

PRONOUNCEMENT OF TALAQ IN MUSLIM FAMILY LAWS ORDINANCE 1961.

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In August 1955, the Government of Pakistan appointed a commission consisting of seven persons entrusted with the task of surveying the existing laws governing marriage, divorce, maintenance and other family matters among Muslims and report as to what modifications are required in them. The Commission on Marriage and Family Laws was also asked 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 courts to deal with cases affecting women's rights. The commission issued a questionnaire for seeking the opinion of the scholars. The commission submitted its report to the Government of Pakistan which was published in the gazette of Pakistan dated June 20, 1956.¹

On 2nd March 1961, the President of Pakistan issued an Ordinance, to give effect to certain recommendations of the Commission on Marriage and Family Laws which is called "Muslim Family Laws Ordinance 1961."² This Ordinance introduced procedure of Talaq to which Muslim scholars have some objections. Before we discuss procedure

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of Talaq laid down in the ordinance, it will be right to know the meaning and classification of Talaq in Islam.

Talaq literally means "release from a knot."³ The Muslim Jurist define it to denote the release of a woman from the marriage tie.⁴

Ibne Hammam defines it as "The release from the marriage tie either immediately or eventually, by the use of certain words, whether spoken or written, by the husband."⁵

Classification of Divorce:

Divorce may be discussed under the following main heads:-

- (1) Divorce Considered with regard to religious sanction,
 - (2) Divorce considered with regard to effect.
- (i) **Divorce Considered with regard to religious sanction,**

Divorce under this head is divided into two classes:-

- (i) Talaq al-Sunnah and
- (ii) Talaq al-Bid'ah.⁶

(i) **Talaq al-Sunnah:** Talaq al-Sunnah is regarded as the regular or orthodox form. Talaq al-Sunnah is again subdivided into two classes, namely:-

- (a) al-Talaq al-Ahsan and
- (b) al-Talaq al-Hasan.

(a) al-Talaq al-Ahsan :

al-Talaq al-Ahsan means the more proper divorce. It means that this kind of divorce is the least disapproved of its various forms. The method for this kind of divorce is to pronounce one divorce within a Tuhr (term of purity) that is, the period of time which intervenes between two successive menstrual discharges, during which he has not had sexual intercourse with her, and then leave her to the observance of her iddah unless revoked in the meantime.

(b) al-Talaq al-Hasan :

al-Talaq al-Hasan means proper divorce. The method for this kind of divorce is to pronounce one divorce in a Tuhr and then the husband pronounces another divorce in the next Tuhr and after that third divorce is pronounced in the third Tuhr.

(ii) Talaq al-Bid'ah:

Talaq al-Bid'ah is regarded as irregular or unorthodox form of divorce. It is so called because it is not approved by the Muslim Jurist. Any divorce which does not conform to

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Talaq al-Sunnah is deemed to be an innovation or bid'ah and is called Talaq al-Bid'ah. Talaq al-Bid'ah is effected in one of the following ways :-

- (a) Repetition of three pronouncements of divorce either at the same time or in the same meeting or on different occasions in the same period of Tuhr.
- (b) Pronouncement of divorce in a period of purity in which the husband has had sexual intercourse with his wife.
- (c) Pronouncement of divorce during the period of menstrual course.
- (d) Pronouncement of divorce in one single sentence.

(2) Divorce considered with regard to effect:-

Divorce with regard to its effect can be divided into the following two main classes:

- (i) Raj'i (revocable)
- (ii) Ba'in (irrevocable)

(i) Raj'i or revocable divorce is such as does not immediately dissolve the marriage but leaves it within the power of the husband to revoke it within the prescribed period of iddah. Al-Talaq al-Ahsan amounts to a revocable divorce. Quran says: "A divorce is only permissible twice: after that,

the parties should either hold together on equitable terms or separate with kindness”⁸.

(ii) Ba'in literally means separation as it separates the parties and leaves no right to resume conjugal relations except by renewing the marriage.

Al-Talaq al-Ba'in is divided into two classes namely :

- (a) al-Talaq al-Mughallazah and
- (b) al-Talaq Ghair Mughallazah.

The word Mughallazah means very hard, but here it conveys the idea of finality and we may call it a final or absolute divorce. Under the Muslim law, a husband can remarry his wife in the case of al-Talaq Ghair-Mughallazah that he had divorced her revocably only once or twice and the period of her iddah has expired. After the pronouncement of three divorces, Talaq becomes Mughallazah it means she becomes absolutely forbidden to him, so that he cannot remarry her untill and unless she marries another person and that other marriage is dissolved after consummation. This rule is based on a verse in the Quran which states, “so if a husband divorces his wife (irrevocably) he cannot, after that, remarry her untill after she has married another husband and he has divorced her”.⁹

Talaq is not considered a pleasant act in the Islamic society. The Holy Prophet (Peace be upon him) says: “Out of

all the things permitted by God, divorce is the most disagreeable in the Sight of God.”¹⁰

Islam desires to make the marriage contract forever. So the time limit voids the marriage contract. When the spouses fail to live together and tolerate each other, the Shariah has the way out that is Talaq. At the first step, Islam teaches the Muslim society when they feel any disagreement between the spouses, they should try to reconcile. The passage in the Qur'an which deals with disagreement between the spouses states: “If you fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation, for Allah hath full knowledge and is acquainted with all thing”.¹¹

Divorce in English Law:

In English Law divorce is only be pronounced through the courts by the Divorce Suits. A divorce petition may not normally be presented until three years after the date of the marriage: M.C.A. 1973, S.3 (1). However, leave to petition before this three year period has expired, may be granted by a judge on the ground of exceptional hardship suffered by the petitioner or the exceptional depravity of the respondent: S. 3 (2).¹²

The spouses can also file another kind of divorce suits which is because of two years desertion the petitioner must prove that the respondent has deserted the petitioner for a

continuous period of at least two years immediately preceding the presentation of the petition: M.C.A. 1973, S.1 (2) (c).¹³

Pronouncement of Talaq in Family Laws Ordinance 1961:-

Any man who wishes to divorce his wife shall as soon as may be after the pronouncement of Talaq, give notice to the chairman of Union Council or an officer authorised in that behalf by the Government to discharge the functions of the chairman. Within thirty days of the receipt of the notice, 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. A Talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which the notice is delivered to the Chairman. If the wife be pregnant at the time Talaq is pronounced, Talaq shall not be effective until the period of the ninety days or the pregnancy, whichever ever be later, ends. The divorced woman can remarry the same husband without an intervening marriage with a third person, unless such termination is for the third time so effective.¹⁴

Moreover column 18 of Nikahnama Form describes: "Whether the husband has delegated the power of divorce to the wife. If so, under what conditions".¹⁵

From the above stated procedure of Talaq, following points can be established:

1. It is essential that the pronouncement of Talaq will be through the Arbitration Council.

2. Arbitration for reconciliation cannot be avoided before the effectiveness of Talaq.

3. The Ordinance considers three divorces at one time as one divorce.

4. The Ordinance describes the term of Iddah as ninety days and in the case of pregnant wife, the period of ninety days or that of pregnancy whichever be later, ends.

5. Woman can condition the marriage contract that she will have the right to pronounce divorce to be delegated to her by her husband

Now we shall discuss main features of the ordinance in detail in the light of Shariah.

1. Family Laws Ordinance compels the husband, after the pronouncement of Talaq to deliver a notice to the chairman. After ninety days and in the case of pregnant woman, the period of pregnancy or ninety days, whichever be later, ends, Talaq becomes effective. But according to the Shariah, Talaq becomes effective as the words of Talaq slip from the lips of

the husband without intervenement of the court or other body. In the case of one or two divorces, he can revoke the divorce within the term of Iddah. When the Marriage Commission questioned Syed Abul Ala Maududi about divorce through courts and registration fo divorce, answering the question he said, "Arrangements for the registration of divorces should necessarily be made, but it should not be compulsory. There are many difficulties in making it compulsory. Every such divorce to which there is proper evidence or which is confessed by the divorcer, should be recognised by the court as such irrespective of the fact whether it has or has not been registered."¹⁶

Procedure of divorce described in the Ordinance can also not be justified because the reasons for which a man is compelled to divorce his wife, are often such that they can be only felt by the man concerned but cannot be described Maulana Amin Ahsan Islahi said, "In such a case, if the court sits to decide the admissibility of the reasons, then the man would be forced to put such allegation upon the woman as may look forceful to the court. Such allegations would mostly be moral in nature, as is substantiated by the example of the modern West. Real reasons are concealed in most of the cases and in their place those allegations are levelled which may be admissible in the court. This would expose out womanfolk to the worst form of exploitation and torture."¹⁷

Moreover the Ordinance leads the people to live a sinful life. There are many couples in our society who after

expiring the term of Iddah, living together without remarrying because they had not registered the divorce. The divorce is effective in light Shariah but according to the Ordinance it is not. It is obvious that the registration of divorce is introduced in the Ordinance because the law making authorities are impressed by the English Law. They tried to make a mixture of Shariah and the English Law.

2. Arbitration:

The Family Laws Ordinance makes arbitration compulsory before the effectiveness of divorce. In favour of the enactment, it is said that relatives and friends of both the parties should make an attempts to consiliate. It is only when such attempts have failed then the required process for divorce should start. The Marriage Commission recommended that in cases of divorce, it should be clearly mentioned that friends and relatives of both the parties had made serious efforts at conciliation which had unfortunately not succeeded.¹⁸

In this respect we can say that the Arbitration Council should, of course, be constituted and this procedure should also be laid down that before issuing decrees on family disputes, the system of arbitration as prescribed by Quran, should be tried for affecting reconciliation. But it is not right that a divorce which has not been referred to the Arbitration Council, should not at all be recognised. According to the

Shariah every divorce which fulfills the legal requisites of a divorce as laid down by the Shariah, becomes effective. Syed Maududi said, "The Shariah has not conditioned reference to any Arbitration Council for making a divorce effective. Now, if the courts refuse to recognise those divorces which, according, to Shariah, have become effective, the people will be faced a very complicated situation and this enactment will lead to a conflict between Shariah and the law of the land".¹⁹

It seems to us that in this enactment, the model of Western countries was kept in mind as the Marriage Commission recommending this procedure quoted, "In some Western countries, Judges of the Matrimonial Courts make efforts at reconciliation at pretrial hearings before starting formal judicial proceedings. The Commission recommends that the judges of our proposed Matrimonial Courts should also make this laudable attempt which is likely to succeed in a number of cases."²⁰

3. Three Divorces At One Sitting:

Family Laws Ordinance considers three divorces at one sitting as one divorce saying, "Nothing shall debar a wife whose marriage has been terminated by Talaq effective under this section from re-marrying the same husband without an intervening marriage with a third person, unless such termination in for the third time so effective".²¹

In support of this view the Marriage Commission has quoted a well known Hadith related by Hazrat Ibn-e-Abbas that during the period of the Holy Prophet, the first Caliph Abu Bakr, and for some years in the reign of Hazrat Umar, three pronouncements at one sitting were regarded as only one pronouncement. But Hazrat Umar made three pronouncement at one sitting as irrevocable divorce.²²

As far as the question of the irrevocability of the divorce pronounced thrice at one sitting is concerned, all the four Imams, most of the companions of the Prophet, the 'Tabaeen' and the jurists are unanimous over it.²³

In some traditions it is said that three pronouncements were taken as one pronouncement and in others it is reported that three or more pronouncements at one sitting were held as irrevocable divorce. Now the question is whether there is a conflict between those. The fact is that both kinds of traditions refer to different kind of cases. In one the situation was that somebody rises up and says that I give you three divorces or one thousand divorces or as many divorce as there are stars in the heavens. In all such cases where the number (three or more) was specified, the divorce was held irrevocable. The other situation was that somebody says, "I divorce you; I divorce you; I divorce you. Here the number was not specified and it could be imagined that the person has made only one pronouncement and has repeated the words only for the sake of emphasis. In such cases, the Holy Prophet asked them whether they meant one or more pronouncements of divorce. If they said "one" he made the divorce revocable

and gave them the benefit of intention. But when the number was specified then the divorce was invariably made irrevocable. This was the situation during the reign of the Holy Prophet. The nature of the change that was affected by Hazrat Umar was that when he came to know of innumerable cases of carelessness in the pronouncement of divorce, he made both the kinds of divorce as irrevocable without going into the question of the intention of the pronouncer of divorce.

During the reign of the Holy Prophet nobody dared to speak a lie before him but how could Hazrat Umar believe that people were not telling lie, Caliph Umar, therefore, very rightly decided to treat both kinds of pronouncements as similar and irrevocable and this closed the doors of a malpractice.

4. The Term of Iddah:

Shariah describes three kinds of Iddah for the divorce woman.

- (i) Women who expect menstrual courses are required the Iddah of the three courses as the Quran says, "Divorced woman shall wait concerning themselves for three monthly periods."²⁴
- (ii) Second kind of Iddah is for pregnant woman, they are required to wait until they deliver the baby as described in

the Quran, "For those who carry (life withing their wombs), their period is untill they deliver their burdens".²⁵

(iii) Women who pass the age of menstrual courses or who have no courses, are required the Iddah of three months. A verse of Quran states, "Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubt, is three months, and for those who have no courses (it is the same)".²⁶

If a woman is divorced after the marriage contract but before the intercourse or *Khilvat-e-Sahihah*, there is no Iddah for her to observe. The Quran states, "O ye who believed! When ye marry believing women, and then divorce them before you have touched them, no period of 'Iddat' have ye to count in respect of them!"²⁷

On the other hand the Family Laws Ordinance held that *Talaq* will become irrevocable after the ninety days or the period of pregnancy. This enactment contradics the injunctions of Shariah, because in the case of menstrual courses the period can increase or decrease from the ninety days. In the light of Qur'an and Sunnah, Iddah for the pregnant woman is only the period of pregnancy while the Ordinance held the ninety days or the period of pregnancy whichever later ends.

5. Divorce Sought By the Wife:-

It has been enacted that it is lawful to provide in the marriage contract that the woman shall have the same right to pronounce divorce, if the right to do so has been delegated to her in the marriage contract, as a man.

In support of this contention, the doctrine of 'tafweez' is quoted which is that if the husband has said to his wife that you can divorce yourself whenever you like, this right of the wife becomes absolute for the whole of her life.²⁸

The marriage contract confers some rights and obligations to each of the husband and the wife. The proportion of rights and obligations between them, as laid down by Islam, naturally, demands that out of the two parties only the male should be entitled to pronounce the divorce. It has cast the burden of dower, the expenses of maintenance during the post divorce period called 'Iddah' and expenses involving the fostering and custody of small children entirely on the male. Therefore, a man is bound to exercise caution in the use of the right of divorce. On the other hand Islam has not imposed any monetary burden on the female. In consequence of divorce, she has to have something and has to lose nothing. It is true that if, while consenting to marry, the woman declares that her offer of marriage is qualified by the condition that she would be free to pronounce divorce upon her husband when she so desires and if the same is accepted by the husband, then the condition may legally be tenable and the jurists have permitted it. But it should be kept in mind that

the legality and permissibility of the delegation of divorce right is altogether different from trying to make it a current practice in the Islamic society.

Syed Maududi Said, "Giving it a currency and incorporating this condition in every marriage contract is against the objectives of Islam".²⁹

Everyone dislikes to talk about the divorce at the time of marriage contract, so there is hardly any such person in our society who practices this right.

The Muslims of Sub-Continent struggled for Pakistan because they wanted to live according to their faith. So it is duty of the Government to enable the people to live according to the teachings of Islam. But the Muslim Personal Laws in India are more Islamic than the laws in Pakistan. The Family Laws Ordinance 1961 must totally be reviewed and be amended in the light of the Qur'an and the Sunnah. All sections repugnant to the injunctions of Islam must be amended according to the recommendations of Islamic Ideology Council of Pakistan.³⁰ So the people of Pakistan may get rid of the sins they are bound to commit.

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