *mahr* or *saddaq*.<sup>60</sup> The *mahr* is not a bridal price. The *mahr* should rather be interpreted as financial independence which the bride receives from the groom. In addition, the *mahr* becomes the exclusive property of the bride.<sup>61</sup> There is a distinct difference between the *mahr* which is found in Islam, and the African custom of *lobolo*. The *lobolo* is paid to the family of the wife and as such does not become the property of the bride.<sup>62</sup> In Islam, the *mahr* is the exclusive property of the bride and is not shared with the family. Nathan correctly argues that under classical *fiqh*, the marriage contract is not valid without the payment of the *mahr*.<sup>63</sup> Doi argues that in exceptional cases a marriage may be legal although the amount of *mahr* has not been specified, but it is obligatory and must be paid afterwards.<sup>64</sup> The *mahr* in most instances consists of an immediate gift of property; and in modern Muslim marriages the *mahr* can be anything: money, a ring, property such as an, apartment or a car, or whatever has been agreed between the parties. The *mahr* may also be deferred, which means that it will be paid on the happening of an event, such as, death or divorce. The deferred *mahr* can also have a stipulated date in the future when it must be paid.<sup>65</sup>

In addition, a Muslim marriage establishes a relationship in which the parties are assigned a set of contractual rights. This means that each party has a duty to perform

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<sup>57</sup> Oman (2010) at 589.

<sup>58</sup> Oman (2010) at 589.

<sup>59</sup> Ennaji M “The new Muslim personal status law in Morocco: Context, proponents, adversaries, and Arguments”. Available at <http://www.yale.edu/macmillan/africadissent/moha.pdf> (accessed on 10 January 2012). A woman who has come of age is entitled to guardianship as a right, if she so chooses or if it serves her interest, in accordance with one of the interpretations of the *Qur’anic* verse which stipulates that “a woman shall not be forced to marry against her will, and place no difficulties in the way of their (re-) marrying their husbands if it’s agreed between them in kindness”. A woman may entrust, of her free will, guardianship to her father or to a relative. This is the woman’s choice and hers alone.

<sup>60</sup> Doi (1984) “Mahr (Dower)” at 158.

<sup>61</sup> Oman (2010) at 589.

<sup>62</sup> Bekker JC & Rautenbach C “Nature and sphere of application of African customary law in South Africa” in Rautenbach, Bekker & Goolam (2010) at 29.

<sup>63</sup> Oman (2010) at 589.

<sup>64</sup> Doi (1984) “Mahr (Dower)” at 159.

<sup>65</sup> Oman (2010) at 589.

towards the other.<sup>66</sup> Upon marriage, the wife acquires the following: her *mahr*, a right to maintenance, and the right to a fair and just treatment by the husband. The husband acquires the rights to the wife's obedience and sexual availability.<sup>67</sup> The right of the husband to demand obedience from his wife has received severe criticism from women activists. It is seen as discriminatory in nature. The issue of obedience involves obeying all of the husband's lawful commands throughout the marriage. A further right, which has been seen as discriminatory in nature, is that regarding sexual availability. This means that the wife has to make herself available or give her husband "free access to herself at all lawful times".<sup>68</sup> Although these concepts may seem discriminatory, the following argument could be advanced. In terms of Islam the marriage establishes a contract, and each party is assigned a set of contractual rights. These rights confer on each party duties towards the other. Under the right which the wife has, namely, "fair and just treatment by the husband throughout the duration of the marriage", we may very well postulate the following, that the husband should obey all lawful commands of his wife and that he must be sexually available to her by granting her free access to himself at all lawful times.

Another primary obligation of the husband is to provide maintenance to the wife throughout the duration of the marriage.<sup>69</sup> Maintenance could include: food, lodging and clothing for the wife and children during the marriage, as well as during the waiting period (*iddat*) following the termination of the marriage. "Men are the protectors and maintainers of women because God has given the one more (strength) than the other, and because they support them from their means".<sup>70</sup>

Although divorce is abhorred within Islam, a Muslim couple can obtain a divorce "if good relations between the spouses become unbearable and impossible".<sup>71</sup> According to Doi, marriage is premised on the fact that it constitutes a contract, and as such, the contract must be able to function properly. However, the contract will not function properly when it becomes humanly impossible.<sup>72</sup> In such circumstances divorce or *talaaq* (repudiation) finds application within an Islamic context.<sup>73</sup>

## 4.2 The concept of divorce in Islam

A termination of a Muslim marriage can occur in one of the following ways: by the act of the husband, referred to as *talaaq*; by mutual agreement, known as *khula* or *mubarat*; and by a judicial decree of separation at the request of the wife or the husband.<sup>74</sup>

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<sup>66</sup> Fournier P "In the (Canadian) shadow of Islamic law: Translating mahr as a bargaining endowment" (2006) 44 *Osgoode Hall Law Journal* 650 at 662.

<sup>67</sup> Fournier (2006) at 662.

<sup>68</sup> Fournier (2006) at 662.

<sup>69</sup> Fournier (2006) at 662.

<sup>70</sup> Yusuf (1984) "Chapter IV, verse 34" at 190.

<sup>71</sup> Reiss (2009) at 748.

<sup>72</sup> Doi (1984) "Talaq: Divorce in Shari'ah" at 168.

<sup>73</sup> The *talaaq* is the unilateral repudiation or cutting off of the marital bond. In addition, the *talaaq* is exclusively available to the husband. See, in particular, Pearl & Menski (1998) at 279.

<sup>74</sup> Thompson & Yunus (2007) at 366.

According to most scholars, the *talaaq* is the dissolution of a valid marriage contract forthwith or at a later date, by the husband, his agent or his wife duly authorised by him to do so, using the word “*talaaq*”, or a derivative or a synonym thereof.<sup>75</sup> It is possible for the husband to delegate the power to issue the *talaaq* to somebody else, including his wife. This type of *talaaq* is referred to as a “delegated *talaaq*” (*talaaq-i- tafwid*) and could be used by the wife to end the marriage.<sup>76</sup> A *khula* divorce, which does not resemble a *talaaq*, is normally requested by the wife, while a mutual agreement to terminate the marriage represents the third type of divorce, namely, *mabarar*.<sup>77</sup> The most controversial form of divorce found in Islam is the husband’s unilateral right of *talaaq*, which can be in the form of a written document or executed orally. Islam, therefore, grants the right to both parties to divorce when the marriage relationship becomes humanly impossible, yet bearing in mind that Muhammad has cautioned: “Of all things which have been permitted, divorce is the most hated by *Allah*”.<sup>78</sup>

Therefore, although Islam permits the dissolution of the marriage relationship it must be exercised only under exceptional circumstances.<sup>79</sup> In most instances, Muslims would give preference to reconciliation because of their belief system that *Allah* despises divorce.<sup>80</sup> Although both parties may institute divorce proceedings, certain procedural structures apply that enable men to divorce more readily than women.<sup>81</sup> The right to institute divorce proceedings is to be found in the primary sources of Islam, namely, the *Qur’an* and the *sunnah* of Muhammad.<sup>82</sup>

Therefore, within an Islamic framework the marriage relationship may also be terminated by divorce or death of either of the parties. In the absence of death, the husband has the unilateral right of *talaaq* (repudiation) to dissolve the marriage.<sup>83</sup> The right of *talaaq* is recognised in Islam: all that is needed is for the husband to say to the wife, “I *talaaq* you” and the marriage relationship is terminated.<sup>84</sup> Although the husband has the unilateral right of *talaaq*, he may only do so if he is an adult, sane and the decision is of his own free will.<sup>85</sup>

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<sup>75</sup> Thompson & Yunus (2007) at 366.

<sup>76</sup> Pearl & Menski (1998) at 280.

<sup>77</sup> Thompson & Yunus (2007) at 366.

<sup>78</sup> Thompson & Yunus (2007) at 366. See also Gokul R, et al “Law of Marriage” in Rautenbach & Goolam (2002) 39 at 67.

<sup>79</sup> Yusuf (1984) “Chapter IV” at 185. See also verses 19-22 of Chapter IV.

<sup>80</sup> Reiss (2009) at 748.

<sup>81</sup> Reiss (2009) at 748.

<sup>82</sup> Rehman J “The sharia, Islamic family laws and international human rights law: Examining the theory and practice of polygamy and talaq” (2007) 21(1) *International Journal of Law, Policy and the Family* 108 at 110.

<sup>83</sup> Fournier (2006) at 667.

<sup>84</sup> Fournier (2006) at 667.

<sup>85</sup> Reiss (2009) at 747.

### 4.3 Men's right to divorce

According to most scholars, there are two types of *talaaq*, namely, *talaaq al sunna* and *talaaq al bidaa*.<sup>86</sup> The difference between the two is that the former is in keeping with the tenets of Islam, while the latter is frowned upon. Reiss correctly argues that the latter is inconsistent with “Allah’s teachings”.<sup>87</sup>

The *talaaq al sunna* which would dissolve the marriage is divided into two categories, namely, *ahsan*, the most common and approved form of dissolving the marriage and *hasan*, a lesser form of divorce, but still an approved form.<sup>88</sup> The application of the *ahsan talaaq* takes place when the husband “pronounces a single repudiation during a period referred to as *tuhr*, that is when the wife is in the period between menstruations and when no intercourse has occurred”.<sup>89</sup> One of the reasons put forward is that the couple should not have sexual intercourse when the wife is menstruating. In this regard, the *Qur án*, addressing Muhammad, says: “They ask thee concerning women’s courses. Say, they are hurt and a pollution. So keep away from women during their courses. And do not approach them until they are clean”.<sup>90</sup>

As soon as the *talaaq* is pronounced, the wife will enter a period of *iddat*, also referred to as a waiting period. The *iddat* or waiting period consists of a three month menstrual cycle. After the *iddat* period the divorce will become final.<sup>91</sup> The purpose of the *iddat* period is to prevent either of the spouses from remarrying immediately after the repudiation or should the couple sort out their differences, or if the wife is pregnant.<sup>92</sup> The dissolution of the marriage relationship is a consequence of the unilateral *talaaq* issued three months earlier. This type of divorce allows for revocation, where the husband decides to take back the wife during the *iddat* period.<sup>93</sup> This type of divorce referred to as *talaaq al sunna* affords the husband revocation (*raji*) of what was pronounced.<sup>94</sup>

According to Pearl and Menski, the *talaaq al sunna* in the *hasan* form, like the *ahsan*, is regarded as an approved or good method of repudiation, and as such, has been

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<sup>86</sup> Pearl & Menski (1998) at 279. In addition, according to Sunni jurisprudence, the *talaaq* is divided into two categories: *talaaq al sunna*, a *talaaq* given in accordance with the sunna, the recorded words and actions of Prophet Muhammad, and *talaaq al bidaa*, a *talaaq* not in accordance with the sunna but referred to as an “innovation”.

<sup>87</sup> Reiss (2009) at 747.

<sup>88</sup> Thompson & Yunus (2007) at 366.

<sup>89</sup> Pearl & Menski (1998) at 280.

<sup>90</sup> Yusuf (1984) “Chapter II, verse 222” at 78.

<sup>91</sup> Thompson & Yunus (2007) at 366.

<sup>92</sup> Thompson & Yunus (2007) at 366.

<sup>93</sup> Pearl & Menski (1998) at 280.

<sup>94</sup> Pearl & Menski (1998) at 280. Once the *iddat* period is over, the divorce becomes irrevocable. The wife is entitled to any deferred dower payment as declared in the marital contract. Should the husband have a change of decision following the three month period, the correct procedure is that he may marry his ex-wife thereby entering into a fresh marital contract, as well as providing a fresh dower. However, Islam places a limitation on the number of times a couple may remarry each other. Should a situation arise where the husband has divorced his wife thrice, he is prevented from remarrying her unless the wife remarries and divorces another man.

accepted by all the dominant schools of thought.<sup>95</sup> The difference between the *hasan* and *ahsan*, is that the former leads to “greater finality” of the marriage.<sup>96</sup> Where the *talaaq al hasan* is pronounced the procedure is as follows: “three successive pronouncements of divorce are made, they must be made during three consecutive periods of purity (*tuhur*), no intercourse must take place during any of the three periods of purity and lastly, it remains revocable until the third, or final pronouncement of divorce”.<sup>97</sup> On pronouncement of the final *talaaq* the divorce becomes final.<sup>98</sup> The purpose of the *talaaq al hasan* is to give the husband the opportunity to think about his actions and to decide whether he wants to proceed with such action. Lastly, both forms of *talaaq al sunna* are geared towards “reconciliation between the parties”. Thompson and Yunus correctly suggest the following: “The reason for Islam’s insistence on reconciliation is its emphasis on maintaining a secure family life and preventing women and children from having to endure the drama and conflict which is normally associated with divorce”.<sup>99</sup>

Following the demise of Muhammad, a new form of divorce appeared as an innovation (*talaaq al bidāh*). The operation of this type of divorce is that *talaaq* becomes irrevocable as soon as it is pronounced.<sup>100</sup> It happens in the following way: the husband utters the formula “I divorce you. I divorce you. I divorce you” either in one sitting or conveyed to the wife in writing. The disadvantage of this form of divorce is that it leaves no room for reconciliation or reconsideration.<sup>101</sup> This type of divorce has received severe criticism from various scholars and is not supported by the *Qur’an* or *sunna* of Mohammad.<sup>102</sup>

#### **4.4 Women’s right to divorce**

The *talaaq* or repudiation by the husband is not the only form of dissolution of the marital relationship. Under classical *shari’ah*, divorce instituted at the request of the woman is not altogether foreign to Islam, although it does cause some difficulty.<sup>103</sup> This difficulty “should not be overstated”, since one of the basic principles found within

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<sup>95</sup> Pearl & Menski (1998) at 281.

<sup>96</sup> Pearl & Menski (1998) at 281.

<sup>97</sup> Doi (1984) at 178-179.

<sup>98</sup> Doi (1984) at 178-179. The third pronouncement ends the marriage immediately and with “greater finality”, because this was the last of three pronouncements. The wife has to observe the *iddat* period after the third pronouncement. The husband cannot revoke his decision to divorce his wife. Should the husband wish to remarry the woman, he can only do so if she concludes a fresh contract of marriage with another which is consummated, and is then validly dissolved.

<sup>99</sup> Thompson & Yunus (2007) at 368.

<sup>100</sup> Doi (1989) at 88.

<sup>101</sup> Doi (1989) at 88. During the time of Muhammad this practice was severely denounced. According to Doi, this practice was usually performed by ignorant Muslims to satisfy their selfish motives. In addition, when these ignorant persons pronounced the divorce thrice in one sitting, they committed a heinous sin within Islam.

<sup>102</sup> Reiss (2009) at 749.

<sup>103</sup> Alidadi K “The Western judicial answer to Islamic talaq: Peeking through the gate of conflict of laws” (2005-2006) *5 UCLA Journal of Islamic and Near Eastern Law* 3 at 22.

Islam is that a marriage which is not functioning properly should be terminated to avoid further trauma.<sup>104</sup>

Within an Islamic context a Muslim woman can obtain a divorce of her own accord. In this section we will investigate the various forms of divorce which are available to a Muslim woman. First, through a “delegated *talaaq*” which, as a rule, must be contained in the original marriage contract. The couple may agree to it as a modification of, or amendment to, the original contract.<sup>105</sup> It happens this way: “If both parties are in agreement as part of the marriage contract, the wife may be given the right to unilaterally divorce her husband, similar to the right which the husband has to divorce the wife.”<sup>106</sup>

Secondly, by way of judicial intervention (*tafriq*) which is referred to as divorce for cause.<sup>107</sup> This type of divorce is usually granted by a religious judge (*qadi*), and is available in instances of abuse or abandonment.<sup>108</sup> If the woman is successful in obtaining such a divorce, the marriage is terminated and the husband must pay to the wife the deferred *mahr* as stated in the marital contract.<sup>109</sup> In addition, the wife could ask for a *faskh*, which falls under the banner of a judicial divorce (*tafriq*). This type of divorce is used to indicate the formal judicial rescission of the marriage.<sup>110</sup> It has been argued that this is the only way that the wife can obtain a divorce without the husband’s consent and involvement. There is consensus amongst the various schools of thought although they differ as to the grounds of repudiation and the procedure which has to be followed. The wife is allowed a *faskh* divorce on one of the following grounds, namely, injury or discord, failure to maintain, defect on the husband’s part and lastly, the absence of the husband or his imprisonment.<sup>111</sup> According to Fournier, the grounds for this type of divorce could include, impotency on the husband’s part (more poetically described as (the loneliness of the marital bed), non-fulfillment of the marriage contract, mental or physical abuse, and to some degree, the husband’s lack of piety.<sup>112</sup> Therefore, the wife may only apply for a *faskh* divorce if she can prove to the court that her case meets one or other of the limited grounds mentioned above. This type of divorce is a fault based divorced started by the wife.<sup>113</sup> Should the marriage be

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<sup>104</sup> Alidadi (2005-2006) at 749.

<sup>105</sup> Reiss (2009) at 749.

<sup>106</sup> Reiss (2009) at 749.

<sup>107</sup> Oman (2010) at 591.

<sup>108</sup> Oman (2010) at 591.

<sup>109</sup> Oman (2010) at 591. Islamic schools of thought differ to a large degree as to what constitutes a valid reason for the courts to get involved. The most conservative view is that when the husband cannot consummate the marriage or if the husband has disappeared, then the courts may get involved. The schools which hold an enlightened view allow the involvement of the courts where physical abuse exists, the husband cannot support the family, where the husband has been missing for more than a year, or where the husband suffers from a mental disease and because of such mental disease puts the wife at risk. See, in particular, Reiss (2009) at 750.

<sup>110</sup> Rautenbach C, Bekker JC & Goolam NMI “Religious legal systems: Law of persons” in Rautenbach C, Bekker JC & Goolam NMI *Introduction to legal pluralism* 3 ed (2010) 245 at 307.

<sup>111</sup> Rautenbach, Bekker & Goolam (2010) at 307.

<sup>112</sup> Rautenbach, Bekker & Goolam (2010) at 307.

<sup>113</sup> Fournier (2010) at 670.

terminated by the wife through a *faskh* divorce, she is entitled to *mahr*. This type of divorce is considered to be favourable to Muslim women but it also has its difficulties.

And lastly, where there is breach of contract the wife may claim a divorce.<sup>114</sup> The argument is that since marriage is regarded as a contract within Islam, any breach of its provisions could result in a valid ground for divorce. To illustrate this type of divorce by way of an example, a Muslim couple could insert a stipulation in the marital contract that says the husband may not take another wife. Upon his marriage to the second woman, the first wife has grounds for a divorce.<sup>115</sup> In addition to the abovementioned, a wife may divorce her husband by way of *khul*. This type of divorce is at the behest of the wife. The difference between a *khul* and a *faskh* divorce is that for the former no grounds are required for the dissolution of the marriage, while for the latter the wife will have to rely on one of the grounds provided for.

## 5 THE LAW OF *KHUL* AND ITS EFFECTS

*Khul* is derived from *Khul'-al-Thuab*<sup>116</sup> and makes provision for divorce at the instance of the wife.<sup>117</sup> *Khul* thus creates the means through which the wife can seek release from the bonds of the marriage relationship.<sup>118</sup> The following verses in the *Qur'an* are associated with the notion of a *khul* divorce: "Permitted to you, on the night of the Fast, is the approach to your wives. They are your garments and ye are their garments. *Allah* knoweth what ye used to do secretly among yourselves."<sup>119</sup> And furthermore: "If a wife fears cruelty or desertion on the husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best."<sup>120</sup>

If the wife is of the opinion that the husband has failed to fulfil the duties that have been imposed on him by the marriage, she may terminate the marriage at her request.<sup>121</sup> According to Nadvi, conditions which could make family life miserable and loathsome for the wife would include where "the husband is cruel to the wife, failing in his marital obligations, involved in crooked behaviour and neglecting the maintenance of the wife and children".<sup>122</sup> In addition, should the husband suffer from an incurable incompetency or insanity (or any other terminal disease), the wife has the right to terminate the marriage relationship.<sup>123</sup>

The divorce by *khul* is also to be found in the second primary source of Muslim personal law (*shari'ah*), based on the *sunnah* of Muhammad. Muslim scholars, such as

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<sup>114</sup> Reiss (2009) at 750-751.

<sup>115</sup> Reiss (2009) at 750-751.

<sup>116</sup> Literally meaning "to take off one's dress" and thus referring to a metaphoric description of the spouses serving as garments to one another.

<sup>117</sup> Doi (1984) at 192.

<sup>118</sup> Doi (1984) at 192.

<sup>119</sup> Yusuf (1938) "Chapter II" at 73-74.

<sup>120</sup> Yusuf (1938) "Chapter IV" at 221-222. See also, in particular, verse 128 of Sura IV.

<sup>121</sup> Doi (1984) at 96-97.

<sup>122</sup> Nadvi (1989) "Muslim Personal Law" at 61.

<sup>123</sup> Nadvi (1989) "Muslim Personal Law" at 61.

Doi and Nadvi, cite a *hadith* that is found in *Sunan al-Baihaqi* as an explicit authority on *khul*:

A woman came to the Prophet and said: 'I hate my husband and like to separate from him'. The Prophet asked: 'Would you return the orchard that he gave you as dower?' She replied: 'Yes, even more than that.' The Prophet said: 'You should not return more than that.'<sup>124</sup>

Therefore, although a *khul* divorce can be initiated at the instance of the wife, the husband's consent is required. It is, however, the duty of the court or *qadi* (normally a judge) to grant the divorce.<sup>125</sup>

There are a number of disadvantages when a wife seeks a divorce by way of *khul*. One such disadvantage is that when the marriage is dissolved by this method, not only is the marriage dissolved, but the husband's duty to pay a deferred *mahr* also evaporates.<sup>126</sup> *Mahr* means "reward" or "nuptial gift" (also referred to as dower, *sadaqa* or *faridah*).<sup>127</sup> Pearl rightly points out that the *mahr* is an effect or consequence of the marriage contract and not the price paid by the husband in acquiring certain rights which accrue to him upon marriage.<sup>128</sup> Another interpretation of the payment of *mahr* is that it is a sum paid to the wife as a sign of respect.<sup>129</sup> *Mahr* can be divided into two kinds, namely, prompt and deferred. Prompt *mahr*, as the name suggests, must be paid on the conclusion of the marriage.<sup>130</sup> Deferred *mahr* is normally paid upon the dissolution of the marriage by death or divorce or upon other terms to which the parties have agreed.<sup>131</sup>

Therefore, in terms of a *khul* divorce, the wife needs the consent of the husband, or, at the very least, there must be some form of agreement. In addition, the wife has to offer something in return for her freedom. In most instances the wife is compelled to return part (or all) of the *mahr* that she has received.<sup>132</sup> It could thus be argued that the wife buys her freedom from the husband. Doi correctly points out that the wife is not bound to return more than what has been given to her.<sup>133</sup> As this type of divorce is based on an agreement, the wife may offer another type of payment or may offer to do something in exchange for her freedom. This could be illustrated by way of an example: the wife may agree to nurse a child during the two year period of suckling, or keep and maintain the child at her own expense for a fixed period of time as agreed upon.<sup>134</sup>

<sup>124</sup> Nadvi (1989) "Muslim Personal Law" at 62. See also Doi (1989) at 97. The term *hadith* refers to the contents of the *sunnah* which have been put forward in a series of reports. See, in particular, Warren (2008) at 2.

<sup>125</sup> Fournier (2010) at 70.

<sup>126</sup> Fournier (2010) at 70.

<sup>127</sup> Fournier (2010) at 70.

<sup>128</sup> Pearl (1987) at 60. The terms *mahr* and "dower" are used by many scholars interchangeably as both terms denote "reward" or "nuptial gift".

<sup>129</sup> Pearl (1987) at 60.

<sup>130</sup> Fournier (2010) at 70.

<sup>131</sup> Fournier (2010) at 70. A deferred *mahr* or "dower" can also be referred to as *muwajjal*.

<sup>132</sup> Doi (1989) at 97.

<sup>133</sup> Doi (1989) at 97.

<sup>134</sup> Doi (1989) at 97.

The question regarding the return of the *mahr* that is payable to the wife by the husband has created its own set of problems. These can roughly be divided into three categories. The first relates to whether there has to be an agreement or a consensus between the husband and the wife. The second relates to whether the *mahr* is the sole property of the wife, or whether she only has a limited real right to the *mahr*. Can the wife, for instance, use the *mahr* as a bargaining tool to obtain her freedom should she initiate a *khul* divorce? And finally, the third relates to whether the husband stands to gain anything from this type of proceedings. To whom does the *mahr* belong, for instance, and which party stands to benefit the most from this type of divorce proceeding?

Concerning the question of consensus (or that there must be some form of agreement), it could be argued that in divorce proceedings the issue of an agreement to obtain a divorce is not self-evident. When the parties agree to obtain a divorce, it is most likely because one of them is dissatisfied with the marriage relationship. This dissatisfaction could stem from various reasons and conditions. Therefore, it could hardly be argued that divorce is based on an agreement of the parties. However, it must be stated that there are cases in which the parties have amicably agreed to dissolve the marriage relationship. The amicable agreement to dissolve the marriage must, however, be seen as the exception rather than the rule.

In so far as a *khul* divorce is concerned, there exists a plethora of opinions that agreement or consensus must be reached by the parties.<sup>135</sup> Consensus is thus viewed as a type of requirement.<sup>136</sup> Should the situation arise that the husband refuses or withholds his consent, the wife may approach the courts.<sup>137</sup> In such circumstances the *qadi* (judge) will examine the reasons for the husband's refusal. Thus, should the husband withhold his consent, the courts will assist the wife. This in effect means that there is no need for an agreement or a consensus to exist between the parties as the wife may obtain a *khul* divorce despite the fact that no agreement or consensus has been reached by the parties. This reiterates the fact that a divorce *khul* is, after all, at the behest of the wife.<sup>138</sup>

In a leading judgement handed down by the Supreme Court of Pakistan, it was held that a *khul* divorce is a right conferred by the *Qur'an* on the wife. Furthermore, it is a right available to the wife regardless of whether the husband is withholding his consent. The Supreme Court, in finalising the divorce, noted:

In Islam, marriage is a contract and not a sacrament, and whatever sanctity attaches to it, remains basically a contractual relationship between the parties. Islam recognises the weakness in human nature, has permitted the dissolution of the marriage, and does not make it an unseverable tie, condemning the spouses to a life of helpless despair. The Quranic legislation makes it clear that it has raised the status of women. The Holy Qur'an declares in verse 2:228 that

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<sup>135</sup> Doi (1989) at 97. See, in particular, Nadvi (1989) at 63.

<sup>136</sup> Rehman (2007) at 118.

<sup>137</sup> Doi (1989) at 98-99.

<sup>138</sup> Doi (1989) at 98-99.

women have rights against men similar to those that men have against them. It conferred the right of *khula* on women as against the right of *talaq* in men.<sup>139</sup>

Ludsin rightly cautions that a *khul* divorce renders a woman's rights to equality and autonomy relational since access to these rights depends on the husband agreeing to the divorce.<sup>140</sup> This means that the wife will lose the property that was given to her by her husband when obtaining a *khul* divorce. Another advantage which accrues to the husband is that he may not have to honour his obligation in terms of the deferred *mahr* payable in the future. Therefore, in terms of a *khul* divorce, the wife relinquishes all financial entitlements she received or should receive from the husband in exchange for an agreement to obtain a divorce.<sup>141</sup> With this type of divorce the *mahr* is thus, in effect, not the property of the wife.

However, should the wife find herself in an abusive marriage and the husband's sole objective is that the wife should forfeit the *mahr*, Doi is of the opinion that the wife need not forfeit the whole of the *mahr*.<sup>142</sup> Should the wife proceed with any of the other options that are available to her to procure a divorce, the wife may insist that the (dower) *mahr* is her own property and the husband would be forced to pay any of the *mahr* immediately to her. The options to lodge a complaint with the *qadi* and request a formal separation remain open to the wife. If the allegations made about the husband are correct, the *qadi* will call on the husband to repudiate the wife. In instances, where the husband refuses to do so, the *qadi* himself will pronounce a divorce which will operate as a valid repudiation. In such an instance the husband will be liable for the whole or deferred *mahr*, if any.<sup>143</sup>

Although the above situation does not fall squarely within the scope of a *khul* divorce, it is an option that remains available to the wife. If the wife is of the opinion that the husband's sole purpose is to ensure that she returns the *mahr*, then a judicial separation is a more favourable route to follow. This option, however, would only be available to women who live in countries where Muslim personal law is followed, as religious courts would have to have been established for such purpose.

Finally, with regard to the advantages that accrue to the parties in a *khul* divorce. The advantage which the wife receives from proceeding with a *khul* divorce is that she may use the *mahr* as a bargaining tool. Should the marriage be an unhappy one or should the husband refuse to agree to a divorce, she would offer to return her *mahr* to the husband. This could prove a worthy incentive to the husband, as the husband will be released from any further financial obligations to the wife. The benefits which the husband receives from a *khul* divorce are twofold. First, any amount of *mahr*, whether prompt or deferred, is extinguished immediately. Secondly, the husband may also require that the wife waive any maintenance payments that are due to the children. In

<sup>139</sup> Rehman (2007) at 122. See also *Khurshid Bibi v Muhammad Amin* (1967) PLD SC 97 and Yusuf (1938) "Chapter II, verse 228" at 89-90.

<sup>140</sup> Ludsin H "Relational rights masquerading as individual rights" (2008) 15 *Duke Journal of Gender Law & Policy* 195 at 219-220.

<sup>141</sup> Ludsin (2008) at 219 - 220.

<sup>142</sup> Doi (1984) at 193.

<sup>143</sup> Doi (1984) at 193.

certain instances, the husband may request that the wife in exchange for a *khul* divorce relinquishes her custodial rights. However, such a course of action may be viewed as extreme<sup>144</sup> and to be in conflict with the injunction in *Qur'an* Chapter 2 verse 229 which reads: "A divorce is only permissible twice. After that the parties should either hold together on equitable terms or separate with kindness."<sup>145</sup>

It must also be pointed out that for the wife to relinquish her custodial rights in return for her freedom cannot be reconciled with the words "equitable" and "kindness". As one of the primary sources of Muslim personal law and deemed by many to be the "literal word" of *Allah*, it could hardly be argued justly that a woman would have to accede to such a request from her husband in order to obtain a divorce. After all, when a divorce takes place it must be done in accordance with the sources of Islamic principles. This must be seen as being in accord with the creed to which Muslims adhere, namely, *La Ilaha Illallah* – There is no god but *Allah*.

Al-Azami rightly points out that the above creed is no mere metaphysical phrase, but a living creed which demands of all Muslims absolute submission to the will of *Allah* and not to the will of man.<sup>146</sup> Therefore, although divorce is something that must not be embarked on without proper thought, it remains a permissible course of action to both parties within the contract of marriage.

## 6 CONCLUDING REMARKS

A *khul* divorce is a procedure whereby the wife offers something in return for her freedom. From a non-religious perspective, *khul* could also be described as a contract of barter or a contract of exchange – an exchange of one thing for another. Such a description is of course not entirely correct, as the consequences emanating from this type of divorce are of a serious nature. The woman may relinquish all of her property which has been given to her upon marriage and in extreme instances she may have to lose custody of her children and relinquish her right to maintenance. A *khul* divorce thus seems to place the woman on an unequal footing in relation to the husband. This is not in accord with numerous international human rights instruments which insist that as far as marriage is concerned, both parties thereto should be treated equitably.<sup>147</sup>

The main concern revolves around the issue of the *mahr* which is given to the wife as a gift and which must be viewed as a consequence flowing from the contract of marriage. The *mahr* is a gift and must not, therefore, be interpreted as payment to a woman to get married. The general view amongst scholars is that the payment of the *mahr* is indeed a mark of respect for the woman. In terms of certain African customs,

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<sup>144</sup> Ludsin (2008) at 219.

<sup>145</sup> Yusuf (1938) "Chapter II, verse 229" at 90.

<sup>146</sup> Al-Azami (1985) at 7. See also Yusuf (1938) "Chapter VI, verse 162" at 338.

<sup>147</sup> See, for example, Art 1 and Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, GA Re 34/180, UN GAOR 34<sup>th</sup> Session, Supp No 46, UN Doc A/34/36 (1980), adopted 18 December 1979. See also the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women which was adopted on 11 July 2003 in Maputo, Mozambique, especially Art 6 which expressly states that partners to a marriage shall enjoy equal rights and status therein.

payment of livestock or other consideration is expected. This payment is often referred to as *lobolo* and is paid to the family of the bride. It is, however, important to note that a Muslim marriage, unlike other religious marriages, is based on a contract between the parties. Since the *mahr* can either be prompt or deferred, the parties may agree that a small portion of the *mahr* be paid immediately and the larger (or full) portion be paid at a later date as agreed upon by them. This later date can be inserted into the marital contract by the parties or may be agreed to verbally. It is advisable to have the date inserted in the marital contract to prevent any confusion. Although verbal contracts are considered as valid under South African law, they do provide their own set problems. Therefore, as a means to protect the wife, this later date cannot merely be sometime in the future and as a rule should be reduced to writing.

It has been suggested that a wife only has a relational right to the *mahr* in terms of a *khul* divorce. This means that should the wife proceed with this type of divorce, she will have to surrender the *mahr* which she had received from the husband. This is not, however, entirely correct. The wife would in such instances have to surrender not only the prompt *mahr*, but also the deferred *mahr*, as agreed to by the parties and that has not yet been paid. The husband would then be released from any further payment towards the wife as regards both the agreed and deferred *mahr*. This would also include any maintenance which would be due to her. Some scholars are of the opinion that the wife may offer an alternative, such as attending (suckling) a young child, or that the husband may be agreeable that only a portion of the *mahr* has to be paid in return for the wife to be set free from the bonds of marriage.

The wife may use the return of the *mahr* as a bargaining tool should the husband not agree to grant her a divorce. This bargaining tool may be extremely effective if the husband realises that he would not have to pay any outstanding amount(s) due to the wife. Should the husband repudiate the wife in the normal course of events at his instance, he would have to pay all outstanding amounts due her in terms of the dowry and maintenance, and he would still be liable to maintain his children. This could be a quite costly procedure as it would in some instances put the husband in some financial difficulty should he decide to remarry. The possibility furthermore exists that the marriage relationship may be abusive in nature and that the husband may force the wife to proceed by way of a *khul* divorce in order not to pay any amounts that are rightly due to her. In the early years of Islam, a *khul* divorce would certainly have left the wife in a financially embarrassing situation. Her surrender of the *mahr* would in most instances have meant the loss of the only property she possessed. Also, the prospect of not receiving any form of maintenance subsequent to the divorce would have been detrimental.

A further issue of concern relates to questions of literacy and general levels of education. Formal education about religion and the rights of women is to a certain degree non-existent in many poorer communities. The pervasiveness of patriarchy and male dominance means that men control critical information and may thus choose to follow a particular school of thought which benefits existing male privilege, and consequently either ignore or undervalue those rights which are due to women. Religious education is seen as a major obstacle by women, as often any interpretation of

the *Qur'an* or the *sunnah* is undertaken exclusively by males. Any challenge by women to secure their rights is thus all too often construed as being disobedient to the law of God. Yet there has been a noticeable rise in women's groups since the 19<sup>th</sup> century challenging the male interpretation of the *Qur'an* and the *sunnah*. In addition, women in Muslim countries, such as, Morocco, Tunisia and Egypt, have organised themselves by gaining formal education, not only in the fields of commerce and law, but most significantly in theology.

Although not on a par with men in so far as income is concerned, women are increasingly occupying influential positions that can directly serve to educate their fellow Muslim women on the various interpretations of scholarly writings to which many women may have no access. A *khul* divorce is not in keeping with the spirit and object of international instruments relating to the rights of women. Although it may well be argued that the rights of women are not being adequately addressed and implemented, one must not lose sight of the fact that true change is occurring at a steady pace in many Muslim countries where such change would, until very recently, have been unimaginable.

In conclusion, *khul* divorce is about the woman giving something to the husband in return for her freedom. The return of something would in most instances be the *mahr* which the woman has received from the husband, including an advantage for the husband who does not have to pay maintenance to the wife, once the divorce is finalised. The something returned does not have to be the *mahr* and it could also be certain services, such as, the suckling of an infant if there are indeed children. By offering this the husband's burden would be eased as he would not need to get a person to suckle the young. A *khul* divorce could also act as a safety valve in cases where the woman is unhappy in her marriage or where there is abuse of a physical or emotional nature. Furthermore, divorce in Muslim countries is often seen as a drawn out process and which does not address the plight of women that are in dire need of help. The *khul* divorce does not require an inspection by the courts which is an added advantage. This added advantage would accrue to the woman. However, most women living in poorer communities and who have had no formal education are dependent on the *mahr*, which has been given to them including maintenance. In such cases the divorce by way of *khul* is not an option, they are best protected by other procedures which are available to them. It may also be argued that the *khul* divorce would only favour those who have financial means and are not entirely dependent on their husbands.

While controversy regarding the constitutionality of *khul* may have come to an end in Egypt, its application is still being hotly debated. The *khul* provision continues to be met with considerable resistance and thus one can rightly question whether and to what extent it actually served to improve the legal position of women. In 2008 the number of Egyptian couples who divorced increased by 8.4% compare to that of the previous year, according to the Central Agency for Public Mobilization and Statistics. Nearly 40% of marriages in Egypt now end in divorce, making it the highest rate in the Arab world. Egypt is also one of the few Arab countries in the world where divorce is discussed freely, largely due to feminist initiatives. In a South African context, where great economic disparity still exists, Muslim women in poorer communities are unlikely

to avail themselves of this remedy. It must also be questioned why only Muslim women who seek their freedom through divorce are compelled to make such a choice. The possible constitutional implications of *khul*, especially as conceptualised in the broader context of the Muslim Marriages Draft Bill, will also therefore have to be considered.