**Divorce and disparity**

BY A S FA N D YA R W A R R A I C H 2021-03-19

IF you are a Muslim man in this country, getting divorced is a remarkably simple and elegant process. All you are required to do is to pronounce `talaq`in front of two witnesses (verbally or in writing, the choice is entirely yours) and then notify this fact to both your wife and the relevant local body typically a union council or a cantonment board or some synonymous set-up. All in all, it is a wholly unilateral procedure final, effective and dependent on none.  
  
Within 30 days of having been notified so, the local body in question shall form what the law calls an `arbitration council`, which shall be tasked with bringing about a reconciliation between you and your estranged spouse. If you fail to reconcile within a 90-day period, or simply neglect or even wilfully refuse to go when summoned by the council, the divorce will stand automatically finalised, the local body will issue a certificate of confirmation, and voila! You shall be free from the contractual and holy bonds of matrimony.  
  
If on the other hand you happen to be a Muslim woman, this process gets far more complicated. If you are fortunate enough to have a delegated right of divorce (talaq-i-tafweez), you may enjoy all the privilege that is accorded to a man and follow the exact same procedure as summarised above, but, if you hold no such right (as is the case with the majority of marriages), you must take recourse to our family courts, and there, in dingy corridors where anxious families pace around in endless circles, frantically chasing the slippery spectre of justice, you must file and contest a suit seeking dissolution of your marriage by way of khula either on account of a legally recognised fault (like cruelty, desertion, impotence and such) or no fault at all (like the fact that you believe that the two of you are simply incompatible).  
  
For this, you will need to hire a lawyer, who will doubtless charge a fee minimal or reasonable or extortionate, as the case may be. On the first date of hearing, the judge shall admit your suit and direct your counsel to serve notices on your spouse, the costs of which you must necessarily bear. Per law, your husband should have no more than 30 or so days to appear before the court and submit hisreply, but in practice, a cunning lawyer can easily employ some of the procedural tricks of our trade and wheedle out a couple of months.  
  
Once a reply has been tendered, you will both be called for a `pre-trial hearing`, where the judge will essentially ask if you are willing to discard your differences and enter into a compromise (albeit an overenthusiastic adjudicator may take this liberty to grill you with intrusive and at times insensitive questions). Thankfully, the personal inclinations of the judge are irrelevant, and at this point, if you record a clear and categorical state-ment that you do not wish to reconcile, the judge must decree your suit immediately no ifs or buts (unless it is a f ault-based claim, which may, if you insist, proceed further).  
  
With a certified copy of this judgement in hand, you shall then be re-routed to the exact same procedure that a man has to comply with while exercising his right to declare talaq notifying the relevant local body, waiting for the arbitration council to complete its 90-day existence, and finally, walking away with a divorce certificate.  
  
As is evident, divorce laws in our country do not treat men and women with even the faintest trace of parity. While both are subject to going through arbitration councils, women must bear an additional burden f acing the physical, emotional and financial cost of having to go through an entire judicial obstacle course to achieve the same result.  
  
There is a reason for this dif ferential treatment.  
  
Dig into not-so-distant history and we find that initially, the law on khula was purely fault-based.  
  
Backin1952,afullbenchof theLahore High Courtconcluded that mere `incompatibility of temperament` was not an acceptable reason for granting khula, for `if wives were allowed to dissolve their marriages, without the consent of their husbands, by merely giving up their dowers, paid or promised to be paid, the institution of marriage would be meaningless as there would be no stability attached to it`. It did not question why this `stability` remained unthreatened when a man already held the right to divorce at any time and for any reason.  
  
In 1959, this judgement was revisited and this time, the court reasoned that to ignore incompatibility or any similar no-fault plea would force people into hateful unions, leaving them incapable of observing `the limits of God`. By 1967, the Supreme Court too had endorsed this view, and thus, the consent of the husband became irrelevant altogether and incompatibility became a valid ground for khula though women continued to be subjected to the trials and tribulations of recording testimony and getting cross-examined, for naturally, the judge had to be `satisfied` that any acrimony had indeed developed.  
  
The real sea change came in 2002, when Musharraf`s government enacted an amendment mandating courts to summarily decree claims for khula as soon as reconciliation failed. For no-fault claims for khula, this bypassed the evidence stage completely, stripping the court of any judicial function per se and turning them into nothing more than a formality (an eminently sensible position, since incompatibility is not a subject fit for judicial determination).  
  
As welcome as these piecemeal developments are, they do lead to a follow-up question if family courts are no longer exercising any adjudicatory role in such cases, on what basis are women still being made to go to courts to assert this right in the first place? Would it not be f airer and more equitable for them to simply notify the concerned local body of their intention to seek khula, just as men already do? Parity is paramount. And all people deserve to exit the unions of their choice gracefully, peacefully and above all, equally.  The writer is a barrister.