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DIVORCE CONCILIATION:

Without the intervention of the Court and Built-in Conciliation in Family Court Proceedings

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Divorce is the most detestable thing in Islam, nevertheless these do happen and Chairmen of Union *Parishad* often receive notice of divorce. The provisions of sections 7 and 8 of the Muslim Family Laws Ordinance, 1961 enable the Chairmen to make conciliation between the disputant parties without the intervention of the court. The Family Courts Ordinance, 1985 also provides for conciliation between the disputants in the midst of the court proceedings but these statutory provisions have not heen so far properly understood and practiced. The intention of these statutory provisions is to maintain harmony with the spirit of *Quranic* sanctions relating to divorce. This article focuses on conciliation facilities and the process of its propor utilization through the creation of right-awareness among the disputants, the Chairmen of Union *Parishad* and Family Court Judges.

Conciliation or medation (the terms are interchangeable) is a process of joint decision making by the disputants themselves with the help of a third party. In conciliation or mediation, there is no surrender by the disputing parties to the third party intervener of the power to make any decision (unilateral or otherwise) which is intended to have a binding effect. Conciliation/mediation is the key componert in arrangement for the dissolution of families. It is argued in favour of mediation/conciliation that other forms of dispute resolution share the objective of agreement rather than judgement. However in conciliation it is the parties who are deemed to be in control[1]. It is seen as a space which allows the parties to work

1 Bottomley, Anne, 1984, "Resolving Family Dispute: A Critical View", Freeman, M. D. (ed.) The State, The Law and The Family: Critical Perpectivcs, Tranistock, London pp. 293-301

out their own problems in their own way[2].

Conciliation to resolve marital conflicts can be traced back to *Quran* and Sunna (tradition of Prophet). When the husband and wife cannot live together in peace and harmony, they are given the option to separate,[3] but before such a separat.ion it is recommended that there is an attempt at reconciliation. The *Quran* (IV:35) counsels arbitration between spouses:

> If ye fear a breach between them twain, appoint (two) arbiters. one from his family and the other from hers; If they wish for peace God hath full knowledge and is acquainted with all things[4] (Ali 1979:191).

Ali, commenting on the verses, states that it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure.The impression given is that a capricious use of *talaq* is a grave distortion of the Islamic institution of divorce[5].

It can be argued thal Islam condemns the husband giving *talaq* to his wife unreasonably and encourages reconciliation between the couple before a hasty decision is made by the hushand. Ali has pointed out that the Prophet restrained the husbands' power of *talaq* he gave to women the right of obtaining a separation on reasonable grounds; and towards the end of his life he went so far as practically to forbid its exercise by men without intervention by arbiters or a judge[6].

The Muslim Family Laws Ordinance, 1961 was enacted with

2 Dingwall, Robert & David Greatbatch, 195 4, "Divorce Mediation the Virtues of Formality", in Eekelaar, J & Maclean, Mavis (ed.) Reader in Family Law, Oxford University Press, New York, pp 391-399.

3 Ahmed K.N, 1978, Muslim Law of Divorce, Kitabe Bhavan. New Delhi p. 184.

4 Ali, Abdulla Yusuf, 1979, The Holy Quran. 5th edition Vol. I & II, Kutale Khana Ishaast, New Delhi, p 191.

5 Mahmood, Tahir 1982, The Muslim Law of India 2nd edition, Law Book Co., Allahabad.p.47-48

6 Ali Ameer, 1965, *Mohammedan Law,* Vol II, 6th edibon, All Pakistan Legal Decision Lahore, p 432

the object to give effect to the sanction of the *Quranic* verse cited. The Ordinance incorporated provisions for conciliation to resolve marital disputes without the intervention of the court. The provisions are equally applicable to both husband and wife exercising their right to divorce. Apart from the Muslim Family Laws Ordinance, 1961, the Family Courts Ordinance, 1985 went a step further in resolving marital disputes through conciliation. during the progress of the family suits.

Women and Divorce:

Of all religions, Islam was the first to recognize the right of women to seek the dissolution of marriage on various grounds, including incompatibility of temperament rendering it impossible for the husband and wife to live within the limits ordained by *Allah*. Islam emphasises the importance of the happiness of both spouses. It ordains that every attempt should be made to maintain the marriage tie, but once it is established that the marriage has broken down, the *Quranic* law allows the parties to dissolve the marriage in order to avoid a greater evil. Despite the freedom of the parties to divorce, Islam warns both parties against the unscrupulous use of this right. It says that divorce is the most detestable thing even when lawfully allowed or permitted.

The modernists proclaim that the nature of divorce under the *Quranic* law is based on the so-called 'breakdown theory'.[7] According to this theory divorce is available to both the spouses without the need to establish any specific grounds for the divorce. It allows for the dissolution of the marriage at the instance of husband (*by talaq*) or the wife (*by khula*) and by mutual consent (*by mubara'at*). The modernists reject the orthodox view that a husband enjoys under the *Quranic* law, unlimited authority to dissolve the marriage whereas a wife has

7 Malhmood. T, 1992, "No More Talaq, Talaq, Talaq-Juristic Restoration of the True Islamic Law of Divorce", in Islamic Comparative Law Review, Vol. XII, pp 1-2. See Ahmad, Furqan, 1991, 'Notes and

a limited or no right to do so and argue that the orthodox view is against the spirit of the *Quran and Sunna.*

Under the *Quran* and *Sunna* (i.e. non-statutory law of divorce) a wife can exercise her right to divorce, either by *talaq-e-tafweez* or *khula*, without the interention of Court. A Muslim wife can at the time of marriage or subsequent to marriage, reserve in the *kabinnama* (marriage contract deed) a right to dissolve the marriage in specified circumstances. This is called *talaq-e-tafweez* (the right to divorce delegated by the husband to the wife), which can be effected without the intervention of the court. Irrespective of the inclusion of conditions in the *kabinnama*, the wife has a right of *khula* (divorcing her husband by forgoing dower). In the *khula* form of divorce, the wife has to compensate the husband or forgo her dower [marriage consideration I for her release from the marital bond. If the husband consents to the compensation the *khula* takes effect extra-judicially, but if the hushand tries to maintain the marriage the wife can ask for a judicial *khula*. Despitc these *Quranic* rights, women's rights have continued to be undermined due to the conservatism of the orthodox jurists[8]. The scholarly debates on the orthodox law have led to modern legislative reforms in many Muslim countries, including Bangladesh.

The reforms have had two main objectives. First, they have tried to prevent the husband from abusing his power to effect a unilateral *talaq* (as popularly understood by the orthodox jurists). Secondly, they have tried to enhance women's rights to divorce.

The first step towards legislative reform of the Muslim Family Laws of British India came with the enactment of the Muslim Personal Law Application *(Shariat)* Act. 1937, followed by the

Comments: Muslim Women's Right to Divorce-An Apparently Misunderstood Aspect of Islamic Law in India, in Delhi Law Review Vol. 13, pp 85-94 at 8s6.

8. Hussain, Justice Altaf. 1987, Status of Women in Islam, Law Publishing Company, Lahore.

Dissolution of Muslim Marriages Act of 1939. The Act of 1939 was considered one of the most important enactment of the British Indian legislature for safeguarding the rights of Muslim women in the Sub-continent. This Act allowed women to obtain a decree for the dissolution of marriage from a court on certain grounds which they could not ordinarily do without a right delegated to them by the husbands or without their husbands' consent.

Although the Act gave more options to women exercising their right to judicial divorce, it did not protect women from the threat or abuse of *talaq* by their husband. This led the reformers to pass a procedural law; the Muslim Family Laws Ordinance, 1961. This Ordinance aimed to minimize the practical complexities of a court hearing, viz, the lengthy procedure and cost. Since most women are barely in a position to support themselves the cost and time of court proceedings the same acted as a strong deterrent against making use of their rights.

The Muslim Family Laws Ordinance, 1961:

The Muslim Family Laws Ordinance, 1961 provided equal opportunity to women to dissolve marriages extra-judicially (without the intervention of the court). It sponsored the idea of reconciliation in the case of divorce by either spouse in accordance with the spirit of the *Quran and Sunna.* The Chairmen (elected member) of the City Corporation or Union *Parishads* (Administrative council at local level) are empowered to effect the procedure of reconciliation before the disputants after its process is initiated by service of notice. The purpose of notice of *talaq* to be served upon the Chairman of Union *Parisad* and the wife is to prevent hasty dissolution of marriage or offer a second chance to the disputants, which is beneficial to both the parties in the event reconciliation is effected. When the due service of notice is satisfactorily established the *talaq* in the event of failure of reconciliation

becomes effective after the expiry of 90 days from the date of service of notice under section 7 of the Muslim Family Laws Ordinance, 1961[9] Section 7 introduced a single method of dissolving marriages and considered all *talaq* by the husband as single revocable *talaq*. Section 8 provided that the wife, who wished to dissolve her marriage, could follow the procedural law in the same way as the husband[10] This was affirmed in the judgement in Hefzur Rhaman's case in which the judgement of the court was given by Mr. Justice Mustafa Kamal:

> When a divorce proceeds from the husband, it is called *talaq*, when effected by mutual consent, it is called Khula or Mubara'at, according as the terms are. The Muslim Family Laws Ordinance, 1961 has given statutory recognition to a wife's right of divorce (Talaq-i-taufiz) in exercise of her delegated power to divorce, as also to dissolution of marriage otherwise than by talaq. There are different modes of *talaq* according as

9 Parveen Sultana (Mosammat) vs Md Enamul Haque, 7 MLR 2002 (HC) Vol-VII, 451.

10 Section 7 of the Muslim Family Laws Ordinance, 1961 provides:

(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which tnay extend to ten thousand taka or with both.

(3) Save as provided in sub-section (5), a *talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purposes of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time *talaq* is pronounced, *talaq* shall not be effective until the period mentioned in sub-section (3) or pregnancy, whichever be later, end.

(6) Nothing shall debar a wife who marriage has been terminated by *talaq* effective under this section from remarry the same husband without an intervening marriage with a third person, unless such termination is for the third time so effective..

Section 8,

Where the right to divorce has been duly delegated to the wife and she wishes to exercise the right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talaq*, the provisions of section 7 shall, *mutatis mutandis* (as near as possible), and so far as applicable, apply.

the pronouncement of *talaq* is by husband. In the case of *Talaq Ahsan* (most proper), a single pronouncement is made during a *tuhr* (period between menstruation) followed by abstinence from the sexual intercourse up to three following menstruations, at the end of which *talaq* becomes absolute. In the case of *Talaq tasan* (proper), three pronouncements are made during successive tuhrs, there being no sexual intercourse during any of the following three *tuhrs*. In the case of *Talak-ul-bidaat* or *Talak-i-badai* (which is popularly called *Bain talaq* in Bangladesh), either three pronouncements are made during a single *tuhr* in one sentence or three separate sentences or a single pronouncement is made during a *tuhr* clearly indicating an intention to dissolve the marriage irrevocably. This from of *talaq* is not rccognised by the *Shafi* and *Shia* Schools of thought, but the Muslim Family Laws Ordinance, 1961 recognises "pronouncement of *talaq* in any form whatsoever" section 7(1)[11]

The procedure makes it incumbent upon the husband to send notice of *talaq* to the Chairman of the Union *Parishad.*[12] The Chairman must take all steps necessary to bring about a reconciliation between the spouses. The divorce will, if not revoked earlier expressly or by conduct (as a result of reconciliation brought about by the Union *Parishad* or otherwise) be effective only after the expiry of ninety days from the date of the notice, or if the wife is pregnant after the pregnancy ends, whichever period is longer. If and when a divorce becomes effective, the parties may remarry each other without intervening marriage, ie, *hila'* except in the case of a third divorce.

Section 7(3) if the Ordinance provides that *talaq* will not be effective until the expiry of 90 days from the receipt of notice

11 Helzur Rahman (Md) vs Shamsun Nahar Begum and another 4 BLC(AD) 14
12 Section 7 of the Muslim Family Laws Ordinance, 1961

by the Chairman. Failure on the part of the husband to give notice or his abstention from giving notice to Chairman connected should perhaps be deemed, in view of section 7, as if he has revoked the pronouncement of *talaq*.[13] In Abdul Aziz vs Rezia Khatoon,[14] it was held the non-compliance with the provisions of section 7(1) makes *talaq* legally ineffective. However, very recently the Appellate Division of the Supreme Court of Bangladesh in apparent contradiction to section 7 of the Ordinance held:

> The petitioner husband divorced his wife by swearing an affidavit before Magistrate and accordingly sent the copy thereof to the *Nikah* Register in whose office the divorce was registered as required under section 6 of the Act, 1974 and the marriage tie is in consequence stands dissolved and as such he wife is entitled to the payment of entire, dower, both prompt and deferred. He cannot take the advantage of his own wrong in respect of nonservice of notice to the Chairman as required under section 7 (l) of the Ordinance 1961.[15]

The apparent contradiction can be explained by Court's desire to prevent the husband from using the statutory requirements of service of notice of *talaq* to the Chairman of Union *Parishad* as devise to defeat the claim of dower of the divorced wife following the *talaq*. The Court probably relied on the following well known principle "Equity will not allow a statute to be used as an instrument of fraud."

Section 7 of the Muslim Family Laws Ordinance, 1961 also applies to the wife who wishes to dissolve the marriage.[16] Section 8 of the said Ordinance has made it incumbent upon the wife who wishes to dissolve the marriage to follow the procedure laid down in section 7 of the Ordinance with

13 Syed Ali Newaz Gardezi vs Lt Col Md Yusuf (1963) 15 DLR SC.
14 21 DLR (1969) 733
15 Serajul Islam (Md) vs Most Helana Begum and others 4 MLR (1999) (AD) 250
16 Section 8 of Muslim Family Laws Ordinance 1961

necessary changes. Where the wife wishes to exercise her delegated right, that is. *talaq-e-tafwez*, she must send notice to the Chainman of Union *Parisad* after actually exercising the right of divorcing herself.

The High Court Division of the Supreme Court of Bangladesh in Shirin Akhter and another vs Md Ismail held:

> When the husband admittedly received the notice of exercise of right of *talaq-tafeeq* and the notice thereof was served upon the Chairman concerned, there was compliance with the requirement of law and the *talaq* became effective.
>
> Direction for restitution of conjugal rights as a consequence relief is wrong in law and is opposed to the principle embodied in article 27 and 31 of the Constitution.[17]

Section 8 says "where any of the parties to marriage wishes to dissolve the marriage otherwise than by *talaq*", which apparently means dissolution of marriage through court, *khula* and *mubara'at* equally falls within the section. These forms of dissolution of marriage, particularly judicial dissolution, need careful examination in the light of section 23(2) of the Family Courts Ordinance, 1985.

Section 23(2) of the Family Courts Ordinance 1985 has made it incumbent upon the court to send a certified copy of the decree[18] within 7 days of the passing of the decree. The Chairman after receipt shall consider the certified copy as intimation of *talaq* and section 7 of the Muslim Family Laws

17 Shirin Akhter and another vs Ms Ismail, 5 MLR (2000) (HC) 81

18 In Pockon Rikssi Das vs Khuka Rani Das and others{50 DLR (HC) 47}, it was held that section 23 of the Family Laws Ordinance, 1961 if read with section 5 will make it clear that the provision of the said Ordinance shall have to be followed in case of decree passed by th Family Court for the dissolution of a marriage as enumerated in section 5(a) of the Ordinance if it elates to Muslim only. The rights and liabilities that have been given to the citizen professing Islam under Muslim Family Laws Ordinance, it appears, have been fully protected under section 5 of the Family Courts Ordinance when the words "subject to the provisions of Muslim Family Laws Ordinance" has been used.

Ordinance 1961 will come into operation. A question may be raised in view of section 23 of Family Courts Ordinance 1985 and sections 7 and 8 of the Muslim Family Laws Ordinance 1961 concerning the time when the dissolution of marriage will be effective, is it after the expiry of 90 days from the receipt of the notice from the wife when she initially filed the suit or action; or is it after the expiry of 90 days from the receipt of the certified copy from the court?

In one case it was held that it is not necessary to inform the Chairman Union Parisad after the court has granted a decree under section 2(ii) of the Act of 1939 on the basis of the option of puberty[19]. But in another case the Lahore Court of Pakistan had dealt with the question extensively and held that after the decree for dissolution has been made by the family court, that court must send a copy of the decree to the Chairman. At the same time it is necessary for the wife, in whose favour the decree is passed, to independently inform the Chairman about the decree, and also to send a notice thereof to the husband. An issue raised before the honourable learned court was the effectiveness of the decree of the dissolution of the marriage after a successful reconciliation. The honourable court held that in an instance of total successful conciliation, the decree shall be deemed to have been abandoned by the wife. The conciliation will have the effect of compromise and thus avoidance of the decree. In other words the decree shall have no effect if within the specified period the reconciliation has been effected between the parties in accordance with the provisions of the Family Laws Ordinance and rules made thereunder.[20]

In the *khula* form of divorce there is no problem when the husband gives consent to the divorce and the wife may then obtain the divorce extra-judicially by serving the notice upon the Chairman. If when he refuses to give his consent the wife has to seek *khula* through family court and then the same

19 Muhammad Amin vs Surraya Begum 1969 21 DLR 253
20 Muhammad Ishaque vs Ahsan Ahmed 1975 PLD LAh 1118

question arises with regard to the applicability of sections 7 and 8 of the Ordinance. The Pakistan Court of Baghdad-ul-Jahid held that as a result of the promulgation of the Muslim Family Laws Ordinance of 1961 reference to an Arbitration Council has become a pre-condition for applying to a family court for dissolution of marriage by *khula.* It further held that *khula* is operative in cases where the wife has as 'fixed aversion' for the husband, in which case any amount of reconciliation would be of no use[21]. The court in this case only gave the probable consequences of 'reconciliation'. It was very practical from the point of view of *khula* sought through court because the wife after going though the trauma of court procedure the wife would not wish to be reconciled the marriage. Nonetheless, whatever the least chances of successful reconciliation the court did not specifically provide that sections 7 and 8 are not applicable to *khula.*

In *mahara'at* form of divorce which is based on the mutual aversion of the parties there is no occasion of going to the court. The marriage can be dissolved by serving the notice by either party upon the Chairman of Union *Parishad..* The prospect of reconciliation is of no effect as the parties have mutually consented to the divorce. It can be contended that Muslim Family Laws Ordinance, 1961 is more appropriate in the cases of divorce without intervention of the court.

The Family Courts Ordinance, 1985:

The Family Court Ordinance, 1985 (No. XVIII of 1985) has been enacted to resolve disputes arising out of marriage, restitution of conjugal rights, dower, maintenance dissolulion of marriage, guardianship and custody of children.[22] The object of the Ordinance is to provide a cheaper and more expeditious remedy and render the court accessible to all sections of society. The Family Court (Amendment Act, 1989) made explicit

21 Mustaz Mai vs Ghulam Nabi 1969 PLD Baghad-ul-Jahid 5
22 Section 5 of the Family Court Ordinance, 1985

provision for expeditious judgments. emphasising the intention and aim of passing the original Ordinance.

The Family Court has no jurisdiction to entertain other issues of family law as for instance inheritance, partition, gift or *wakf.* Further, the jurisdiction of the Family Courts includes only the civil jurisdiction regarding these issues. The Family Court Ordinance applies to all citizens irrespective of religion. This Ordinance has not taken away any person right of any litigant of any faith. It has just provided forum for the enforcement of some of the rights as is evident from section 4 of the Ordinance.[23]

The Family Courts Ordinance, 1985 has built-in conciliation mechanism enabling disputant parties to resolve the outstanding issue informally, discreetly and with a sense of accommodation in which the Family Courts play the role of a well-wisher and friends rather than an adjudicator.

After the filing of the plaint, written statement and service of summon, the Family Courts proceeds with the pre-trail hearing of the suit.[24] According to section 10 of the Family Courts Ordinance, 1985 the Court shall fix a date ordinarily of not more than thirty days for a pre trial hearing of the suits. Subsection 3 states that at the pre trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if that is possible. If no compromise or reconciliation is possible at the stage, the court shall frame the issues to be tried in the suit and fix a date ordinarily of not more than 30 days for recording of evidence. At the conclusion of the trial[25] but before the pronouncement of the judgment the Family Court Judge makes another effort to effect a compromise or reconciliation between the parties.

23 See note.18

24 Section 10 of the Family Courts Ordinance, 1985.

25 section 13 of the Family Courts Ordinance, 1985.

The Family Court Judge here acts as a mediator or a conciliator between the disputant parties. The intention of Legislature is to uphold the spirit of the *Quran* and *Sunna*- "With Allah, the most detestable of all things permitted is divorce."[26]

Conclusion:

The Chairman of Union *Parishad* and the Family Court Judge are expected to play the role of a conciliator or mediator in real terms in the marital disputes. However, this object of the Ordinance is to some extent frustrated because of the Chairman's lack of initiative to arrange for reconciliation or the parties reluctance to reconcile. The Muslim Family Laws Ordinance, 1961 does not provide any consequences provision if the Chairman of Union *Parishad* does not arrange conciliation between the disputants and does not take any steps to facilitate a reconciliation between the parties. In practice the Chairman either does it mechanically without commitment or it is forgotten totally in the absence of any initiations by the disputant parties.

The Family Courts set up to adjudicate on family matters were supposed to be specialist and exclusive courts to ensure effectiveness and at the same time privacy, where mediation or conciliation as well as other informal procedure in aid of resolution of family disputes were expected to be utilised frequently to make those regular practice of the court which could encourage the disputants to opt for these procedures to their advantage. In practice the Family Courts also has ordinary civil and even criminal jurisdiction which tax upon the working hours of the presiding judge, who either does not feel encouraged to insist or prevail upon the disputant parties to opt for mediation or conciliation or does it mechanically due to pressure of other non-family matters. The desired specialisation in disposing of family matters and the practice of mediation or

26 Ali Maulana undated A Manual of Hadith, The Ahmadiyya Anjuman Ishaat Islam, Lahore, p. 284

conciliation during family court proceedings are waiting and the atmosphere or tradition of it is virtually non-existent. Probably social movement is necessary to motivate the disputant parties to invoke mediation or conciliation as a means to resolve family disputes either when occasion arises outside the court proceedings as well as during the court proceedings. Social movement in this regard becomes all more the important in view of the illiteracy, ignorance and superstitious, culture and traditions of the disputant parties. Family Courts could be restricted to disposing of family matters only. Family Court Judges could be selected from comparatively more experienced Assistant Judges, they could be trained to motivate them to become specialise in adjudicating family disputes, they could be encouraged to urge upon the disputants to go for mediation or conciliation as the occasion arises.