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MUSLIM LAW OF TALAQ

— A Review.

by

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Introduction

Talaq is an important weapon in the hands of a Muslim husband to dissolve a Muslim marriage. He can exercise this power at his will without the intervention of a court. He can also delegate this power to his wife, It is called *Talaq-e-tafwiz* (delegated divorce).

In this Article attempts will be made to show how far the Muslim law of *Talaq* has been affected by legislations and Judicial decisions in indo- Pak-Bangladesh sub-continent. For the sake of convenience of discussion we will deal with the subject matter under two heads: A. *Talaq* by the husband at his will; and B. *Talaq-e-tafwiz.*

A. *Talaq* by the husband at his will: — A divorce may proceed from the husband. If if is proceeded from the husband, it is called *talaq*. There are different forms of *talaq*.

The *ahsan* (or most approved form) form of divorce consists of a single pronouncement in a period of tuhr (period between menstruations i.e. when the woman is free from her menstrual courses) followed by abstinence from sexual intercourse for the period of *Iddat*. It becomes irrevocable, complete and effective on the expiration of *Iddat*.

The *talaq Hasan* — (an approved form but less approved than the *ahsan*) consists of three successive pronouncements made during the three consecutive period of *tuhr*, no intercourse taking place during any of the three *tuhrs*. It becomes irrevocable, complete and effective on the third pronouncement, irrespective of *iddat*.

The *talaq-ul-biddat* or *talaq-i-badai* (disapproved form) consists of (i) three pronouncement made during a single *tuhr* either in one sentence, e. g., "I divorce thee triply or thrice, or in three sentences," "I divorce thee, I divroce thee, I divorce thee". Such a *talaq* is lawful although sinful in Hanafi law, but in Athna Ashari and the Fatimid laws it is not permissible;[1] or (ii) Even a single irrevocable pronouncement either during the period of purity *(tuhr)* or even otherwise clearly indicating an intention irrevocably to dissolve the marriage, e.g. "I divorce thee irrevocably".[2] Such a *talaq* comes into operation immediately and severes the marital tie.[3] This form is not recognised by the Ithna Ashari or the Fatimid school.[4]

Under Muslim law any Muslim who has attained puberty and is of sound mind may divorce his wife at any time without showing any cause.

In order to prevent hasty dissolution of marriage by *talaq* pronounced by the husband unilaterally without an attempt being made to prevent disruption of the matrimonial status section 7 has been incorporated in Muslim Family Laws Ordinance, 1961. This section 7 does not interfere with any form of *talaq* envisaged by Muslim law prevalent among the Muslim of Bangladesh. It only fixes a period after which it becomes effective. There are two approved formes of divorce, *Talaq-us-sunna* known as *talak ahsan,* or *talak hasan,* and an unapproved form known as *talak-ul-biddat.*

Section 7(1) of the Ordinance of 1961 runs thus: (1) Any man who wishes to divroce 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

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1. Tyabji, F.B Mohammadan law: *The personal law of Muslims* 3rd end. Bombay 1940, section 148; Mulla Sir D.F: Principles of Mohammadan law, section 311.
2. Tyabji, F.B. Mohammadan law: *The personal law of Muslims,* 3rd end. Bombay, 1940., Section 147.
3. Mulla Sir D.F. *Principles of Mohammadan law.,* section 313
4. Cadi Nu'man Da'a'im, II section 986

which may be extended to one year or with five which may be extended to five thousand rupees 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 purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation. (5) It the wife be pregnant at the time of *talaq* is pronunced, *talaq* shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends. (6) Nothing shall debar a wife whose marriage has been terminated by *talaq* effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

The expressions, "any man who wishes to divroce his wife" need not cause any difficulty in view of the express words, "after the pronouncement of *talaq* in any form whatsoever in sub-section (1). The expressions "any man who wishes to divroce his wife" cannot be interpreted to mean just a formation of an intention of divorce in futurity. The expressions should be read subject to what has been stated in sub-section (3) of section 7 which makes complete dissolution of marriage i. e. effectiveness of divorce dependent upon the expiration of 90 days from the date of notice to the chairman. Therefore, the use of the expressions "any man who wishes to divroce his wife" cannot be objected to on the ground of introducing an element of uncertainty in the interpretation of the sub-section when the effectiveness of divroce has been made dependent upon the intervering factor of a certain interval of time and that being made the condition precedent. Sub-section (1) refers to the existing modes of *talaq* which are resorted to for dissolution of marriage and a marriage is dissolved as soon as marriage is terminated by *talaq* according to the existing recognised modes. For the first time in the history of Muslim law what sub-section(1) read with sub-section (3) introduces is that whatever be the mode or pronouncement of a

talaq will have to be supplemented by something else and when the provisions newly introduced have been complied with the final stage will only reach.

The expressions "after the pronouncement of *talaq* in any form whatsover "need attention. There are three (according to some four) modes of *talaq* under the Muslim law, namely (1) *talaq-ul- ahsan,* (2) *talaq-ul- hasan* and (3) *takaq-ul-biddat. Talaq-ul ahsan* consists of a single pronouncement of *talaq* followed by abstinence from connubial intercourse for the period of *iddat.* If the woman is subject to manstruation, the period of *iddat* is three courses; it is 3 lunar months if she is not so subject. *Talaq-ul hasan* consists of three pronouncement of *talaq* made during three period of purity of the wife i. e. three pronouncement of *talaq* made during successive *tuhrs.* The *talaq* becomes irrevoocable when the last formula in pronounced. *Talaq-ul-biddat* takes effect immediately after the pronouncement of *talaq* is made and this pronuncement of the formula makes the *talaq* irrevecable (*talaq-ul-bain*). In the three different modes of *talaq* the *terminus* a quo are different. A good deal of time must elapse before the marriage tie is severed and the *talaq* becomes effective in the first two cases of *talaq* i. e. *talaq-ul ahsan* and *talaq-ul hasan.*

In view of the expressions, "after the pronouncement of *talaq*"question may arise whether the expressions mean that as soon as the formula of *talaq* is first uttered and have no reference to the interval of time which must pass before the *talaq* becomes irrevocable under the *talaq-ul-ahsan* and *talaq-ul hasan* modes of divorce, and therefore uttering the formula of divorce the man will have to give notice "as soon as may be" and not wait till the time when the *talaq* will become irrevocable.

The most widely practised mode of *talaq* resorted to in Indo-Bangladesh is the third mode of *talaq* i. e. *talaq-ul-biddat* which dissolves the marriage immediately and effectively with the pronouncement of the formula of *talaq.* So, for practical purposes a question of this character will not come for frequent consideration. The difference in the first two modes and the third one is that in the former case the *talaq* is revocable during the period of *iddat*

and in the latter case the *talaq* becomes immediately irrevocable and the period of *iddat* will have to be observed to satisfy the other requirements of law.

In view of the above position it can be logically said that in all cases the notice will have to be served "as soon as may be" after the *talaq* is pronounced and without reference to the time which makes the *talaq* effective after the lapse of the period of *iddat* in the modes of *talaq-ul-ahsan* and *talaq-ul hasan.*

It will be safe to assume that the expressions, "shall not be effective until the expiration of 90 days" in sub-section (3) has no reference to the period of *iddat,* the observence of whcih is obligatory on a divorced woman and in fact is independent of it. Though the period of *iddat* is also near about 90 days any attempt to identify this period of 90 days with the period of iddat will be without any positive and sure foundation, not only in the case of *talaq-ul biddat* whcih is irrevocable and immediately effective but also in the case of *talaq-ul ahsan* and *talaq-ul hasan.* The husband is under obligation to send the notice under sub-section(1) "as soon as may be after the pronouncement of *talaq*", that is to say, within a reasonable time. So far as the service of notice is concerned if the husband serves notice of *talaq* after seven days of the pronouncement of talaq he will be acting within a reasonable time. 90 days plus 7 days made a total of 97 days and this is beyond any ordinary period of iddat.

To effect legal divorce section 7(1) & (3) must be complied with. The question arose whether the deed of divorce even if held to be genuine would operate as a valid divorce under the Shia law and further in view of the fact that the alleged divroce having taken place on 16.11.61, whether the marriage of the divorced woman alleged to have held on 2.12.62 was valid under the provisions of section 7 of the Ordinance. Held : *Talaq-ul biddat* is not recognised as valid by Shia law,. According to Shia doctrines, a *talaq* among the Shias for the purpose of bringing about a dissolution of marriage must be orally pronounced by the husband, in the presence of two witnesses and the wife, in set form of Arabic words. A written divroce amongst the Shias is not recognised, except in

certain circumstances. Unless the provisions of section 7(1) of the Muslim Family Laws Ordinance are complied with regarding service of notice to the chairman of union council a *talaq* will fail to operate. Therefore, the *talaq* being dated 16.11.61 cannot free a woman to marry a man on 21. 12. 62, the provisions of section 7(1) standing on the way.[5]

In *Sayed Ali Newaz Gardezi V Lt. Col. Md. Yusuf*[6] it has been held that a marriage with another man followed by a divorce by the husband if taken place in violation of provisions of section 7 of Ordinance which enacts that the marriage between the divorced woman and the former husband shall subsist for a period of 90 days, will not be a valid and lawful marriage. The position that emerges is that the respondent was guitly of enticing or taking away Christa Renate, when She was still the lawful wedded wife of the complainant, from the latter's home and he, therefore, committed an offence which fell within the perview of section 498 B. P. C. The point remains that he knows her to be the wife of the appellant at the relevant time. The intention to marry her had no genuine basis as he must have known that there was no legal seperation between her and her first husband and no marriage ceremony, even if gone through, could wipe out that fact from his conscientiouness. The subsequent marriage in the circumstances must be regarded merely as a divorce to put up a facade of respectability over an illegal union.

In *Abdul Aziz V Razia Khatoon*[7] it was held that non-compliance with provisions of sub-section (1) of section 7 of the Ordinance makes *talaq* legally ineffective. It was further held that the petitioner in the present case failed to prove compliance with the provisions of sub-section (1) of section 7 of the Ordinance, with the consequence that the alleged *talaq*, if it was pronounced by him, was not effective in law, so that in the eye of law the marriage between him and the opposite party subsists. In this case A. M. Sayem, J observed as follows: "Mr. Razzaq Rahman who

5. *Syed Ali Newaz Gardezi* V *Lt. Col. Md. Yusuf* (1963) 15 DLR (S. C.) p. 9
6. (1963) 15 D. L. R. (S. C.) p. 9
7. (1969) 21 D. L. R. p. 733

appeared at my request took me through the text of the Ordinance, including section thereof which consists of six sub-sections. It is sub-section (1) and (3) he contented, that are relevant for the disposal of this rule, and not sub-section (4) which weighed not much with the learned Magistrate, for a proper appreciation of Mr. Rahman's submission it is necessary to refer to the contents of sub-section1, 3 and 4 of section 7. These 3 sub-sections are produced below : (I) Talaq — any person who wishes to divroce 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." "(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 purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation."

The court observed : "sub-section (5) of which reference has been made in sub-section (3) is not relevant for the purpose of this rule. Sub-section (5) fixes the period on the expiry of which *talaq* would be affective, if the wife be pregeant at the time *talaq* is pronounced. It was not the case of Razia Khatoon that she was pregnant at the time of the alleged divorce. Mr. Razzak Rahman pointed out that sub-section (4) of section 7, which makes it obligatory on the chairman to constitute an Arbitration Council and directs that council to take all steps necessary to bring about reconciliation between the parties, does not say what would be the consequence if the Chairman does not appoint an Arbitration Council or if such a council, duly constituted, fails to take such steps as it is required to take. On the other hand, Mr. Razzak Rahman further pointed out, sub-section (3) lays down in clearest terms that the *talaq* shall not be effective until the expiration of the period mentioned in it from the day on which notice under sub-section (1) is delivered to the Chairman"[8]

8. *Abdul Aziz* V. *Razia Khatun* (1969) 21 D. L. R. p. 733

In this case,[9] which does not involve the question of pregnancy, Mr. Rahman submitted, the alleged divorce could be effective only on the expiry of ninety days from the day it could be proved that such a notice as required by sub-section (1) was delivered to the chairman. The court further observed, " I am thankful to Mr. Razzak Rahman for the lucid exposition of the legislative intent expressed in section 7 as to the date on which a *talaq* becomes effective in law, and that the parties have little to do with sub-section (4) for a violation of the provisions of which it is not they but the Chairman of the Arbitration Council, if it has come into existence, will be responsible. If the chairman fails in his duty or the Arbitration Council fails in its reconciliation efforts the *talaq*, if otherwise valid, cannot but be effective in law on the expiry of period mentioned in sub-section (3) .... The contention of the learned advocate for the petitioner, Moulvi Abdul Aziz, that the learned Magistrate was in error in holding that in the absence of proof of an Arbitration Council having been constituted under sub-section (4) of section 7 of the Ordinance, the alleged divorce was not legally effective, cannot therefore, be accepted." . . . . . ".

The court opined: "I agree with the learned Magistrate that the petitioner Moulvi Abdul Aziz failed to prove compliance with the provision of sub-section (1) of section 7 of the Ordinance, with the consequence that the alleged *talaq*, if it was pronounced by him, was not effective in law, so that in the eye of law, the marriage between him and Razia Khatoon subsists. She is, therefore, entitled to maintenance. Whether petitioner Moulvi Abdul Aziz's statement on oath before the learned Magistrate alleging divorce constitute a valid pronouncement of *talaq* need not be considered in this case, as that can be of no avail to the petitioner who has to serve a notice on the chairman in terms of sub-section (3) of section 7 in order to make such a *talaq* effective.[10]"

In *Abdus Sobhan Sarkar V. Md. Abdul Ghani*,[11] the court observes, "It appears that Section 7 of the Muslim Family Laws

9. *Ibid*
10. *Abdul Aziz* V *Razia Khatun* 21 D. L. R. (1969) p. 736
11. (1973) 25 D. L. R p. 227

Ordinance requires only a notice of a *talaq* to be given to the Chairman. It will further appear that section 7 requires the Arbitration Council neither to decide nor to determine anything upon such notice, though section 6 requires the Arbitration Council to decide a husband's application for permission to contract another marriage during the subsistance of an existing marriage and record reason for its decission and section 9 requires the Arbitration Council to determine the matter upon an application by a wife for maintenanne. It will also appear that although sub-section (4) of section 7 provides that within 30 days of the receipt of notice of pronouncement of a *talaq* the Chairman is required to constitute an Arbitration Council which is to take steps necessary for reconciliation, nothing has been said in the section or any where else in the Act providing as to what happen if upon receipt of such a notice of the *talaq* the Chairman does not constitute an Arbitration Council and does not take any step to bring about reconciliation between the parties. Failure of the Chairman to constitute an Arbitration Council or that of duly consituted Arbitration Council to take necessary steps to bring about reconciliation is thus inconsequential and under section 7(1) *talaq* becomes effective after schedule period. Arbitration Council's function is limited. Once notice of the pronouncement of *talaq* in terms of section 7(1) is delivered to the Chairman, the *talaq* that is otherwise valid, will be effective of the expiration of 90 days of the delivery of notice or if the wife be pregnant at the time of the pronouncement of talaq till the pregnancy ends. Thus, so far as *talaq* is concerned, the Arbitration Council has no function except to take step to bring about reconciliation between the parties. Beyond that the Arbitration Council has nothing to do.

Now we shall see wether section 7 of the Muslim Family Laws Ordinance is applicable to a marriage by a Muslim with a christian woman or with a non-citizen woman. In *Mrs. Marina Jatoi* V *Nuruddin K Jatoi,*[12] it has been held that if a Muslim husband marriage a Christian woman (in England), such marriage can be terminated in *Pak-Banglades h* under the Muslim Family Laws

12. (1968) 20 D. L. R (S.C.) 44

Ordinance, the *lex loci* of the husband. If a Muslim husband is married to a Christian woman in a form recognised by Muslim law, or to a non-citizen Muslim woman, there is no reason why the provision of section 7 of Muslim Family Laws Ordinance should not apply, if he wants to divooce his wife by *talaq*.

Section 7 of the Ordinance prescribes an elaborate procedure how a marriage can eventually result in its dissolution following a pronoun-cement of *talaq*. There is nothing in this Ordinance which ruled out the possibility of an application of its provisions to Muslim husband married to Christian wife in regular form.

Even the latest judcial trend in England favours the principle that if the law of the domicile permits a dissolution of marriage solemnized in England by the pronouncement of *talaq*, the divorce may be recognised as valid under the rules of private international law.[13] A pertinent factor to note in this context is that divorce by *talaq* is now regulated in Pakistan & Bangladesh by the procedure prescribed in the Muslim Family Laws Ordinance, so that it no longer remains a purely private unilateral act of the husband. The matter does go before a public authority before it receives finality.[14]

Provisions of section 7 are applicable even where one of the parties to the marriage is a non-citizen of Pakistan or Bangladesh.

It was held that it is impossible to read a limitation of section 7 of the Ordinance that the marriages contemplated by the Ordinance should necessarily be between two Pakistani or Bangladeshi Muslims. A marriage by a Pakistani or Bangladeshi Muslim with, say, an Indian Muslim woman, would fall within the provisions of this section 7 if it is performed within Pakistan or Bangladesh.[15]

Now we shall discuss how far the provision of section 7 of the Muslim Family Laws Ordinance is in conformity with the injunc-

13. *Mrs Mordina Jatoi* V *Nuruddin K. Jatoi* (1968) 20 D. L. R. (S. C.) p.44
14. *Mrs. Mordina Jatoi* V. *Nuruddin K. Jatoi* (1968) 20 D. L. R. (S. C.) 19
15. *Syed Ali Newaz Gardezi V Lt. Col. Md. Yusuf* (1963) 15 D. L. R. (S. C.) 9

tions of the Holy Qur'an and how far it has affected the traditional Sharia law of *talaq*.

The provision of section 7 is based on the Qur'anic verse.[16] The Translation of the verse runs thus : " if you fear a breach between the two (i.e. between the husband and the wife), then appoint a judge from his people and a judge from her people; if they both desire agreement, God will effect hermoy between them." The above mentioned verse of the Qur'an contemplates an exploratory process for the purpose of bringing about a reconciliation between the husband and the wife when differance and disputes have seperated them from each other . Before there be an actual seperation by pronouncement of *talaq* the Qur'anic *ayat* seems to suggest that the attempt at reconciliation should be made. It is submitted that this has kept the qur'anic *ayat* immune from any confusion to which the section under reference has lended itself.

The above ayat aims at an intervention at the pre-divorce stage. The situation which arises in the post divorce stage has altogether a different bearing. By a different procedure it has been sought to be solved by Qur'an with its characteric wisdom and profound knowledge of human psychology. Sub-section (3) is bound to cause a flutter in the mind of the religious and orthodox section of the community. It is submitted that its provisions set at naught the procedure and practice followed with respect to the mode in which a marriage is dissolved between Muslim couples. The anomaly thus created brings it in conflict with law (Shariat) as it stood before the Ordinance. Sub-section (3) provides that a *talaq* unless revoked earlier shall not be effective until expiration of 90 days from the date of service of notice. When a sunni has effected a *talaq* by three pronouncement in one sitting (i. e. by *talaq-ul Biddat*) there is an immediate dissolution of the marriage tie between the parties in accordance with the law as applicable to them. When a marriage is thus dissolved what is the effect of sub-section (3) ? Under this sub-section (3) a *talaq* shall not be effective until the expiration of 90 days and the parties will continue to live as husband and wife till then. In the case of an issue born as a result of cohabitation

16. The Qur'an Chapter iii verse 35, in Sura An-Nisa.

between the parties during these 90 days an anomalous position is likely to happen if ultimately the efforts of reconciliation fails and the parties seperate.

According to Muslim law, as it stood before the Ordinance, marriage terminates with the expiry of *iddat* in the case of *talaqu-ul ahasan* and *talaq ul hasan* and immediately in the case of *talaq-ul biddat*. In such a case unless the divorced wife is married to a third person and the latter in his turn divorces her again re-marriage between the parties is not allowable. This situation comes in conflict with sub-section(3). We can illustrate the case of *talaq-ul biddat*. Under sub-section(3) read with sub-section(6) there must be three *talaq-ul biddat*, each followed by a period of 90 days after which a marriage with third person would have intervene if the parties want again to be united in marriage. It is submitted that this is something strickingly different from what the Muslim Law (Shariat) was before the Ordinance.

In *talaq-ul hasan* mode the third pronouncement of *talaq* dissolves the marriage. In this mode the third pronouncement of *talaq* which dissolves the marriage has become ineffective under the provisions of sub-section(3) which makes expiration of 90 days as to terminus a quo for dissolution of marriage. Ninety days shall be counted from the date of service of notice of *talaq* to the chairman. According to Shariat remarriage with the divorced wife after the third pronouncement in the case of talaq-ul hasan is not possible. According to shariat until she has been married to another person and has been divorced by him remarriage with the divorced wife after the third pronouncement in the case of *talaq-ul hasan* is not possible. But sub-section (6) makes it open to a husband to divorce his wife thrice by *talaq-ul hasan* mode, each having its full course and to enable parties to remarry each other again, intervention of marriage with another man will be necessary after the third *talaq-ul hasan* has been completed in accordance with the law. Under sub-section (6) the resultent position will be that the husband will be at liberty to pronounce *talaq* during 9 *turs* of the wife and after that marriage will terminate effectively and finally. This is also different from what the law (Shariat) was before the Ordinance.

B. Talaq-e Tafwiz. (delegated divorce)

Under Muslim law dissolution of marriage may also be effected in the exercise of power of delegation under a system known as the doctrine of *tafwiz.*[17] The wife may exercise the power so delegated even after the institution of suit against her for restitution of conjugal right and the power so delegated to the wife is not so revocable.[18] An agreement between husband and wife by which the husband authorises the wife to divorce herself from him in the event of his marrying a second wife without her consent is valid.[19] Failure to pay maintenance in terms of *kabinnama* entitles the wife the right of divorce.[20] The wife is entitled by virtue of the delegated power to dissolve the marriage tie in case where there is an express stipulation as to the basis of delegated power given to her by her husband in the event of not living with her in her parents' house.[21] A *talaq* by *tafwiz* means that the husband who has a right of divorce stipulates at the time of marriage to deligate sanction the enforcement of those conditions that is to say in case of breach of some of the important terms, the husband specifically makes over his right and authority to his wife.[22]

In *Buffatan Bibi* V *Sk. Abdul Salim* [23] it was held that an antenuptial agreement by a Muslim husband in a *Kabin-nama* that the wife would be given seperate maintenance in case of dissagreement and that in case of failure to pay maintenance for a certain period the wife should have the power to divorce herself is not opposed to public policy and is enforceable. It was held further that in exercising her power under the agreement the wife must establish that the conditions entitling her to exercise the power must have been fulfilled. This form of delegated divorce is common in Bangladesh and this is perhaps the most potent weapones in the hands of a Muslim wife to obtain her freedom without the help of

17. *Saimuddin V Lutfunnessa* 46 Cal 141 (148)
18. *Ibid.*
19. *Mahrram Ali V Ayesa Khatun 19 C. W. N. 1226*
20. *Sofura Khatoon V Osman ghani Mollah* (1957) 9 D. L. R. 455
21. *Shamsun Nessa V Md yakab Mia* (1956) 8 D. L. R. P. 601
22. *Ibid*
23. A. I. R. (1950) Cal 304

any court.[24] Firstly, the wife must clearly establish that the events entitling her to exercise her option have occured and secondly, that she has actually exercised her option.[25]

The husband cannot delegate his power to divorce before he becomes major but majority for delegation of power of divorce is to be governed by the Muslim Law and not by section 3 of the Majority Act 1875. Such delegation amounts to an "act in the matter of divorce" within the meaning of section 2 of the Act.[26]

The power may be conferred to any person including the wife herself. It is open to the husband to appoint another person as his *vakil mutlaq* or fully empowered agent in the matter of the divorce of his wife authorising him to divorce her at any time and also delegate that power to another person. Such a divorce would be equivalent to a divorce by the husband himself.[27] The power must, however, be expressly delegated and will not be implied.[28]

The mere fact that the husband has granted a power of *talaq* to the wife or to any other person does not deprive the husband of his power to pronounce *talaq*.[29] The observation that such power may perhaps be given by a contract entered into at the time of marriage[30] does not seem to be correct.

The power to pronounce talaq may be granted at the time of the contract of marriage or at any time after that. The validity of the granting of power after the marriage has been challenged in some cases. It has been held that there is no authority for challenging its validity and, in fact, most of the instances of *tafwiz* given in the texts are of post-nuptial grant of power and refer to the authority

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24. (1936) 38 Bom Law Rep; II, 113, 120-1
25. *Mirjan Ali* V *(Mst) Maimuna Bibi* A I R (1949) Assam 14; *Buffatan Bibi* V *Sk. Abdul Salim* A I R (1950) Cal 304
26. *Fatima Khatun* V *Fazl Kairm,* (1928) Cal 303; 110 I C 52
27. *Fida* V *Sanai Badar,* (1923) Nag 262; 173 I. C. 1942; *Mohd Amin* V Mt *Himma Bibi,* (1931) Lah 134
28. *Sayeda V Mohd Sami,* P. L. D. (1952) Lah 113
29. *Nag Ky W* V *Hittla,* 49, I. C. (Rang)
30. *Hasan Channea* V *Mi Sin,* 29 I. C. 659 (U. B.)

given by a person to another who is already his wife.[31] A pre-nuptial agreement conferring such power is also valid. The question whether there would be any difference in law in the case of ante-nuptial or post-nuptial agreements was left open in a case.[32] The contention that a delegation of power by an agreement made at the time of marriage would not be valid was raised in some cases but this contention was overruled.[33] It was pointed out that the provisions of Muslim law which provide for delegation of power of divorce after marriage is unlimited, and there was no reason for holding a pre-nuptial delegation to be invalid.[34]

The power granted for *tafwiz-i-talaq* does not require any declaration by court. It is sufficient by itself. If the wife pronounces a *talaq* in exercise of such right, a marriage by her with another person does not bring home the charge under section 404 B. P. C.[35]

The marriage does not automatically become dissolved. A formal pronouncement of *talaq* must be made to the husband or it must be to witnesses.[36]

The power may however not be limited to any particular period but may be absolute as regards time.[37] Thus, if a man says to his wife "thou art repudiated when or whenever thou will", or at the time thou wish" the power is not restricted to the meeting and may be exercised at any time. In such a case the wife is not bound to use her power immediately even though the contingency on which the power depends have been fulfilled.[38]

The delegation of power of divorce may be made subject to the fulfilment of any condition or happening of any contingency, just as

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31. *Sainaddin* V *Latifunnissa,* 46 Cal 141; *Mst Fatima Khatun* V *Fazal Karim,* (1928) Cal 305
32. *Babu Mian* V *Badrunnissa,* 40 I. C. 803
33. *Fatima Khatun* V *Fazal Karim,* (1928) Cal 303
34. *Hamidoola V Fazunnissa* 8 Cal 327; *Mirjan Ali* V *maimuana* (1949) *Asam* 14; *Ayatunnissa* V *Karam Ali* 36 Cal 23;
35. *Suroj Mia* V *Abdul Mijid* (1953) Trip 6(i); (1953) Cr. L. J. 1804
36. *Mirjan Ali* V *Mat Maimuna Bibi* (1949) Asam 14
37. *Ashraf Ali* V *Arshad Ali* (1871) 16 W. R. 260
38. *Sainnuddin* V *Latfunnissa* 46 Cal 141

a husband is entitled to pronounce the divorce conditionally or contingently.[39] There is nothing whatever unreasonable in the husband delegating to his wife the power to divorce in the event of the happening of certain circumstances.[40] It is not valid to make a transaction dependent on any condition or contingency in the case of ordinary *tamliks* or transfers. On the other hand *tafwiz* partakes of the character of *tamlik* only partially. It may be made dependant on a condition or contingency unlike ordinary *tamlik*.[41] If a marriage, under the terms of a *kabinnama* is to stand dissolved on default on the part of the husband to fulfil certain conditions, the deed itself would be treated as a *talaqnama* if there is defect.[42]

The terms of the conditions must be fulfilled. The wife's right of divorce will not arise if a breach occurs which the husband in legally entitled to make. It is necessary that the conditions entitling the wife to pronounce *talaq* must be clearly established.[43] It is also necessary that the conditions must be fulfilled fully and strictly and conditions must be reasonable and not opposed to policy of Muslim law.[44]

Agreements made at the time of or before or after marriage are binding unless they are illegal or cpposed to the policy of Muslim law. On certain conditions the power to pronounce *talaq* is often provided in matrimonial agreements. If a valid power can be given absolutely and unconditionally to the wife or to any other person is a matter of doubt. In many cases the question of the validity of the conditions has been raised. In a case where unconditional and absolute power was granted to another person, it is held that such power authorised the person to pronounce a divorce for any reason that would entitle the husband to do so with the exception perhaps of a mere *wasi* or caprice of his own in which case he exercised an

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39. *Nafisunnissa V Bodi Rahman* 20 I. C. 642 (Rang)
40. *Fatima Khatun* V *Fazal Karim* (1928) Cal. 308 at p. 304
41. *Saimuddin* V *Latifunnissa*, 48 I. C. 609 at p. 610 (Cal)
42. *Aziz* V *Mst Naro*, (1955) H. P. 32
43. *Mirjan Ali* V *Mst Maimuna*, (1949) Asam 14
44. *Ahmad Ali* V *Sabha Khatun*, P. L. D. (1952) Dhaka 385

unjustifiable and unreasonable use of this power.[45] A guardian can also validly make such an agreement.[56]

An agreement to the effect that if the husband married another wife the existing wife may pronounce *talaq* is valid.[47]

An agreement to the effect that if the husband abuses or assaults the wife[48] or beats her without any fault or otherwise ill-treats her[49] the wife antitled to pronounce talaq would be valid.

Now we shall consider the impact of section 7 of the Muslim Family Laws Ordinance, 1961 on *talaq-e-tafwiz* and for this purpose we are to read section 8 of the said Ordinance which runs thus: "Where the right to divorce has been duly delegated to wife and she wishes to exercise that 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* and so far as applicable, apply."

So the provisions of section 8 seem to cover wide grounds and their applicability will have to be determind according to the nature of each case.

A *talaq-e-tafwiz* carries with it the same incidents whcih are applicable to a *talaq* pronounced by the husband in case where a *talaq* is effected not by the husband but by the wife in exercise of the right delegated to her by her husband. As a logical corollary applicability of the provisions of section 7 to such a mode of *talaq* follows. The words "and she wishes to exercise that right" seem to suggest that before the wife has divorced herself in exercise of the right conferred on her provisions, partial only of sub-section (4) of section 7 will be set in motion. Sub-section (3) of section 7 clearly contemplates pronouncemnt of *talaq* which becomes effective on the

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45. *Fida* V *Sanai Sardar,* (1923) Nag 262
46. *Marfat Ali* V *Jabedannessa* (1941) Cal 657
47. *Mohd Amin* V *Mst Amina Bibi,* (1931) Lah 134; *Sultan Ahmad* V *Sabra Khatun* 43 I. C. 17; *Sadiqa* V *Ataullah* (1933) Lah 685 *Mahram Ali* V *Ayesa Khatun* 19 C. W. N. 1226; *Badrunnissa* V *Mafiatullah* (1871), 7 Beng L. R. 542
48. *Nafisunnissa* V *Bodi Rahman* 20 I. C. 642
49. *Hamidoolla* V *Faizunnissa,* 8 Cal 327

expiration of 90 days and so interpretation of these words in the way suggested above will however bring it in conflict with the provisions of section 7. If there is no *talaq* before hand, it cannot be said that it will not be effective until the expiration of 90 days, to avoid a conradictory conclusion it should be held that the words of section 8 mentioned above really contemplate a situation when the wife has actually exercised her right of divorcing herself and not earlier to that.

Conclusion

There are two approved forms of divorce, *talaq-us-sunna* known as *talaq ahsan* and *talaq hasan* and an unapproved form as *talaq Biddat* and under Muslim law any Muslim who has attained puberty and is of sound mind may divorce his wife at any time without showing any cause.

In order to prevent hasty dissolution of marriage by *talaq* prounced by the husband unilaterally, without an attempt being made to prevent disruption of the matrimonial status section 7 has been incorporated in Muslim Family Laws Ordinance, 1961. This section 7 does not interfere with any form of *talaq* envisaged by Muslim law prevelent among the Muslims of Bangladesh. It only fixes a period after which it becomes effective.

Not only in the case of *talaq-ul-bddat* which is irrevocable and immediately effective but also in the case of *talaq-ul-ahsan* and *talaq-ul-hasan* the husband is under obligation to send the notice under sub-section(1) of section 7 "as soon as may be after the pronouncement of *talaq,*" that is to say within a reasonable time.

Unless the provisions of section 7(1) of the Muslim Family Laws Ordinance are complied with regarding service of notice to the Chairman of Union Council a *talaq* will fail to operate and be ineffective and if in compliance with section 7(1) of the Ordinance notice of *talaq* is served upon the Chairman of the Union council, the *talaq* will be effective after the expiry of 90 days from the date

of service of notice in a case where there is no reconciliation between the parties within the aforesaid period.[50]

This provision of section 7 of the Muslim Family Laws Ordinance, 1961 is contrary to the provision of Muslim Law. It has great impact on the traditional Hanafi system of *talaq* by the husband.

A *talaq-e-tafwiz* carries with it the same incidents which are applicable to a *talaq* pronounced by the husband in case where a *talaq* is effective not by the husband but by the wife in the exercise of the right delegated to her by the husband.

In conclusion we like to say that in present socio-political context and modern human rights movement for women the judiciary and the public of Bangladesh must come forward to curtail the arbitrary power of *talaq* of Muslim husbands and make *talaq* more 'detestable' than ever before.

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50. *Abdul Aziz* V *Razia Khatoon* (1969) 21 D. L. R. p.733; *Abdus Sobhan Sarkar* V *Md. Abdul Ghani* (1973) 25 D. L. R. p. 227; *Syed Ali Newaz Gardezi* V *Lt. Col. Md. Yusuf* (1963) 15 D. L. R. (S. C.) p. 9