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TALAQ : A MODERN DEBATE

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The Law of *talaq* has been the subject of a long running controversy among Muslim scholars. The law of *talaq* repeatedly raises two important issues for consideration : first, the concept of the 'unilateral right' of the husband to divorce his wife and second, the modes of *talaq*. There is divergence of opinion among the various schools of jurists and scholars relating to *talaq.*[1] The modernists have argued against the conventional interpretation of *talaq.* They exegete the law according to the spirit of the *Quran* and *Sunna* and the changing circumstances of the society.

Islam has given rights to both the husband and the wife to dissolve the marriage. It 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 greater evil. Despite the freedom of the parties to divorce, Islam warns both parties against unscrupulous use of the right. It says that divorce is the most detestable thing even when lawfully allowed or permitted. Thus divorce is allowed as a last resort, it is discouraged rather than encouraged in Islam. This attitude is preserved in the tradition of the prophet and the verse of the *Quran* (IV : 35). However, the orthodox jurists were reluctant to accept divorce as a last resort. Hedaya calls, a legal manual, which describes divorce as

> "a dangerous and disapproved procedure as it dissolves marriage, an institution which involves many circumstances as well of a temporal as a spiritual nature; nor is it propriety at all admitted, but on the ground of urgency of relief from an unsuitable wife".[2]

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1 Syed Ameer Ali, II Mohammadan Law , (1985)PLD (Lah.) 423, (1965)

2. Charles Hamilton, The Hedaya : A Commentary on the Mussulman Law, 73 (Lahore, 1957)

The Islamic ideal is often defeated by social custom. The Arab custom enabled a man to divorce his wife at will and on whim. This is followed by orthodox jurists, although the *Quran* and *Sunna* established certain guidelines for man and rights for women based on considerations of equity and responsibility. This article examines and orthodox interpretation of the law of *talaq* and shows how the modernists counter these exegeses.

Unilateral right

Modern jurists contend that the concept of *talaq* as a 'unilateral act of the husband' is due to the influence of Hebraic Laws[3]. The laws of Manu and, to a great extent, the matrimonial law of pre-Islamic Arabia.[4] Ali says that under ancient Hebraic law a husband could divorce his wife for and cause which made her unacceptable to him, and there was little or no restraint on his arbitrary and capricious use of this power[5].

Orthodox jurists often cite the following two verses of the *Quran* in support of the husband's authority to pronounce unilateral divorce (*talaq*). First, (*Quran* II : 228) :

> "And women shall have rights similar to the rights against them, according to what is equitable, but men have a degree over them[6] ."

The second (*Quran* IV : 34) :

> "Men are the protectors and maintainers of women. Because God has given the one more (strength) than the other and because they support them from their means[7] ."

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3. Id. at 432 (1965).
4. M. R. Zafar, "Unilateral Divorce in Muslim Personal Law", in Tahir Mahmood (ed.) Islamic Law in Modern India,168 (Bombey, 1972)
5. Ameer Ali, supra note 1, at 432; Ameer Ali, the Spirit of Islam : The History of the Evolution and Ideals of Islam with a Life of the Prophet, 241 (1967); see M. A. Qureshi, Muslim Law of Marriage, Divorce and Maintenance, New Delhi, 186 (1992); Bashir Ahmad "Status of Women and Settlemant of Family Disputes Under Islamic Law" in Tahir Mahmood (ed.) Islamic Law in Modern India, 187 (Bombay, 1977)
6. Abdulla Yusuf Ali, I & II The Holy Quran, 190 (New Delhi) 1979.
7. Id. at 190.

Orthodox jurists[8] have held that the husband can put an end to the marriage at his absolute discretion. The wife may do the same only if the husband has conferred such a power upon her[9] . Rahim says that, with a view to regulating matrimonial relations, Muslim Law allows a predominant position to the husband because, generally speaking, he is mentally and physically the superior of the two. Some orthodox jurists treat the dower payable to the wife as consideration for enjoyment of sexual freedom over the body of the wife[10] .

However, some modern jurists do not agree with the above argument and hold that the spirit of these two key verses is not intended to be prejudicial to the equality of the sexes[11] . Engineer clarifies the reference in the *Quranic* verse that men are 'a degree above them'. This is not meant to indicate their superiority over women : the 'edge' that men have over women is a biological not a social fact. The statement also relates to other matters referred to in the verse (*Quran* LXV : 1) namely that women, on being divorced, have to wait for a period of three courses i. e. *iddat* so as to be sure

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8. The orthodox jurists consider that Islam is inimical to change. Esposito points out that conservative religious leaders lend to be fixed on the past. For them tradition is not so much a source of inspiration and direction as a literal map to be followed in all its details. This perfect blueprint for Muslim society, contained in the traditional (classical) legal manuals, is not seen as a response to a specific socio-historical period–a conditioned produced hammered out by jurists in light of Islamic principles and values–but as a final, comprehensive guide. The orthodox jurists failed to distinguish between revealed, immutable principles and the historically conditioned laws and institutions that were the product of the early jurists fallible human reasoning and the assimilation of foreign influences and practices (John L. Esposito, Islam : The Straight Path, 214 (Oxford, 1994).

9. Abdur Rahim, The Principles of Muhammadan Jurisprudence, 335 (London, 1911).

10. Id. at 327; also see Paras Diwan, Muslim Law in Modern India, 76 (1991); C. M. Shafqat, The Muslim Marriage, Dower and Divorce, 96 (New Delhi, 1979); Radha Krishna Sharma, Nationalism, Social Reform and Indian Women, 32 (Patna, 1989).

11 See L. N. Ahmed, Muslim Law of Divorce,14-16 (New Delhi, 1978); Firasat Ali & Furqan Ahmed, Divorce in Mohammedan Law, 16-17 (New Delhi, 1988).

whether *Allah* has created life in their womb or not. This does not apply to men who are free to marry without observing *iddat*[12] .

Moreover modern scholars contend that a husband cannot exercise the power of *talaq* in an arbitrary, irrational or unreasonable manner[13]. While the *Quran* recognizes the right to divorce, it recognizes *talaq* only with numerous injunctions to observe justice and fair play, generosity and kindness[14] . The behest of the *Quran* (II : 299) in this regard is :

"A woman must be retained in honour or released in kindness" and in the words of the Prophet :

"With *Allah,* the most detestable of all things permitted is divorce[15]."

Divorce in Islam is strongly disapproved of and discouraged. It is permitted only when it is absolutely necessary[16]. Radd-ul-Muhtar limits the use of *talaq* by the husband and lays down that *talaq* is allowed only when the wife by her conduct or her words does injury to the husband or is impious. On the other hand, on the part of the husband it is *wajib* (obligatory) when he cannot fulfil his duties, as when he is impotent or an eunuch[17] . Anderson contends that it is a sin before God for a man to divorce his wife without cause or to divorce her in any way other than the two traditional forms (*ahsan* and *hasan*), which alone are regarded as being divinely sanctioned[18]. However, the capricious use of *talaq* in the Sub-continent, as elsewhere, gives an impression that it is an unfettered right of the husband to divorce his wife. Justice Iyer has commented on the arbitrary use of *talaq* :

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12 . Asghar Ali Engineer, The Rights of Women in Islam, 53 (New Delhi, 1992).

13 . See Tahir Mahmood, The Muslim Law of India,114 (Allahabad, 1982).

14 . Kamila Tyabji, "Polygamy, Unilateral Divorce and Mahr", in Tahir Mahmood (ed.), Islamic Law in Modern India, 142 (Bombay, 1972).

15 . Maulana Muhammad Ali, A Manual of Hadith, 284 (Lahore).

16 . Ahmed, supra note 11, at 3.

17 . Cited in Ameer Ali, supra note 1.

18. J. N. D. Anderson, Law Reforms in the Muslim World, 150-169 (London, 1976).

> "It is a popular fallacy that a Muslim male enjoys under the *Quranic* law, unbridled authority to liquidate the marriage . . . The view that muslim husband enjoys an arbitrary, unilateral power to inflict divorce does not accord with Islamic injunctions. However, Muslim Law, as applied in India has taken a course contrary to the spirit of what the Prophet or the Holy *Quran* laid down and the same misconception vitiates the law dealing with the wife's right to divorce[19]."

The *Quran* (IV : 19) enjoins forbearance even if the husband is not satisfied with his wife :

> "If ye take a dislike to them, it may be that ye dislike a thing and God brings about through it a great deal of good[20]."

On the other hand, Islam does not require the couple to hang on to an ill founded marriage tie. When the husband and wife cannot live together in peace and harmony, they are given the option to separate[21] , but before such a separation 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 peach God hath full knowledge and is acquainted with all things[22] .

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[23] . It can be argued that Islam condemns the husband giving *talaq* to his wife unreasonably and encourages reconciliation between the couple

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19 . Yusuf v Sowramma AIR 1971 Ker 264.

20 . Yusuf Ali, supra note 6, at 184.

21 . Ahmed, supra note 11, at 4.

22 . Yusuf Ali, supra note 6, at.

23 . Maulana Muhammed Ali, The Religion of Islam, 627 (Lahore,1936); Tahir Mahmood, "A Unreported Judgement on the Islamic Law of Divorce" In II Islamic and Comparative Law Quarterly, 47-48 (1982)

before a hasty decision is made by the husband. 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[24] .

However, divorce law as applied in the Sub-continent has taken a course contrary to the spirit of what the *Quran* and *Sunna* has laid down[25] . The husband's right of *talaq,* at his whim and caprice, has been found valid in law[26] . Munro and Abdur Rahim JJ. said in *Asha Bibi v Kadir Ibrahim Rowther*[27] .

> "No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the *Koran* and in the reported sayings of the Prophet (*Hadith*) and is treated as a spiritual offence."

but at the same time the judges held:

> ". . . impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband."

The law of *talaq* was only partially understood by the judges of British India. They ignored totally the provision of taking recourse to reconciliation before any marriage is dissolved. The British Parliament left the Muslim personal law more or less untouched as they were fully alive to the fact that Muslims consider their religion to be based upon divine origin and therefore, infallible and unchangeable[28] . in fact the British Colonial powers were more interested in the wealth of British India and the protection of Christianity than interfering in the

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24 . Ameer Ali, supra note 1, at 432

25 . V. R. Krishna Iyer, "Reform of the Muslim Personal Law" in Tahir Mahmood (ed.), Islamic Law in Modern India, 26 (Bombay,1972).

26 . Ahmed Nasim Molla v Khatoon Bibi, 1933 ILR 59 Cal 833, Reuben Levy, The Social Structure of Islam, 121 (Cambridge 1957).

27 . ILR (1909) 33 Mad 25.

28 . Nisar Ahmed Ganai, "Judicial Contribution to Muslim Matrimonial Law in a Changing Soiciety in India : Some Policy Perpectives" in K. L. Bhatia & Shri Jagmohan (eds.), Judicial Activism and Social Change, 408 (New Delhi, 1990).

personal laws of India. Fyzee argues that there were three main considerations which dictated their non-interference with personal law. First, they did not desire any break with the past, that is, the Mughal rules of non-interference with the religion. Second, their chief object was to have security in social matters so as to facilitate trade. Thirdly, they had no desire to interfere with the religious susceptibilities of their subjects[29] .

However, the administrators and judges of British India supplemented the indigenous law, custom and Islamic law with their own ideas of justice and fairness. Hussain contends :

> "European Judges slowly and cautiously introduced the elements of English Law and Principles of equity into the native systems including the Muslim Law. There is no doubt that of the agencies that have influenced the development of Anglo-Muslim Law in British India, the Judges were the earliest and the most important. It is the how directly modified the operation of Muslim Law by refusing to apply its provisions as being repugnant to usages of the country or the general notions of justice, equity and good conscience or at times curtailing the extent of their application or at other times by substituting a foreign principle[30] ."

In India a large number of Muslims were converted Hindus who maintained their deep-rooted customs, especially in the case of succession (females were excluded from inheritance by their customary law). The British judges gave effect to such custom to the extent of undermining the *Quranic* text.

The British Indian judges ignored the rationale and spirit of the *Quran* and *Sunna* and gave effect to the evil practice of *talaq-ul-bidat* which the Prophet called a 'sin'. In this respect Justice Iyer observed :

> "Marginal distortions are inevitable when a judicial committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture — law is largely the formalised and

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29 . A. A. A. Fyzee, Outline of Muhammadan Law, 55-56 (Delhi,1974).

30 . Abul Hussain, Muslim Law as Administered in British India, 16 (Calcatta, 1935).

enforceable expression of a community's cultural norms — cannot be fully understood by alien minds."[31]

Tahir Mahmood argues more emphatically :

"What the English judges in British India did in respect of the *Shariat* law was however, much worse than a 'marginal distortion'. They changed the very nature of the Islamic legal principles by ignoring their true rationale and spirit and often enforcing them as they appeared in literal (sometimes faulty) English translations[32] ."

It can be argued that, in respect of family law, the equitable laws of divorce have suffered as a result of the rigidity and conservations of orthodox jurists. The British judges influenced by these sentiments, by-passed the *Quranic* reconciliation provisions and left women vulnerable to the husband's unilateral right to *talaq.*

Modes of TalaQ

The law of *talaq* has been classified by traditional Muslim jurists as *talaq-ul-Sunna't* i.e. in conformity with the dictates of the Prophet and *talaq-ul-bidat* i.e. of innovation and therefore not approved. The Hedaya refers to these respectively as 'laudable divorce' and the 'irregular form of divorce'[33] .

Talaq-ul-Sunna't

The Prophet though disapproving and discouraging all divorce, favoured the *talaq-ul-Sunna't* mode of divorce : divorce which is effected in accordance with the rules laid down in the tradition (*Sunna't*) handed down from the Prophet or his principal disciples. It is the mode or procedure which seems to have been approved of by the Prophet at the beginning of his ministry and is consequently regarded as the regular or proper an orthodox form of divorce[34] .

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31 . Yusuf Rowthan v Sowramma, AIR 1971 Ker 264.

32 . Tahir Mahmood, Personal Law in Crisis, 52 (New Delhi, 1986).

33 . Hamilton, supra note 2, at 72-73.

34 . Ameer Ali, supra note 1, at 434.

Talaq-ul-Sunna't is itself again classified by the traditional jurists into first the most approved form or most laudable divorce, being *talaq ashan,* and second, the approved form or laudable divorce being *talaq hasan.* In the *talaq ashan* form the husband can repudiate his wife by a single sentence within a *tuhr* or term of purity[35]. The Hedey a calls the *ashan* as 'most laudable', for two reasons. First, the companions of the Prophet chiefly esteemed those who gave no more than one divorce until the expiration of the *iddat* as holding this to be a more excellent method than that of giving three divorces, by repeating the sentence on each of the two succeeding *tuhr.* Second, in this method the husband still retains the power of recalling his wife before the expiry of *iddat*[36].

Talaq hasan or laudable form of divorce involves the husband pronouncing *talaq* three times during three successive *tuhrs,* namely three periods of purity of the wife[37] . Each of these pronouncements, as held by the jurists should be made at a time when no intercourse has taken place during that particular period of purity.[38] In this method the third pronouncement of *talaq,* as popularly understood, operates as a final and irrevocable dissolution of the marriage tie.

A contemporary Muslim jurist, Mahmood, contends that the different modes of *talaq* are erroneously allowed and that *talaq hasan* has been wrongly interpreted by Muslim orthodoxies.[39] According to him:

> "the law of Islam simply prescribed a procedure for pronouncing *talaq,* keeping all chances of reconciliation and reconsideration open[40] ."

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35 . Hamilton, supra note 2, at 72.

36 . Id. at 72.

37 . Ameer Ali, supra note 1, at 436; Hamilton supra note 2, at 72.

38 . Fyzee, supra note 29, at 153.

39 . Tahir Mahmood, supra note 13, at 116 Tahir Mahmood, "No More Talaq, Talaq-Juristic Restoration of the True Islamic Law of Divorce" In Islamic Comparative Law Review, 5, (1992).

40 . Tahir Mahmood, supra note 13, at 114.

He goes on to say that it is not necessary that the *talaq* should be pronounced on three consecutive *tuhrs* but that it can be pronounced at any time during the subsistence of the marriage[41] . The *Quran* (II : 229) in respect of *talaq* holds :

> "A divorce is only permissible twice, after that the parties should either hold together on equitable terms, or separate with kindness[42] ."

In another verse the Quran (II:230) counsels,

> "So if a husband divorces his wife (orrevocably), he cannot after that remarry her until after she has married another husband and he has divorced her[43] ."

The *Quran* (LXV:1) also specifies when *talaq* should be pronounced.

> "When ye divorce women divorce then at their prescribed period, and count (accurately) their prescribed periods. And fear *Allah,* your Lord." [44]

The above verses as understood provide the procedure of giving *talaq,* rather than the classification of the modes of *talaq.* 'A divorce is only permissible twice' indicates that a husband is allowed to divorce his wife and revoke such divorce twice during his life time and each divorce must be followed by the prescribed period of *iddat* to form a complete divorce (*Quran* LXV:1). After the third divorce he is barred by law (*Quran* II:230) from revoking the divorce and he cannot marry the same wife without going through the penalty of '*hila*' (intervening marriage).

This view also finds support from Valibhai. He argues that a divorce once given always counts, no matter how long the

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41 . Id. 116; see II Shahih Muslim translated by A Hamid Siddiqi 760 (Lahore 1972).

42 . Yusuf Ali, supra note 6, at 91.

43 . Id.

44. Id, at 1563

interval between a first and a second divorce or between a second and a third divorce: there is no limitation as to time in this case.[45] Ali in the notes on the *Quran* (II:230) refers to an instance in which a woman was divorced for the first time in the time of Prophet; a second time in the time of Omar, the second *Khalifa;* and a third time in the time of Usman, the third *Khalifa.* If, after recalling a divorce twice, a man is impelled to pronounce it for the third and last time it shows that there is no chance of the couple living happily together and that they had better, in that case, part for ever. Their reunion after this is practically made impossible. When a man divorces his wife for the third and last time, he is told that it is not lawful for him to take her again unless and until she shall have married another husband and he also in turn divorces her.[46] It is evident from the above discussion that definite guidelines are provided that a *talaq* should be pronounced when the wife is free from her menstruation courses and *iddat* should be counted to effect a divorce, it does not indicate that *talaq* should be pronounced in three consecutive *tuhrs* to constitute *talaq hasan* as popularly understood.

Talaq-ul-bidat

Talaq-ul-bidat is an irregular mode of divorce which was introduced in the second century of Islam. The Ommayyad monarchs, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find a way out from the strictness of the law. They found in the pliability of the jurists a loophole to effect their purpose.[47] The question arises as to why Hazrat 'Umar' the second Caliph, enforced *talaq-ul-bidat.* Scholars maintain that it was done in

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45 . Muhammad Valibhai, A Book of Quranic Laws,151 (New Delhi 1981).

46 . Id. 152

47 . Ameer Ali, supra note 1, at 435 ;Firasat Ali & Furqan Ahmad, supra note 11, at 21 Ibrahim Abdel Hamid, "Dissolution of Marriage in Islamic Law" in III Islamic Quarterly 171-172 (1956)

view of the extraordinary conditions prevailing at the time. During the wars of conquest many women from Syria, Egypt and other places were captured and brought to Madinah. They were fair complexioned and beautiful and the Arabs were tempted to marry them. But these women were not used to living with co-wives and often made a condition that the men divorce their former wives thrice so that they could not be taken back. Little did they know that according to the *Quaranic law* and the *Sunna* three divorces were treated only as one divorce. The Arabs would pronounce three divorces to satisfy these Syrian and other women but later took their former wives back, giving rise to innumerable disputes. To overcome these difficulties, Hazrat 'Umar' thought it fit to enforce three divorces in one sitting as an irrevocable divorce.[48] However, the modern jurists often argue that during the Ommayyad period a *Quranic* or *Sunna* injunction on *talaq* was substituted by a different rule to retain the husband's absolute authority to divorce.[49]

The essential feature of *talaq-ul-bidat* is its irrevocability. In this form of divorce the husband repudiates his wife by three divorces at once or he repeats the sentence separately thrice within one *tuhr*.[50] But the triple repetition is not a necessay condition for *talaq* in the *bidat* form and the intention to render a *talaq* irrevocable may be expressed even by a single declaration. Thus if a man says: I have divorced you by a bain *talaq* (irrevocable *talaq*), the *talaq* is *talaq-ul-bidat* and will take effect immediately it is pronounced.[51] It leaves no room for revocation and reconsideration.

The Prophet condemned the simultaneous pronouncement of three divorces and declared it a sin.[52] In a *Hadith* (statement of the

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48 . Cited in Asghar Ali Engineer, supra note 12, at 125.

49 . See Justice Altaf Hussain, Status of Women in Islam,590 (Lahore, 1987).

50 . Hamilton, supra note 2, at 72.

51 . Hussain, L supra note 49, at 586.

52 . M Abul A' Ala Maududi, The Laws of Marriage and Divorce in Islam 31 (Lahore, 1983).

Prophet) it was reported that the Prophet was told about a man who once gave three divorces at a time to his wife. The Prophet, enraged, then got up and said "you are making a plaything with the Book of the Almighty and Glorious Allah while I am (still) amongst you".[53] Such a pronouncement of divorce on a single occasion is un-Islamic and has no basis in the *Quran* or *Sunna*.[54] In another *Hadith*, narrated by Anis Bin Sirln, when Umar divorced his wife while she was menstruating, the Prophet told Umar to take back his wife and divorce her when she was clean.[55] From these *Hadith* it can be gathered that the Prophet warned the people not to make a toy out of *Allah's* commandments and directed the husband to divorce (when absolutely necessary) only in the way prescribed by *Allah*.

Most of the orthodix jurists recognise the practice of *talaq-ul-bidat* (triple divorces) and this was followed by the judges of British Indian courts with this form of *talaq* declared to be good in law.[56] Tyabji says:

> "deplorable, though perhaps, natural development of the *Hanafi* law, it is the fourth and most disapproved or sinful mode of *talaq* that seems to be most prevalent, and in a sense even favoured by the law." [57]

The *talaq* with regard to its effect is again classified by the orthodox law as *talaq-ul-rajee* i.e. revocable and *talaq-ul-bain* i.e. irrevocable *talaq*. In the case of the revocable or *rajee* form of *talaq* the husband can remarry the same wife without the intervening marriage even after the expiry of the *iddat* period. The *rajee* form of divorce becomes *bain* (irrevocable) divorce after the third pronouncement of *talaq*.

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53 . M. I. Siddiqi, The Family Laws of Islam,222 (New Delhi,1986); Hussain, supra note 49, at 589-637.

54 . Muhammad Ali supra note 23, at 288

55 . Al Bukhari Shahih, translated by Dr. Muhammad Mushin Khan, 130 (undated).

56 . Amiruddin v Mt Khatun Bibi, AIR 1917, All 343, Fazlur Rahman v Mt Aisha AIR 1929 Pat. 81.

57 . Faiz Badruddin Tyabji, Muhammadan Law, 221 (Bombay, 1940); see also Joseph Schacht, An Introduction to Islamic Law, 164 (Oxford, 1964).

In Sarabi v Rabiabai,[58] 'A', a Mahamedan belonging to the *Hanafi Sunni* sect, took two witnesses with him to the *kazi* and there pronounced single *talaq* to his wife. In her absence he had a *talaqnama* written out by the *kazi*, which was signed by him and attested by the witnesses. 'A' then took steps to communicate the divorce and make over the *iddat* money to the plaintiff, but she evaded both. 'A' died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of 'A' and claimed maintenance and residence. The court held that *talaq-ul-bidat* was considered good in law, though bad in theology. The court further held in answer to the contention that the divorce was not final as it was never communicated to the wife, that a *bain-talaq,* such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it was effected as soon as the words were written even without the wife receiving the writing.

The husband had pronounced a single divorce but the court gave the meaning of the word '*talaq dia*' (*talaq* given) as *talaq-ul-bain* by implication and gave effect to an irrevocable divorce. In fact it was a single revocable divorce and it was effective only after the expiry of the *iddat* period, but the husband died before expiry of the *iddat* period. The court in denying the wife's right to inherit her husband's property misconstrued the law and ignored the rationale and spirit of the *Quran.* The authoritative jurists like Ali and Tyabji hold that when the *talaq* in *rajee* or revocable form is not definitive and the husband dies within *iddat,* the wife retains her right of succession.[59]

In another case the husband divorced his wife by a written *talaq* but the parties reconciled soon after the divorced and once again lived as husband and wife. The Lahore court refused to accept the subsequent reconciliation as revocation of the *talaq* and held, purportedly on the basis of orthodox law, that a divorce by a

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58 . ILR (1906) 30 Bom 537.

59 . Ameer Ali, supra note 1, at 543 ;Faiz Badruddin Tyabji, supra note 57, at 219

husband, evidenced by a written document, the contents whereof had been duly communicated to the wife, constituted an irrevocable form of divorce.[60]

However, orthodox form of *talaq* has been reformed by the Muslim Family Laws Ordinance, 1961. Here only the relevant provision, namely section 7 is considered. This section lay down the procedure to be followed when the husband and the wife wish to divorce each other without the intervention of the court.

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 may 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, 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."

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60 . Mt. Hayat Khatun v Abdullah Khan 1937 AIR Lah.270.

The procedural law makes it incumbent upon the husband to send notice of *talaq* to the Chairman of the *Union Parishad* (Section 7 of the Muslim Family Laws Ordinance, 1961) irrespective of the methods adopted by the husband, that is, whether it be *talaq ahsan, talaq hasan* or *talaq -ul-bidat* . Failure to give such a notice will be an offence punishable under the Ordinance. The *Union Parishad* 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, except in the case of a third divorce.

Section 7 of the said Ordinance has made all forms of *talaq : ashan, hasan and talaq-ul-bidat* into single revocable *talaq* . The Ordinance further made provision for reconciliation at the initiation of the Chairman. The object of this section is to prevent the hasty dissolution of the marriage by way of *talaq* pronounced by the husband unilaterally, without any attempt being made to prevent the ending of the matrimonial tie.[61] This Ordinance was intended to draw upon the original spirit of the *Quran* and *Sunna* in respect of reconciliation.

Sub-section 3 of section 7 of the 1961 Ordinance provided that the *talaq* will not be effective until the expiry of 90 days from the receipt of the notice by the Chairman of the *Union Parishad* in the rural areas, or the Chairman of a Ward within a municipality. Failure on the part of the husband to give notice or his abstention from giving notice to the Chairman concerned should perhaps be deemed, in view of section 7, as if he has revoked the pronouncement of *talaq* and that would be to the advantage of the wife.[62] In Abdul Aziz v

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61 . Syed Ali Newaz Gardezi v Lt Col Md. Yusuf (1963) 15 DLR SC.

62 . Ib.

Rezia Khatoon,[63] it was held that non-compliance with the provisions of section 7(1) (regarding delivery of notice to the Chairman) makes *talaq* legally ineffective. However, recently the High Court Division of Supreme Court of Bangladesh in contradiction to section 7 of the Muslim Family Laws Ordinance, 1961 held:

> "Non-service of notice to the Chairman of the Union Parishad under the provision of this section cannot render ineffective divorce disclosed in an affidavit".[64]

The High Court Division emphasized on the intention of the husband to divorce rather than the formalities of the procedural law. In Sirajul Islam's case, the husband did not serve divorce notice to the Chairman of the Union Parishad but swore an affidavit before the Magistrate and the copy of the said affidavit was served upon the Nikah Registrar to record the divorce according to section 6 of the Muslim Marriages and Divorces (Registration) Act, 1974. The said Court further observed:

> "It shows that he purposely avoided to give notice to the Chairman of Union Council under section 7 of the Ordinance 1961 and with the intention not to revoke it again, otherwise he would have given notice to the Chairman and would have tried for reconciliation but he did not. Be that as it may, we are however, of opinion that mere non-service of notice upon the Chairman of the Union Council under section 7 of the Muslim Family Laws Ordinance cannot render the divorce infective if the conduct of the husband appears to be so.[65]

The High Court Division of Supreme Court of Bangladesh relied on the decision of Pakistani Courts and referred to the case of Ganhar v Mrs Ghulan Fating and another.[66] The High Court of Lahore in Muhammad Rafique v Ahmad Yar[67] made redundant the provisions of section 7(3) of the Family Laws Ordinance 1961 by

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63. 21 DLR 733.

64. Sirajul Islam v Helana Begum 48 DLR (1996) 51.

65. Id. at 51

66. PLD 1984 Lah.124.

67. Muhammad Rafique v Ahmed Yar 1982 PLD 825.

declaring that failure to notify the appropriate Chairman did not invalidate the divorce, contrary to the 1963 decision of the Pakistan Supreme Court.[68] Carroll[69] focuses on Pakistan Court judgements which deviated from section 7 of the Muslim Family Laws Ordinance, 1961 and concludes that if that interpretation of section 7 as held by the present courts of Pakistan were allowed then the opportunity for wives to try to save their marriages would be denied.

Whether giving notice of divorce to the wife is a necessary condition is not very clear. In Zikria Khan v Altaf Ali Khan,[70] the court held that the non-supply of a copy of the divorce notice to the wife did not prevent the divorce from becoming effective after ninety days. The whole emphasis is on the date of receipt of the notice by the Chairman of the *Union Parishad* or Ward. However in Inamul Islam v'Mst Hussain Bano,[71] it was held that service of the copy on the wife was as important as service of the notice on the Chairman. Carroll suggests that the interpretation of section 7(3) in the earlier case[72] is preferable to that in the later case.[73] The former gives an opportunity to the wife to try to save marriage within the *iddat* period.[74]

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68 . See also Chulam v Ghulam Fatima 1984 PLD Lah 234, Dr. Ashique Hussain v 1st Additional District Judge and Family Appellate Court Karachi, 1991 PLD Kar 174, Mirza Qaman Raza v Mst Tahira Begum 1988 PLD Kar 169, Shaukat Hussain v Mst Rubina 1989 PLD Kar 513.

69 . Lucy Carroll, "Jurisdiction in Regard to Talaq under the Pakistan Muslim Family Laws Ordinance" in III Islamic and Comparative Law Quarterly, 132-137 (1983 a); Lucy Carroll, "Divorce and Succession; Some Recent Cases from Pakistan" in (1984); Lucy Carroll, "Talaq and Polygamy; Some Recent Decision from England and Pakistan" in V Islamic and Comparative Law Quarterly, 271-297 (1985a); Lucy Carroll, "Wife's Right to Notification of Talaq under Muslim Family Laws Ordinance, 1961 in Journal of 37 PLD 272-276 (1985b).

70 . Zikria Khan v Altaf Ali Khan 1985 PLD Lah 319.

71 . Inamul Islam v Mst Hussain Bano 1976 PLD Lah 1466.

72 . Ib.

73 . Supra note 70.

74 . Lucy Carroll, supra note 69 278 (1985b); see Rubya Mehdi, The Islamization of the Law in Pakistan,166-172 (Surrey 1994).

The author's fieldwork reveals that divorces are mostly obtained by registering with *kazis.*[75] The legislation provides that a *kazi* (Nikah Registrar) may register divorces.[76] The registration of divorce has not been made compulsory. Section 6(2) of the Muslim Marriages and Divorces Registration Act, 1974 provides: "An application for registration of a divorce shall be made orally by the persons who has or have effected the divorce." The whole emphasis is on the wording "who has or have effected the divorce." The wording indicates that one may register the divorce who has actually divorced his wife or her husband by a formal method of divorce. As it appears from section 7 of the Ordinance, 1961 that the divorce is not effective until the expiry of 90 days from the receipt of the notice by the Chairman.[77] A question may arise as to whether such divorces are valid according to section 7(1) (3) of the Muslim Family Laws Ordinance, 1961. According to the orthodox law the divorce is effective after the expiry of the *iddat* period, that is, after 90 days, but the Ordinance makes it clear that its provisions override other laws, custom and usages (section 3 of the Muslim Family Laws Ordinance,1961). Neither the Muslim Family Laws Ordinance of 1961, nor the Muslim Marriages and Divorces Registration Act of 1974, provide for reconciling the two statutes and they do not state the effectiveness or consequences of divorces if no notice is sent to the *Union Parishad* but nevertheless the divorce is registered at the Marriages and Divorces Registration office. It is presumed that all such divorces registered in the Marriages and Divorces Registration office have no effect in the eye of the law, but in practice such divorces are considered effective by the *kazis*. Pearl comments on the Ordinance:

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75 . Findings of a village shows that almost all divorces were only registered with the Kazis and the procedure of Section 7 of the Muslim Family Laws Ordinance had been ignored by the rural society. Naima Huq, Women's Right to Divorce in Rural Bangladesh, Unpublished Ph. D Dissertation, University of East London, 1995).

76 . Section 6 of the Muslim Marriages and Divorces Registration Act, 1974.

77 . Abdul Aziz v Rezia Khatoon DLR 733.

> "a large number of marriages in these areas are not registered and there are still a proportion of marriages where the bride is under 16. Many divorces are not communicated to the Chairman, thus at least in strict legal theory that marriage would still be in existence. Where the matter is communicated to the Chairman and he establishes an Arbitration Council, the Council, more often than not, will follow prevailing social norms in making decision regarding polygamy and divorce. Contrariwise amongst the upper-middle class in the large towns such as Karachi, Lahore or perhaps Dacca, the Ordinance has done no more than continue a trend already apparent". [78]

This observation of Pearl was made in 1976 i.e. "fifteen years after the promulgation of the Ordinance and we have seen that the situation is not very different today".[79] The author's study in Shohonpur village reveals a similar situation with the only difference being that almost all marriages were registered. The women of Shohonpur were aware that registration of marriage is an essential condition of marriage. Moveover, they were aware that without a registered *kabinnama* (marriage document) they cannot obtain *talaq-e-tafweez.*

One of the objects of the said Ordinance is to give effect to the sanction of the *Quranic* verse (*Quran* IV : 35). It made provision for reconciliation within a period of 30 days from the receipt of the notice [Muslim Family Laws Ordinance,1961 of section 7 (4)] Nothing has been said in the section, or anywhere else in the Ordinance, as to what will happen if upon receipt of such written notice of *talaq* the Chairman does not constitute an Arbitration Council and does not take any steps to facilitate a reconciliation between the parties. It has been held to be a failure of the Chairman to constitute an Arbitration Council or a duly properly Constituted Arbitration Council to take the necessary steps to bring about reconciliation.[80]

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78. David Pearl, "The Legal Rights of Muslim Women in India, Pakistan and Bangladesh" in V New Community73 (1976).

79. Rubya Mehdi, the Islamization of the Law in Pakistan, (198 Surrey, 994).

80. Abdus Sobhan Sarker v Md Abdul Ghani, 1973, 25 DLR 227.

This loophole in the law to some extent frustrates the object of the said Ordinance. The purpose of the reconciliation is that before making a hasty decision the husband and wife get an opportunity to reconsider. It has been seen that during the long period of *iddat*, much of the intensity of the disputes providing the grounds for divorce is tempered with more cool headed after thought. Where there are children to think about sobriety prevails which may lead the parties more readily to a reconciliation.[81] The statistics of Dhaka City Corporation shows that 4.3 percent and 10 percent of couples were reconciled through the Chairmen as per the Ordinance during the period of 12.2.92 to 31.12.92 and 1.1.93 to 31.12.93 respectively.[82] The percentage of reconciliation is very low even in urban areas and it is worse in the rural areas. Two explanations can be given for the low percentage of reconciliation : first it may be the Chairman's lack of initiative to arrange for reconciliation; second it may be the parties reluctance to be reconciled.

Conclusion

The paper explored the scholarly debate on the law of *talaq*. What emerges out of this exposition is that *talaq* is one of the misconceived and distorted aspect of the Muslim Law. The conservatism of or thodox jurists hindered the development of the law for a long time. With the dawn of modernist movement the scholars reinterpretated the law through *ijtihad*. Legislative reforms were made in many Muslim countries including the then East Pakistan and presently Bangladesh. The Muslim Family Laws Ordinance, 1961 was enacted in order to protect women from their husband abusing their right to *talaq*. This Ordinance has done away with the difference between *talaq-e-rajee* and *talaq-ul-bain*. As a result it simplifies the matter of remarriage between the same husband and wife even after an irrevocable divorce between the parties. The Ordinance has also imposed restriction on the unilateral right of a husband to *talaq* by laying down a procedure of service of

81 . The Daily Star, 12 (9 April 1994)

82 . Id

divorce notice. A waiting period of 90 days to enable reconciliation as well as a period of moratorium during which the divorcing the husband cannot marry another because as per Ordinance he needs the consent of the very woman he purports to divorce. The Ordinance also has a restraining effect on polygamy by providing for the necessity of consent and in default criminal proceedings leading to even jail custody to husband violating the provision.

However, it did not reduce the constant threat to the wife which can, at any time, throw her into a state of insecurity. The husband still retains the absolute right to dissolve marriage extrajudicially. He can divorce his wife at his will and without showing any cause. Contraire, the right to divorce that a wife has is not absolute. Her right to divorce depends upon the presence of conditions in the *kabinnama*, breach of a condition or evidence to prove before the court of law that the marriage has broken down. Ironically, the provisions of Ordinance of 1961 are not being invoked, particularly in the rural area as revealed from my village study. [83] This is due to the prevalence of orthodox law and sociocultural norms of the society. Nevertheless, even with these drawbacks, the Muslim Family Laws Ordinance, 1961 is an important development in the Family Law, unfortunately we have not another legislation concerning divorce. Now the consideration is needed for ways and means for effective implementation of the law. The Courts by and large upholds the provisions of the 1961 Ordinance, however a recent decision in *Sirajul Islam v Helana* Begum[84] has watered down the implication and importance of the provisions by holding that *talaq* would be effective without notice to Chairman. The significance of notice ought not to be lost sight of, otherwise it will deprive the opportunity of reconciliation between the parties and moreover will go against the spirit of Islam. If this recent decision is considered as a correct interpretation of the provision of section 7 of the Muslim Family Laws Ordinance, 1961 then it is definitely retrograde step.

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83 . See chapter II of Women's Right to Divorce in 'Rural Bangladesh, an unpublished Ph. D. Dissertation (University of East London, 1995)

84 . Op. cit 64.