

ALTERNATIVE TO THE MATRIMONIAL LITIGATIONS OF MUSLIMS IN INDIA

MOHAMMAD ARIF

Sr. Assistant Professor, Department of Law, University of Jammu (Tawi) (J and K)
Post Office, Jammu university. 180006

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ABSTRACT

Marriage in Indian society is of great importance. India is a multi religious Country and here the matrimonial matters are governed by the personal Laws. Among Muslim marriage is contractual in nature. It may give arise to circumstances wherein it becomes difficult for the parties to live in the marital relationship. In such a situation the remedy available with the parties is only the dissolution of marriage. Under Muslim law the husband has inherent powers of divorce whereas the wife cannot divorce herself from her husband without his consent. The remedy available to wife is either talaq-e-tafweez or dissolution by judicial process. The later involves the formal mechanism which is normally slower, expensive and cumbersome. At this juncture the establishment of informal mechanisms of settlement of disputes provides source of motivation for the justification of more concrete institutions. As the Mohammedans Law is based on the Quran mostly, it governs relations between Muslims including marriage and divorce. The Holy Quran on several occasions prescribes for amicable settlements of disputes including the matrimonial conflicts. In the present article an effort is being made to bring out the relevance of informal mechanism for the settlement of matrimonial disputes among Muslims.

Keywords: Muslim, Matrimonial, Disputes, ADR, Quran, Sunna, Sharia, Khula, Women

Introduction:

"Discourage litigation; persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time."

Abraham Lincoln

Conflicts are as old as human societies themselves. Historically, individuals, social groups and societies have disputed and competed against one another over scarce commodities and resources, land, money, political power, and ideology. They have even fought one another and bitterly sought the elimination and subjugation of rivals, in order to control these resources and commodities. But at the same time, human societies and groups have found their own ways and means for averting and resolving conflicts. The existing body of literature confirms that the nature and causes of conflicts and the mechanisms for resolving them are deeply rooted in the culture and history of every society.

Thus the conflict is a fact of life. It is not good or bad. However, what is important is how we manage or handle it. Alternative Dispute Resolution (ADR) refers to a variety of streamlined resolution techniques designed to resolve issues in controversy more efficiently when the normal negotiation process fails. It is an alternative to the Formal Legal System. It was being thought of in view of the fact that the Courts are over burdened with cases. In litigation, the dispute is understood only in terms of the evidence presented by the parties to the court. The Judge or Magistrate determines what evidence is relevant and what the law is before making a ruling on which party is right. Therefore, it is known as rights-based dispute resolution. The court's ruling becomes an enforceable order. In almost all civil cases the losing party is required to pay the legal costs of the winning party. Whereas, in ADR the parties meet together with a neutral third party (the neutral) to discuss the case, they come to a resolution upon which the parties agree. When the parties are agree, there is less likely to be a winner and a loser. Another significant characteristic of ADR is that the issues need not be as narrowly confined as they are in litigation. This may give greater satisfaction to the parties as it allows the resolution to address underlying issues which may be excluded in litigation. That is why this is known as interest-based dispute resolution.

ADR includes a range of processes alternative to litigation. These may include Arbitration, Mediation, Conciliation, Negotiation, *Lok Adalat* etc. Court officials need not necessarily conduct court-ordered ADR, although at present as a general rule they do¹. ADR processes do not normally result in enforceable

¹ . Rule 1, Order 10 of CPC, 1908

outcomes and are effective only because the parties agree to them. However, the parties' resolution can become enforceable as a court order if the ADR process is related to court proceedings and the resolution is entered as a judgment by consent.

Explanation of the various kinds of ADR mechanisms:

a) Arbitration: Arbitration, in the law, is a form of alternative dispute resolution specifically, a legal alternative to litigation whereby the parties to a dispute agree to submit their respective positions to a neutral third party for resolution.²

b) Mediation: Mediation has been defined as a private informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. Mediation is a process of dispute resolution focused on effective communication and negotiation skills. The mediator acts as a facilitator assisting the parties in communicating and negotiating more effectively, thereby enhancing their ability to reach a settlement. Mediation is being actively utilized in almost every conceivable type of dispute resolution and comes in various forms. This process has also been effectively adopted for multiple party dispute resolution with tremendous success.

c) Conciliation: Conciliation is an alternative dispute resolution process whereby the parties to a dispute agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. If the conciliator is successful in negotiating an understanding between the parties, said understanding is almost always committed to writing and signed by the parties, at which time it becomes a legally binding contract and falls under contract law.³

d) Negotiation: Negotiation is the process whereby interested parties resolve disputes, agree upon courses of action, bargain for individual or collective advantage, and to craft outcomes which serve their mutual interests. It is usually regarded as a form of alternative dispute resolution. Given this definition, one can see negotiation occurring in almost all walks of life, from parenting to the courtroom.⁴

Negotiation is also sometimes called mutual gains bargaining. The mutual gains approach has been effectively applied in environmental situations as well as labour relations where the parties (e.g. management and a labor union) frame the negotiation as problem solving.

f). Lok Adalat: The institution of *Lok Adalat* means People's Court. *Lok* stands for people and the *Adalat* for the court. Both pre-litigation and post-litigation efforts are invited by *Lok Adalats* to enable the entire society to create peace and harmony. The Legal Services Authorities Act, 1987 makes provision for free legal aid which can be availed both before the Courts and *Lok Adalats* so constituted. The concept of *Lok Adalat* is no longer an experiment in India, but it is an effective and efficient alternative mode of dispute settlement. The true basis of settlement of disputes by the *Lok Adalat* is the principle of mutual consent, voluntary acceptance of conciliation with the help of counselors and conciliators. It is a participative, promising and potential ADRM (Alternative Dispute Resolution Mechanism).

Development of ADR in India:-

The Informal Mechanisms for settlement of disputes are understood as arrangements that have been in place in an attempt to deliver justice, without relying the formal procedure based on the law of lands. These devices are informal because they exist outside of the officially-sanctioned institution that has been put in place by the State as a means of providing justice.

From the time immemorial there was a tradition in India to settle the disputes by a council of village elders, known as a *Panchayat*.⁵ This was an accepted method of conflict resolution. Since the *Vedic* times, India has been heralded as a pioneer in the achievement of the social goal of speedy and effective justice through informal but culminating resolution systems⁶. Prior to the modern justice delivery system which was introduced by the colonial British rulers in India, the Informal Mechanisms for settlement of disputes were in existence in some form or the other. There were various types of arbitral bodies which led to the emergence of the celebrated *Panchayati Raj* system in India, especially in the rural locales. The decisions of the *Panchayat* were accepted and treated as binding⁷.

The first formal footstep towards taking resort to alternate methods of dispute resolution in

² <http://en.wikipedia.org/wiki/Arbitration>

³ <http://en.wikipedia.org/wiki/Conciliation>.

⁴ <http://en.wikipedia.org/wiki/Negotiation>.

⁵ Law Commission of India "Need for Justice-dispensation through ADR etc." Report No.222, April 2009.

⁶ Ibid.

⁷ Ibid.

India can be traced back as early as The Bengal Regulation act, 1772 which provided that in all cases of disputes accounts, parties are to submit the same to arbitrators whose decision are deemed a decree and shall be final. The Regulation Act, 1781 further envisaged that Judges should recommend the parties to submit disputes to mutually agreed person and no award of arbitrator could be set aside unless there were two witnesses that the arbitrator had committed gross error or was partial to a party. A recommendation for the first time was made to the Second Law Commission for a uniform law regarding arbitration. Later on, The Arbitration Act ,1899 was also enacted to apply only to presidency towns to facilitate settlement of disputes out of court.

The Arbitration Act, 1940 repealed and replaced the previous Act.⁸When India became a State signatory to the protocol on arbitration under the Geneva Convention and in order to give effect to the same, the Arbitration (Protocol and Convention) Act was passed. Later on, India also became a signatory to the New York Convention and accordingly Foreign awards (Recognition and Enforcement) Act, 1961 was passed. The Indian Arbitration and Conciliation Act, was enacted in 1996 which superseded the earlier Act of 1940 and brought about radical changes in the law of arbitration and introduced concepts like Conciliation⁹ to ensure speedy settlement of commercial disputes. A key feature of this Act is that by virtue of Section 5, the judiciary shall not intervene in an arbitration agreement between the parties to dispute except as provided under the Act.

It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights. Poverty, ignorance or social inequalities should not become barriers to it. Article 39A of the Constitution of India (enacted in 1976) enjoins that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent Judiciary within a reasonable time are the cherished goals of our Constitution.

Beside this the Code of Civil Procedure (Amendment) Act 1999, has incorporated section 89 in the Code of Civil Procedure, 1908 which provides for the settlement of disputes outside the Court. This was basically an attempt to blend the judicial and non-judicial dispute resolution mechanism in order to envisage the equal rights of every person in the eyes of law. The Section embraces the provisions for settlement of disputes outside the court.¹⁰ In view of inordinate delays and the limited number of judges, the legislature has given due recognition to ADR Mechanism to bring an end to litigation between parties at an early date. The Section refers to different Acts in relation to arbitration, conciliation, mediation or settlement through *lok Adalat*.¹¹ Order X of CPC, 1908 deals with the examination of parties by the Court. Rules 1A, 1B and 1C were inserted in Order X by the CPC (Amendment) Act, 1999 in consequence of Section 89(1) CPC, making it obligatory for the courts to refer the dispute for settlement through arbitration, conciliation, mediation, judicial settlement including *Lok Adalat*. A settlement can thus be made by adopting any of the said modes specified in the amended Section 89. Order X of CPC along with Rules 1, 1A, 1B and 1C provides a procedure to be adopted by the court at the time of first hearing to ascertain from the parties whether allegations in pleadings are admitted or denied. According to Rule 1A¹² of order X after recording the admissions and denials, the Court shall direct the parties to opt either mode of settlement outside the Court as specified in sub-Section (1) of Section 89. At the option of parties, the Court shall fix the date of appearance before such forum or authority as opted by the parties. Where a suit is referred under Rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.¹³ Where a suit is referred under Rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear

⁸ .Arbitration Act, 1899

⁹ .Under part I of the Act.

¹⁰ Section 89, CPC, Sub-Section, 1

¹¹ Id. Sub-Section, 2

¹² Added by Act No.46 of 1999.

¹³ CPC, 1908, Order X Rule 1B

before the Court on the date fixed by it.¹⁴

With a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith,¹⁵ in addition to Procedural Law, in India in 1984, Family Courts Act has also been enacted for the establishment of Family Courts. In the Statement of Objects and Reasons of the Act, five essential requirements were pinpointed in the context of providing reconciliatory efforts to litigating parties and these can be summarized in the following words stated in the statement of objects and reasons:

- (a) Make it obligatory on the part of the Family Court to endeavour, in the first instance to effect reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;¹⁶
- (b) Provide for the association of social welfare agencies, Counsellors, etc., during conciliation stage and also to secure the services of medical and welfare experts¹⁷;
- (c) Provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioners. However, the court may, in the interest of justice, seek assistance of a legal expert as *amicus curiae* in the case¹⁸;
- (d) Simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute¹⁹, and
- (e) Provide for only one right of appeal which shall lie to the High Court²⁰.

This enactment is a wholesome legislation on reconciliatory modes in family disputes in the Indian matrimonial jurisdiction.

Indian Judiciary and ADR

Besides legislatures Judiciary is also not behind in exploring the situations for settlement of disputes out of the court. In *Advocate Bar Association V. Union of India*,²¹ the Supreme Court of India directed the Setting up of a committee to formulate the manner in which various provisions of the Code of Civil procedure including section 89 is to be brought in to operation. The Court also directed the formulation of rules and regulations that are to be adhered to while taking recourse to alternate dispute resolution system. Before this case, in *Babar Ali V. Union of India and Others*,²² the constitutionality of the Act was challenged. The apex court held that the Act of 1996 was not unconstitutional and it does not in any way offend the basic structure of the Constitution of India. Settlement through reconciliation and mediation in family matters has also been recognized by Supreme Court at large. Upholding the salutary provisions to endeavor reconciliation in the first instance, the Apex Court in the *Jagraj Singh V. Birpal Kour*²³ clearly confirms that settlement efforts in matrimonial matters are not an empty, meaningless ritual. Matters of the family which can be repaired must be mediated and settled by sewing and patchwork. Human relationships must be bonded by the settlement and as far as possible, not litigated in Court. In *Gaurav Nagpal V. Sumedha Nagpal*²⁴ the Supreme Court emphasized that the effort should be made to bring about conciliation gaps to prevent people from rushing to Courts. The pressing need in the current social milieu is to create infrastructure machinery for alternative disputes resolution mechanisms.

ADR and Islam:-

In case of Muslims ADR is part and parcel of Islamic law since last fourteen centuries. Its unique nature lies in the support that the Quran and *Ahdith* give to it. *Sharia* or Islamic law is not only law but a code of life for the Muslims encompassing his entire life from the cradle to the grave. The provisions of this law are either revealed (Quran) or based on *Prophet's Sunna*, (saying, doings or his tacit approvals), or Jurist made. As the ADR processes in Islamic law are based on the Quran and *Sunna*, so a legal sanctity demanding

¹⁴ CPC., 1908, Order X Rule 1c

¹⁵ Preamble to the Family Courts Act, 1984

¹⁶ Family Courts Act, 1984. Section 9(1)

¹⁷ Id. Section 5 read with section 12

¹⁸ Id. Section 13

¹⁹ Id. Section 9(2)

²⁰ Id Section 19(1)

²¹ . AIR (2005)6 SCC 344

²² . AIR (2000)2 SCC 178

²³ . AIR 2007 SC 2083

²⁴ . AIR 2009(1) 42

unquestionable compliance comes to be attached with it, conferring on it a status which is unique and unparalleled among the legal systems of the world.

It is clearly stated in the Quran that "this is a Book which (*Allah*) has revealed as a blessing; so following it be righteous, that ye may receive mercy". A Muslim again comes across in the Quran such verses which tell him about objects and benefits of divine revelations. For example, Quran says, "Verily in this (Quran) is a message for people who would (truly) worship Allah." And describing the objective of *Sharia*, Quran declares, "O mankind, a direction has come to you from your Lord; It is a healing for the ailments.....and guidance" About the sanctity of the Prophetic Pronouncements, we have a declaration from the *Allah* Himself in the Quran that "Nor does he (i.e., the Prophet) say of his own desire. It is no less than inspiration sent down to him."

Sunna of the Prophet has become a source of inspiration for every Muslim and a pillar, second only to the Quran, on which rests faith and life of a Muslim. No wonder, a Muslim always turns to the Quran and *Sunna* for answers of every Problems.

The path laid down in the Quran is to be followed by a Muslim, as commanded by Allah in the Quran: "Verily, this is my way leading straight: follow it; follow not (the other) paths: they will scatter you about from His (great) path. Thus do that He commands you, that ye may be righteous."²⁵

In fact the original support that the Quran gives to the peaceful settlement of disputes forms the basis of the widespread support that the idea finds among Muslim. For example, the Quran says:

"The believers are but a single brotherhood, so make peace and reconciliation (*Sulh*) between two (contending) brothers; and fear *Allah* that may ye receive mercy."²⁶

In this verse the Holy Quran has repeated the same thing which it had already stated in the previous verse of the same chapter. Here Quran said;

"If two parties among the believers fall into a quarrel, make ye peace between them.....with justice, and be fair: for *Allah* loves those who are fair (and just)."²⁷

The Prophet (P.B.U.H.) was also so supportive of the amicable settlement of disputes that he is reported to have expressed his readiness to condone the use of an exaggeration or mis-statement if it is for the sake of *sulh* (peaceful settlement). The *Hadith* is as follows:

"Narrated Um Kulthum bint Uqba that she heard Allah's Apostle (P.B.U.H.) saying 'He who makes peace (*sulh*) between the people by inventing good information or saying good things, is not a liar'.²⁸

After appointing Abu Musa Al Ashri as a *Qadi* (Judge) the Second Caliph of Islam Umar bin Khatab wrote him a letter Umar bin Khatab wrote which contained the rule to guide him in deciding cases. One of these rules spelled out the wide span of coverage of amicable settlement of disputes. The exact words of Umar are:

"All types of compromise and conciliation among Muslims are permissible except those which make *haram* (unlawful) anything which is *halal* (lawful) and a *halal* as *haram*".²⁹

This principle is in fact based on the saying of the Prophet (P.B.U.H.) that "if somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected".³⁰

In this way the Islamic literature is full of such writings based on *Sharia*, which explains to Muslims the importance of adhering to the Quran and *Sunna* and there by dissolving their disputes through amicable process. It is therefore correct to say that to adopt and practice ADR processes is like a religious or sacred obligation for a Muslim. It is very unfortunate that the majority of Muslim Community is unaware of this fact and they involve in the formal adjudication process for the settlement of their disputes which is not only time consuming but also expensive.

Alternative Dispute Resolution (ADR) in Muslim's Matrimonial Conflicts:-

For almost fourteen-hundred years, Muslims have looked to Islamic law to bring order and structure to their lives. The Islamic legal system based on the principles of *sharia*. Muslims view the *Sharia* extends to all aspects of life. The *Sharia* is the Islamic code of law based on the Quran, *Sunnah* of the Prophet, *Qiyas* and *Imja*, all of which are mutually independent and listed by weight of authority. The principal source of *Sharia* is the Quran, the Islamic holy book. The Quran is a collection of revelations that the Prophet Muhammad

25. Quran; Chapter:6 ; verse: 153

26 .Quran; Chapter:49: Verse:10

27 . Quran; Chapter:49: Verse:9

28 . M.Muhsin Khan, *Sahih Al Bukhari*, (Dar Al Arabia, Beirut) Vol. 3 P.533,(English translation)

29 . A.A.A. Fyzee, *A Modern Approach to Islam*, Lahore 1978 Ed. Pp 41-46.

30 . Supra note 28 P.535,

received from God which Muslims believe to be the literal word of God. Next in importance is the *Sunnah* of the Prophet Muhammad; the deeds, sayings and approvals of the Prophet Muhammad are translated into *Hadith*, stories and anecdotes, to illustrate a concept. Third is the *Ijma*; specific personal or political issues that are solidified by Islamic scholars. Of least importance is the *Qiyas*, the legal precedent from former cases that a Sharia judge may use to decide a pending case.

In the Islamic legal system, disputes are resolved in accordance with the principles set forth in these sources. As in other legal systems, this process may sometimes manifest itself in the form of formal litigation. In the Islamic tradition, however, such an approach represents the exception cases.

Marriage in Islam is deemed as a civil contract. In fact, it is essentially a solemn divinely ordained covenant. One of the major legal innovations by the Quran and *Sunna* was to award a legal personality to a woman.³¹ Under the *Sharia* they have an independent right to enter into marriage, thereby legalize their sexual relations and procreations.³² Islam, therefore, has always encouraged its followers to get married with the women of their choice. Since the matrimonial relations play a significant role in social life of a community, therefore, the parties have to give great respect to this relationship and they should be encouraged to keep this relationship alive even under very difficult circumstances. Islam, therefore, as a religion has done everything possible to maintain the sacred union up to the last moment and in case of serious dispute between the spouses has recommended reconciliation through their representatives.³³ This practice is expressly sanctioned in a Quranic passage that reads:

“And if you fear a dispute between husband and wife, send an arbitrator from the man’s family and another from the woman’s family; if these two wish conciliation, Allah will unite them;...”³⁴

The above verses signifies not only the cause leading to the dissolution of marriage which is referred therein as mutual disagreement to live together as husband and wife but also lays down the process to be adopted to normalize the situation when the rupture of the marital relation is feared. The two sexes here have been placed at the level of equality. The expression, “dispute between husband and wife” gives rise to the natural implication that both the husband and wife have got an equal right to repudiate their marital tie when they can not bind themselves in the Limits of Allah. Hence either of them may claim divorce from the other in the exercise of right vested in them when they can no longer pull on in agreement. However, in the pre-divorce process husband and wife both are to be represented on a status of equality. Therefore, an arbiter has to be nominated from the relatives of the wife and other from the relatives of the husband. The basic duty of arbiters is to search out points of differences and reconcile parties to each other using their good offices. If reconciliation, in their opinion, is impossible they may recommend for reparation followed by dissolution of marriage.³⁵

It is needless to mention here that Islam has given the spouses equal right to repudiate their union when marital relations have poisoned to a degree which makes their peaceful and harmonious life impossible and their exist an apprehension of limits of Allah being violated and all the means fail to bring them together, then the divine law does not insist that such strained relation should continue indefinitely and spouses are, therefore, allowed to separate from each other with kindness and human dignity.³⁶

Therefore, just as the husband has been given the right to terminate the marriage by pronouncing the divorce to his wife with whom he cannot pull on. Likewise, the Quran has also given a wife the right to release herself from the fortress of marriage by giving back some portion or whole of her dower amount received from her husband. This instant right of wife is popularly known as *Khula* and is expressly enshrined in the Quran.

The word *Khula* has been derived from the Arabic term *khal’un*, which literally means extracting out one thing from another. In *sharia* the *Khula* is used where the husband after accepting compensation from the wife renounces his rights and authority under marriage contract. In *Fatawa-I- Qazi khan*, *Khula* has been described as to take off your clothes. The spouses are garments to each other’s and when they make *khula*,

³¹ . Javid Rehman; “The sharia, Islamic Family laws And International Human Rights law: Examining theory and practice of polygamy and Talaq” *21IJLPFI* 108-127 (2007),

³² . Ibid.

³³ . Saleem Akhter and Mohd, Wasim Ali, “Repudiation of Marital Tie at the Instance of Muslim wife: Misgiving and Clarification,” *45:3&4;JILL*, 471 (2003)

³⁴ . Quran; Chapter:4 ; verse:35

³⁵ . Supra note, 33

³⁶ . Ibid.

each of them take off his or her clothes. Therefore, in *Sharia* it signifies the relinquishment of rights and authority over his wife by a husband dissolving the marital relationship at the desire of wife in lieu of compensation paid by her to husband out of her property.³⁷

From the above discussion, it is very much clear that *Khula* is always at the instance of wife. As under Mohammaden law when husband is not willing to continue the marital tie he is authorized to divorce the wife on the payment of dower. But where the husband is willing but the wife is not willing she can pay either compensation or leave the dower to husband and get herself released from the marital relations. It is submitted here that where both the parties are agreed to separate or where the desire of separation is mutual, there is no question of *khula* and it is known as *mubarat*. Here the scope of third party mediation or arbitration is very least. The question of mediation, arbitration or reconciliation would arise only or it would have greater scope where one party will be willing to continue as husband or wife and the other would want separation. Here the party who wants separation may be agreed to continue the marital relations for which Quran has expressly asked³⁸ or in failing to do so the other can be asked to get separation on the payment of dower or *khula* as the case may be without involving in any formal litigation. As the primary sources of Islam are Quran, *Sunna* and *Ahdith* of Prophet (P.B.U.H.), *Ijma* and *Qiyas* the concept of *khula* is present in all these sources and practice of *Khula* has been allowed by Quran itself, then prophet (P.B.U.H.) of Islam and then by the Companions of Prophet (P.B.U.H.) in deciding the problems.

The right of *khula* given to the wife is enunciated in the Quran which commands:³⁹

It is not lawful for you (men) to take any of your gift from your wives except when both parties fear that they would be unable to keep limits ordained by God. If ye (Judges) do indeed fear that they would be unable to keep limits ordained by God. There is no blame on either of them if she gives something for her freedom.

The practice of *khula* can be more easily understood by the decisions of the holy Prophet (P.B.U.H.) in the cases brought to him by the women where women were not willing to continue their marital tie. Such decisions specified the circumstances which would establish the fear of a breach of Allah's limits, viz-a-viz the exact amount to be paid by wife to husband as compensation and how the husband is made agree to accept the compensation to be paid by the wife. In this regard the most famous case of *khula* was that which was brought by the two wives of Sabit ibn Qais, to the Prophet (P.B.U.H.). They did not like his appearance. This incident has been reported by most of the Ahadith reporters. Imam Bukhari reports through ibn Abbas that one day wife of Sabit appeared before holy Prophet and presented her complaint in the following words:⁴⁰

"O Messenger of Allah nothing can never unite his (Sabit) head with mine (Jameela). When I raised my veil I saw him coming in the company of a few men. I saw that he was blackest. The shortest and the worst appearance of them all. By Allah I do not dislike him because of defects in his faith or morality. I just hate his ugly looks. By God if I did not fear Allah, I would have spit on his face when he came near me. 'O' Messenger of Allah, You can see how beautiful I am while Sabit is an ugly man. I do not blame him for any depravity in his religious practice or morality but I fear that I may be guilty of transgression of injunctions of Islam.

The Messenger of Allah heard her complaint and observed, 'will she return him garden which Sabit had given her.' She replied, 'O' yes, Messenger of Allah. I shall give him even more if he demands more. The Messenger of Allah further observed, "No, not more just return him his garden". The holy Prophet (P.B.U.H.) then ordered, "Sabit take back garden and divorced her which he did."

The complaint of the other wife, Habibah bint Al-Ansaria is described in these words:⁴¹

One day the holy Prophet (P.B.U.H.) came out of his house and found Habibah standing there. He enquired what the matter was. She said, Sabit and I cannot live together. When Sabit came, the holy Prophet told him what his wife Habibah had said about him. Habibah said, Allah's Messenger, whatever Sabit gave me is all with me. Then the holy Prophet told Sabit to take it all and leave her. And Aisha⁴² narrated this incident in these words. Sabit had beaten Habibah so much that it broke her bones. She complained to the Holy Prophet and he ordered Sabit to take a part of her wealth and separate from her.

³⁷ .Fatwa-I-Qazi Khan , Translated by Moulvi Mohd. Yousaf khan Vol.1 at P. 513

³⁸ . Supra note, 34

³⁹ Quran; Chapter: 2; Verse: 229

⁴⁰ . Supra note 28, p.150

⁴¹ . Ibid.

⁴² .Aisha was the wife of prophet and a number of *ahdith* have been Quoted through her reference. The *Ahdith* quoted through her reference is considered as most authenticated one.

This custom has also been endorsed by the companion of the Prophet. Once a case of a husband and wife was brought before Hazrat Umar.⁴³ He admonished the woman and advised her to stay with her husband but she refused. Thereupon, he shut her in a room full of rubbish. She was taken out after three days and Hazrat Umar asked her how she was. She replied, by Allah she had real comfort in these nights. Hearing this Umar ordered her husband to release her in lieu of compensation.

Dissolution of Muslim Marriage Act, 1939 and ADR: - In India after the Muslim personal law (*Shariat*) Application Act, 1937 in the year 1939 this Dissolution of Muslim Marriage Act was enacted. The main object of this legislation was to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. The Dissolution of Muslim Marriage Act, 1939 is an important enactment which allows the Courts intervention in the dissolution of Muslim marriage. In fact, the decisions for dissolution of marriage made by prophet of Islam (P.B.U.H.) or by Hazarat Umar were not in the capacity of *Qazi* or Judge because they did not adopt the formal procedure of administration of justice. These were merely made in the capacity of mediator as evident by their conduct and supported by the Quranic Verses. Prior to the passage of this Act the condition of Indian Muslim Women was very miserable. After marriage, a women facing situations like disappearance of her husband, his lunacy, his impotency, his refusal to provide maintenance to her in spite of his ability to do so etc. was left with virtually no remedy for the dissolution of her marriage. In order to cop up this situation this Act was enacted and Section 2 of this Act provide certain grounds for decree for dissolution of marriage. According to this Section a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage where her husband is missing for four years,⁴⁴ husband fails to provide her maintenance for two years,⁴⁵ husband has been sentenced to imprisonment minimum for Seven years and it is confirmed by the highest court and become final,⁴⁶ husband fails to perform marital obligations for three years,⁴⁷ husband is impotent,⁴⁸ or insane,⁴⁹ or where she having been given in marriage by her father or other guardian before she attained the age of fifteen years,⁵⁰ or where the husband treats her with cruelty.⁵¹

According to the conditions of Muslim women in 1939, the provision of this Act were most appropriate as they were needed an awareness with regard to their right provided by divine law and which was totally ignored by the male. It has created a sense of security among the Muslim Women in India who were living at the mercy of their men. This was the most positive aspect of this Act. But the unfortunate step of this legislation was the procedure which it had provided to be adopted by a wife in order to get dissolution of her marriage. Majority of Muslim women were not in a position to get justice by the provision of this Legislation firstly because a Muslim Woman can not approach to Court as Islamic law prohibits her to appear in public places. Secondly, the procedure of Court in Country like India is so complex, that it is too difficult for a woman to comply the all and more over it is time consuming. Thirdly, the ground like missing of husband for four years require the service of notice to the relatives of husband or otherwise the relatives of husband become respondent there and there by the case become more complex. Fourthly, pleading of husband impotency for a Muslim woman in a Court is also not an easy task. As compared to the Western women, Indian women in general and Muslim women in particular cannot express their sexual lust particularly at places like Courts. Otherwise if the husband is impotent at the time of marriage, this marriage will be invalid because the basic object of marriage under Muslim law is to legalize the sexual relations. Fifthly, in this Act a provision for repudiation of marriage by wife⁵² has also been incorporated according to which after attaining the age of puberty, if the marriage is not consummated women can repudiate it by seeking a judicial separation and then she is entitled to decree of divorce. This provision has only a little scope for Muslim women who has been given in marriage by her father or other guardian before attaining the age of 15 years.

⁴³ . Umar is Second Calipha of the prophet. His system of Administration of Justice was very famous and till date Muslim words particularly see it as a role model.

⁴⁴ .Dissolution of Muslim Marriage Act,1939: Section 2(i)

⁴⁵ Id.Section 2(ii)

⁴⁶ Id. Section 2(iii)

⁴⁷ .Id Section 2(iv)

⁴⁸ . Id. Section 2(v)

⁴⁹ .Id. Section 2(vi)

⁵⁰ .Id.Section 2(vii)

⁵¹ .Id.Section 2(viii)

⁵² Id. Sec.2(vii)

Under Muslim law at the age of 15 years a female is deemed to attain the age of puberty. So her right to get the dissolution of her marriage becomes mature at the age of 15 but she can avail the remedy only on attaining the age of majority which is 18 years in India. In this case she has right but no remedy till she attain the age of majority. A right without remedy is meaningless. Furthermore, non-consummation of marriage has been made a condition here. Under such circumstances rarest of the rare women could be in a position to avail the benefit of this provision, which otherwise should be incorporated in such a manner that maximum of Muslim women could made use of it because marriage in early age was very common among Muslim and even today among some of the communities like Tribes in Jammu and Kashmir this custom has its affects. Sixthly, In order to invoke the door of Court on the other ground like cruelty or failure of husband to maintain his wife is also not easy for a Muslim wife. Procedural requirement always discourage her to approach to the Court for the same. On other hand, a wife can also exploits the husband on these grounds and it can not be ruled out that an innocent husband could be prosecuted on these grounds.

According to this Act,^{53a} Muslim wife can seek dissolution of her marriage when her husband has become insane for a period of two years or if he suffers from leprosy or or a virulent venereal disease.⁵⁴No doubt ,this provision has been incorporated in the Act keeping the situation where husband become totally unable to company the wife, but the moral value of the society and moral obligations of the wife has been ignored here. Islam is a religion which teaches about the morality and ethics. Islam is the eternal divine message of Allah, the Almighty and Exalted, to all mankind, delivered by the Prophet and Messenger of Allah. Allah declared that all human beings are dignified and honored more than other creatures of Allah, as He stated in the Holy Qur'an:

*“ And indeed We have honored the children of Adam, and We have carried them on land and sea, and have provided them with lawful good things, and have preferred them above many of those whom We have created with a marked preference”.*⁵⁵

The divine law speaks that all men and women are equal in terms of humanity and basic values, obligations and responsibilities. All men and women are created equal in the sight of Allah. Their differences in race, language, livelihood and geography etc have no relationship to increase or decrease this honor. True distinction among them is based on their God-consciousness, commitment to Islam, the revealed religion of Allah, and their level of practice and application of its principles in their own daily lives. Allah stated this in the Glorious Qur'an when He said: *“O Mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honorable of you in the Sight of Allah is the one who is most pious and righteous. Verily, Allah is All-Knowing, All-Aware”.*⁵⁶

The teachings of Islam remove all artificial differences between men and women and place them all on equal footing. This is one of the essential teachings of Islam. Allah stated in the Glorious Qur'an:

*“The believers, men and women, are helpers, supporters, friends and protectors of one another; they enjoin (on the people) Islamic Monotheism and all that Islam orders one to do; and they forbid (people) from all forms of evil (i.e. polytheism and disbelief of all kinds, and all that Islam has forbidden); they offer their prayers perfectly, and give their charity and obey Allah and His Messenger. Allah will shower His Mercy upon them. Surely Allah is All-Mighty, All-Wise.”*⁵⁷

Islam designates certain duties and obligations that necessarily go hand in hand with the rights. Islam is a divine religion revealed by the Beneficent and Omniscient, as opposed to man-made laws that dictate artificial boundaries, privileges, and monopolies. Islam is everlasting and universal, for the whole of mankind, male and female, rich and poor, the ruler and ruled, and strong and weak, whether white, black, red or yellow. They are all equal in the Sight of their Creator, Allah who knows best what is of benefit in both this world and the hereafter.

It is submitted here that where husband and wife are associated under moral duties towards each other and if any law justify the claim of separation of any spouse (particularly wife here) when the other require a special treatment from him or her such law would have no moral or ethical value. More over if a husband divorce his wife when she becomes insane or suffer form any incurable disease his conduct would not be justified by the divine law.

⁵³ . Dissolution of Muslim Marriage Act,1939

⁵⁴ Id. Section 2(vi)

⁵⁵ .Quran; Chapter 17, Verse 70

⁵⁶ .Id.; Chapter 49, Verse 13

⁵⁷ .Id.; Chapter:9 verse: 71

Conclusion

Any conflict is like cancer. The sooner it is resolved the better it is for all the parties concerned in particular and the society in general. If it is not resolved at the earliest possible opportunity, it grows at a very fast pace and with time the effort required to resolve it increases exponentially as new issues emerge and conflicting situations galore. One dispute leads to another. Hence, it is essential to resolve the dispute the moment it raises its head. The method to achieve this goal must be agreeable to both the parties and it should achieve the goal of resolving the dispute speedily. This state of uncertainty and indecisiveness should be as brief as possible to avoid all psychological, physical and mental losses.

The concept of conflict management through informal means has introduced a new mechanism of dispute resolution that is non-adversarial. A dispute is basically "lis inter parties" and the justice dispensation system in India has found an alternative to adversarial litigation in the form of informal mechanism. The world has experienced that adversarial litigation is not the only means of resolving disputes. Congestion in Court rooms, lack of man power and resources in addition with delay, cost and procedure speak out the need of better options, approaches and avenues. Informal Mechanism for settlement of disputes is a click to that option.

As the marriage in Indian society is of great importance as it ensures social and financial security to women, and in order to run the society smoothly the marital relations need a protection from breaking down. The contractual nature of Muslim Marriage gives a misconception to the persons who are of the opinion that the Muslim Males have inherent Powers to divorce his wife. The study of the selective verses of Quran and reported traditions it can be concluded firstly, that in Muslim Law divorce is not permitted as a right to male Muslim, but it is only a way out to meet a situation raised between husband and wife which make it difficult for them to remain in marital tie. Otherwise Prophet of Islam (P.B.U.H.) is reported to have said "with Allah, the most detestable of all things permitted is divorce,"⁵⁸ and towards the end of his life he practically forbade its exercise by men without intervention of an orbiter or a judge.⁵⁹ Secondly, the wife also stood on equality with her husband in the matter of dissolution of marriage. The rights which the codified laws⁶⁰ have given to women with respect to their matrimonial life in twentieth century have been recognized by the Islam almost Fourteen hundred years ago. According to Muslim Law if the wife is not willing to live with her husband she can pay compensation or let off her dower and ask for divorce. Under this situation husband cannot enforced her to remain as his wife, only she can be asked for reconciliation or reconsideration of his decision of separation by the husband or by any third person. If she cannot be agreed for continuation of marital tie then the holy Quran has repeatedly stressed the husband's duty in several verses. It makes his duty to keep his wife with kindness. Thus it is laid down in Quran;⁶¹the parties should either hold together on equitable terms, or separate with kindness. The Quranic duty to keep them with kindness requires that if mutual love and understanding cannot work and the wife desires release from the marriage bond, the husband must release her. If in spite of the wife's persistent demand of release, the husband will refuse to release her, obviously, he shall be guilty of not complying with the injunctions of Quran. Islamic law here does not speak about any formal mechanism of adjudication required to be adopted by the parties. Such matter can be solved even by the family members or by some respectable person appointed by the parties as provided in Quran.⁶² It is pertinent to mention here that during all this process the mediators have to play a positive role. First he has to try for reconciliation between the parties and if he is satisfied that he has failed to reconcile the parties he can agree the husband for divorce. Dissolution cannot takes place merely on the order or decree of Judge or *Qazi* or Mediator. Pronouncement of divorce from the husband is essential for dissolution of marriage under Muslim law. Perhaps considering the psychological nature of woman this condition has been kept by the divine law, because majority of women take the decision in so hurry that had it been taken seriously a major tragedy could be averted by it. So where the separation will be at the instance of wife the role of mediator will be more. He has to agree her to remain in marital tie, otherwise he has to agree husband to pronounce *talaq* without involving the parties in formal adjudicative system.

In short, in order to avoid litigations with respect to the matrimonial relations in India particularly among Muslims they are need to aware with respect to their personal law which has a greater scope of amicable resolutions of such conflicts. By using such amicable means not only the money or time can be saved which incurred in and during the formal litigations, but a very poise relation can also be saved from breaking. The act of saving a marriage from breaking under Islam is considered so graceful that the person

⁵⁸ . Radd-ul-Mukhtar Vol.II p.682 Reported by Abu Daud

⁵⁹ Syed Ameer Ali, *Mahommedan Law*; Kitab Bhavan New Delhi .Seventh Edition vol. II 432(1986)

⁶⁰ E.g. Hindu Marriage Act, 1955 etc.

⁶¹ .Supra note 39

⁶² . Supra note 38

who saved the marriage is considered equal to person who performs a pilgrimage of *Kahaba*. Moreover, in the informal Mechanism of settlement of disputes in matrimonial conflict among Muslim in India, that all can be done for which under the Dissolution of Muslim Marriage Act, 1939 is either silent or cannot be done by adopting the formal procedure under this Act.