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Talaq and the Muslim Family Law Ordinance, 1961 in Pakistan:

An Analysis

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Abstract

Divorcing one's wife is considered as one of the most hated but legal act by God, yet divorce do happen among married couples. Muslims attach tremendous significance to issues involving talaq. Unfortunately, Pakistani law on talaq is one of the most controversial and confusing and its interpretation by our superior judiciary has made it even more confusing. The current law is not only against the injunctions of Islam, it has also been misinterpreted by the judiciary.

THE Muslim Family Law Ordinance, 1961 (hereafter MFLO) is the most significant but controversial reform law in Pakistan. Bangladesh has inherited the same law. The background of the MFLO is interesting. In 1955, Muhammad Ali Bogra, the then Prime Minister of Pakistan, married his secretary while still legally married to his first wife. The All Pakistan Women's Association (APWA) began an organized agitation throughout the country.¹ On August 4, 1955 the government of Pakistan announced a seven member Commission on Marriage and Family Laws, consisting of Dr. Khalifa Shuja-ud-Din (President), Dr. Khalifa Abdul Hakim (Member Secretary), Maulana Ihtisham-ul-Haq, Mr. Enayet-ur-Rahman, Begum Shah Nawaz, Begum Anwar G. Ahmad and Begum Shamsunnahar Mahmood.² After the death of the President of the Commission, Mian Abdur Rashid, former Chief Justice of Pakistan was appointed as President on October 27, 1955. The Commission was mandated to report on "the proper registration of marriages and divorces, the right to divorce exercisable by either partner through a court or by other judicial means, maintenance and the establishment of Special Court to deal expeditiously with cases affecting women's rights."³ The Commission published its report on June 20, 1956 and the dissenting note of Moulana Thanavi was published separately on August 30, 1956. The Commission brought severe

¹ See, Freeland Abbott, "Pakistan's New Marriage Law: A Reflection of Qur'anic Interpretation", *Asian Survey*, Vol. 1, No. 11, (Jan., 1962), pp. 26-32 at 26. Also see, *Pakistan Times*, Lahore, April 14, 1955.

² "Report of the Commission on Marriages and Family Laws", *The Gazette of Pakistan, Extraordinary*, Karachi, 20 June 1956, 1197. (Hereafter Report).

³ *Ibid.* 1197-8.

criticism from the *ulama*.⁴ A detailed discussion of the Commission's Report is beyond the scope of this work.⁵

The Commission recommended the enactment of laws providing that three divorces in one session amounts to one pronouncement and for a divorce to be effective, two further pronouncements in two subsequent *tuhrs* would be necessary.⁶ Moreover, the legislation should provide that no person shall be able to pronounce a divorce without obtaining an order to that effect from a Matrimonial and Family Court.⁷ Moulana Ihtisham-ul-Haq rejected outright the recommendations of the Commission. The Moulana opined, "To put a restriction on the exercise of this right by making it ineffective if *talaq* is not registered or not authorized by the Matrimonial and Family laws Court, not only amounts to tampering with the injunctions of the faith but also putting obstacles in the way of dissolution even when it becomes necessary and desirable."⁸

Because of the intense hostility of the *'ulama* to the Commission's recommendations relating to divorce, the framers of the MFLO ignored the idea of court intervention in divorce. The provisions of section 7 of the MFLO relating to *talaq* are reproduced below:

⁴ For example, see, Syed Abul A'la Maududi, "The Family Law of Islam" in Khurshid Ahmad (ed.), *Studies in the Family Law of Islam* (Karachi: 2nd edn. 1961), 21 and Amin Ahsan Islahi, "A Critique of the Modernist Approach to the Family Law of Islam", in Khurshid Ahmad (ed.), *Studies in the Family Law of Islam* (Karachi: 2nd edn. 1961), 194.

⁵ For a detailed analysis of the Report, see, Alamgir Muhammad Sirajuddin, *Shari'a Law and Society: Tradition and Change in South Asia*, (Karachi: Oxford University Press, 2nd edn. 2001), pp. 35-75.

⁶ *The Report*, p. 1213.

⁷ *Ibid.*, p. 1214.

⁸ *Ibid.* 1586-7.

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 five thousand rupees or 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 the 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 the pregnancy, whichever be later, ends.
6. Nothing shall debar a wife whose marriage has been terminated by *talaq* effective under this section from marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time, unless such termination is for the third time so effective.

The most noticeable implications of section 7 are: First, it refers the issue of divorce to an administrative body for re-conciliation; secondly, *talaq* is not effective for ninety

days during which reconciliation shall be attempted between the parties. Unfortunately, the reconciliation effort does not precede the pronouncement of *talaq*, it follows it. Thirdly, although sub-section (1) mentions any form of *talaq* (*talaq* in any form whatsoever) which obviously include *ahsan*, *hasan*, as well as *talaq al-bid'a*. But as discussed above, under Islamic law the procedure for reconciliation is only possible if only one or two pronouncements are made.⁹ Fourthly, section 7 can be construed to have impliedly abolished *talaq al-bid'a* (triple *talaq*) because it allows remarriage between the two parties after the divorce without an intervening marriage or *halala*, unless this is the third such pronouncement under section 7.

The MFLO is indeed a very vague law and the *'ulama* brought in a scathing attack on it.¹⁰ The main criticisms of section 7 are: First, under Islamic law a third divorce becomes effective as soon as it is pronounced¹¹ but under section 7 a third divorce will be effective after ninety days are passed from the date of the receipt of the notice by the Chairman (and not from the date of pronouncement of *talaq*). Secondly, under Islamic law, *'iddat* is counted from the time of the pronouncement but under section 7 it is counted from the time the notice is received by the Chairman. Problems arise when no notice is sent to the Chairman. Thirdly, under Islamic law, divorce of a couple who have not yet consummated their marriage becomes effective immediately and no *'iddat* (waiting period) is required for the woman. But under the MFLO every divorce whether the marriage is consummated or not consummated will be effective until ninety days of

⁹ This is according to the *jamhur*. Reconciliation is possible according to Ibn Taymiyya, Ibn al-Qiyyam, the majority of the *ahl al-hadith* and the *Shi'a Imamiyya* because they treat three repudiations in one session to be one.

¹⁰ *Muslim Family Laws Ordinance as Commented by Ulama in the Light of [the] Quran [sic] and [the] Sunnah* (Hyderabad: Maktaba-e-Ilmi, n.d.). The original pamphlet was in Urdu and was signed by 14 *'ulama* mostly from Lahore; and Khurshid Ahmad, ed., *Marriage Commission Report X-Rayed* (Karachi: Chirag-i-Rah Publications, 1959). Its second edition was titled as *Studies in the Family Law of Islam*.

¹¹ For a comprehensive study of the issue of triple *talaq*, see, my, "Triple *Talaq* in one Session: An Analysis of the Opinions of Classical and Medieval Muslim Jurists", forthcoming.

the receipt of the notice by the Chairman.¹² Fourthly, according to section 7, the *'iddat* of a woman who is not pregnant is more than ninety days but under Islamic law, her *'iddat* is three monthly courses. Fifthly, under section 7 the *'iddat* period of a pregnant woman is the end of pregnancy or ninety days, whichever is later. According to the *Qur'an*, it ends with the end of pregnancy which may be less than ninety days. Finally, under section 7 effectiveness of *talaq* is dependent on the notice of *talaq* to the Chairman and reconciliatory efforts by him. This has no basis in Islamic law.

An Analysis of Judicial Interpretations of Section 7 of the MFLO¹³

The first question that had to be interpreted by the judiciary in Pakistan was the consequences of failure to give notice of *talaq* to the Chairman, i.e. what would be the effect if the husband failed to give any notice of *talaq* to the Chairman. In *Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf*¹⁴ the Supreme Court held that where the husband did not give notice of *talaq* to the Chairman, he would be deemed to have revoked the *talaq*.¹⁵ This remark by S. A. Rahman, J. could only be considered as a *dictum* because failure to give notice of *talaq* was not an issue in that case. However, the Supreme Court as well as the High Courts raised it to the status of a celebrated *ratio* in subsequent cases, such as, the *State v Mst. Tauqir Fatima*,¹⁶ *Abdul Aziz v. Rezia*

¹² In practice the Arbitration Council locally known as '*Musalihati* Council' (in some areas it is known as *Musalihati* Court) upon the receipt of the notice looks at the type of *talaq* pronounced by the husband. The Council does not act if three pronouncements are made by a husband and tells the parties to wait for 90 days for obtaining their divorce certificates.

¹³ For a comprehensive treatment of judicial interpretations of case law on *talaq*, see, my, "*Triple Talaq* in Islamic Law and Personal Laws of Muslim States: Continuity versus Change", forthcoming.

¹⁴ PLD 1963 SC 51.

¹⁵ *Ibid.* at 74-75. (*per* Justice, S. A. Rahman).

¹⁶ PLD 1964 (W.P.) Kar 306.

Khatoon,¹⁷ *Abdul Mannan v. Safrun Nessa*,¹⁸ *Mst. Ghulam Fatima v. Abdul Qayyum and Others*,¹⁹ *Muhammad Salahuddin Khan v. Muhammad Nazir Siddiqui*,²⁰ and *Junaid Ali v. Abdul Qadir*.²¹ The *Gardezi* case had thus become ‘the *Gardezi* rule’ – failure to give notice of *talaq* amounts to revocation. There have been only two exceptions to the *Gardezi* rule reported in two cases but this is because of the peculiar circumstances of the two cases.²² Till the passing of the Protection of Women Act, 2006, husbands who would not comply with sub-section (3) of section 7 to give notice of *talaq* would, in order to harass his divorced wife, accuse her of *zina* (adultery) with her new husband (after her marriage with another husband). The Protection of Women Act, 2006 has put an end to this practice.²³

In *Mst. Kaneez Fatima v. Wali Muhammad*²⁴ the Supreme Court while discussing the *Gardezi* rule held that "failure to send notice of *Talaq* to the Chairman of the Union Council does not by itself lead to the conclusion that *Talaq* has been revoked. *It may only be ineffective but not revoked.*"²⁵ This is the first time that the infamous *Gardezi* rule was overruled by the Supreme Court itself. Unfortunately, in *Mst. Farah Naz v. Judge Family Court*,²⁶ the Supreme Court once again upheld the controversial *Gardezi* rule (without referring to the *Gardezi* case itself). The Supreme Court has not been very consistent regarding this issue. It is important to note that the

¹⁷ 21 DLR 1969, 733.

¹⁸ 1970 SCMR 845.

¹⁹ PLD 1981 SC 460.

²⁰ 1984 SCMR 583.

²¹ 1987 SCMR 518.

²² See, *Noor Khan v. Haq Nawaz* PLD 1982 FSC 265 and *Chuhar v. Ghulam Fatima* PLD 1984 Lah 234.

²³ For details, see, my, “Is *Zina bil jabr a hadd, ta ‘zir*, or *Syasa* Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan”, *Yearbook of Islamic and Middle Eastern Law*, Vol. 14 (2008-2009), pp. 95-115.

²⁴ PLD 1993 SC 901.

²⁵ *Ibid.*, at p. 916. (*Per* Saleem Akhtar, J for the five members Bench. Other members of the Bench were Shafiur Rahman, Abdul Qadeer Chaudhry, Saeeduzzaman Siddiqui and Wali Muhammad Khan, JJ).

²⁶ PLD 2006, SC 457.

Farah Naz case was decided by a Divisional Bench of the Supreme Court comprising of Rana Bhaqwandas and Muhammad Nawaz Abbasi, JJ whereas *Kaneez Fatima* was decided by a larger Bench of five judges. The facts both cases were somewhat similar. In *Kaneez Fatima* the husband and wife agreed to mutually dissolve their marriage with effect from 1-11-1977 and the wife received rupees 10,000 and five *tolas* (one *tola* is equal to 12 grams) of gold in lieu of the prompt dower of rupees 30,000 and 20 *tolas* of gold and a monthly maintenance of rupees 200. Both the parties agreed that they will have no further claim in future against each other. However, on 6-4-1978 the appellant filed a suit for recovery of the remaining amount of dower (i.e. rupees 20,000) and maintenance in Family Court pleading that the compromise was arrived at due to coercion and no notice of dissolution of marriage was given to the Chairman as provided by section 7 of the MFLO, 1961. It was held that “In case where with the consent of both the parties divorce is effected and confirmed in writing under their undisputed signatures, section 7 should not be strictly construed.” The Court opined that “the notice can be sent at any time thereafter to comply with the provisions of section 7.”²⁷ The Court refused maintenance to the appellant. Commenting on the Gardezi rule the Court held, “So far the observations made in Syed Ali Nawaz Gardezi’s case, it may be observed that failure to send notice of Talaq to the Chairman of the Union Council does not by itself lead to the conclusion that Talaq has been revoked. It may only be ineffective but not revoked.”²⁸

In *Farah Naz’s* case the appellant filed a suit for recovery of maintenance from the husband on 16-2-2002 but the husband claimed to have pronounced divorce on

²⁷ See, PLD 1993 SC 901 at 917.

²⁸ See, PLD 1993 SC 901 at 915-6.

her on 13-12-1997 and therefore she was not entitled to the relief of maintenance. Her claim for past maintenance was rejected by the trial Court but accepted by the first the Appellate Court from 28-12-1996 to 14-4-98. Both Courts accepted the oral *talaq* pronounced by the husband although the husband had not given any notice of *talaq* to the Chairman under 7. The High Court upheld the decision of the trial Court regarding maintenance. However, the Supreme Court disagreed and held that “[O]ral allegation of Talaq would neither be effective nor valid and binding on the appellant.” The Court awarded the wife past maintenance as she claimed.²⁹ In *Farah Naz* the Court neither made any reference to *Ali Nawaz Gardezi* case nor to *Kaneez Fatima*. Our conclusion is that in *Kaneez Fatima* the parties opted out of the procedure of section 7 whereas there was no mutual compromise to put an end to the marital tie and the husband alleged to have orally pronounced *talaq* but failed to prove it. Another point is that in *Farah Naz*, the respondent (husband) was trying to benefit from his own failure to give notice of *talaq* to the Chairman. Unfortunately, the Court did not raise this point in its discussion. The *Farah Naz* decision has apparently re-activated the Gardezi rule (i.e., failure to give notice of *talaq* to the Chairman amounts to revocation). In addition, *Farah Naz* (a Divisional Bench’s decision) cannot overrule *Kaneez Fatima* (a five members Bench’s unanimous decision) because a larger Bench of the Supreme Court binds a smaller Bench.³⁰

²⁹ See, PLD 2006, SC 457 at 463 (*per* Rana Bhagwandas, J for the Divisional Bench).

³⁰ For details of this rule, see, Muhammad Munir, *Precedent in Pakistani Law*, forthcoming.

In *Allah Rakha v. The Federation of Pakistan*³¹ the Federal Shariat Court in Pakistan has declared sub-sections (3) and (5) of section 7 as repugnant to the injunctions of Islam.³²

As we have seen above there are more than two objections against section 7 from an Islamic law perspective and not just two. It is high time that the Supreme Court of Pakistan should clarify the confusion regarding case law on divorce and give a sound interpretation to section 7.

³¹ PLD 2000 FSC 1.

³² *Ibid.*, 62. The Pakistani Government has appealed against the decision of the Federal Shariat Court to the Shariat Appellate Bench of the Supreme Court where the case is pending till the writing of this article. Section 7 of the MFLO has been the subject of fierce debates in the academic circles as well as amongst the superior judiciary in Pakistan. It is pointed out by some authors that because of the procedure laid down in section 7, Pakistani law abolishes triple *talaq* or *talaq al-bid'at*. See Alamghir, *Shari'a Law*, 215 and Lucy Carroll, 'Talaq-e-Tafwid in the Classical Texts,' in Carroll and Kapoor, *Talaq-e-Tafwid*, 45.