

UNILATERAL DIVORCE IN MUSLIM PERSONAL LAW

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I. Introduction

IN HIS COMMENTARY on the Holy *Qur'ān*, Maulana Mohammad Ali has said :

Divorce is one of the institutions in Islam regarding which much misconception prevails, so much so that even the Islamic law, as administered in the courts, is not free from these misconceptions.¹

This paper seeks to bring out the full force and effect of this statement by examining the prevailing system of divorce in Muslim law.

Under Islamic law, broadly speaking, there are two types of *talāq*: *talāq al-sunna* and *talāq al-bid'a*. In *talāq al-sunna*, there is room for a well-considered judgement and also for reconciliation. But, at present it is the concern of Muslim scholars only, and is rarely used in day to day life. On the other hand, *talāq al-bid'a*, which is "good in law, though bad in theology"², is the most commonly pronounced *talāq*. Irrespective of their propriety, each of the aforesaid forms of *talāq* is unilateral and may be pronounced arbitrarily without rhyme or reason.

Unilateral divorce has always been detested as harsh and unjust to women; but, strange enough, it has never been discontinued and still hangs as the sword of Damocles over the head of every Muslim woman. J.N.D. Anderson has aptly observed :

It is the Islamic law of divorce not polygamy which is the major cause of suffering to Muslim women. . . . The Muslim wife indeed has always lived, so far as the law is concerned, under the ever-

1. Mohammad Ali, *Commentary on the Holy Qur'ān*, 96.

2. Mulla, *Principles of Mahomedan Law*, 311 (16th ed. 1968).

present shadow of divorce, a shadow mitigated only in comparatively rare cases by certain precautionary devices.³

The verdicts of Muslim jurists regarding the propriety of unilateral divorce are not uniform. Ameer Ali has said:

Great divergence exists among the various schools regarding the exercise of the power of divorce by the husband of his own motion and without the intervention of the judge.⁴

These divergent verdicts and other aspects of the subject, including the modern trends in the Muslim world, will be briefly discussed in this paper.

II. Basis of unilateral divorce

Some jurists hold that in an archaic society where the ideas of honour and decency are at a low ebb and the human values are not well defined, the laws regulating the relation between the sexes take their imprint from a coarse imperiousness of male desires and favour the stronger sex. Instances of such laws are the Hebraic law⁵, the laws of Manu⁶, and to a great extent the matrimonial law of pre-Islamic Arabia. The Prophet of Islam found that divorce was effected by husbands of his days with as much facility as the snapping of one's finger and for no other reason than mere caprice. He looked at the baneful and pernicious custom of divorce with horror and tried to contain it within tolerable limits.

The idea on which unilateral divorce is based is that men are superior to women. Some Muslim scholars seek authority for this view in these words of the *Qur'ān*.

Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property (*i.e.* on dower and maintenance).⁷

This idea of men's superiority is expressed by Abdur Rahim in these words:

The relations between the members of the opposite sexes which marriage legalizes are, however, so subtle and delicate and require such a constant adjustment, involving the fate and well-being of

3. J.N.D. Anderson, *Islamic Law in the Modern World*, 51-52, (London, 1959).

4. Ameer Ali, *II Mahomedan Law*, 432. (1965).

5. Under the ancient Hebraic law, a husband could divorce his wife for any cause which made her disagreeable to him; and there were few or no checks to arbitrary and capricious use of his power. See Ameer Ali, *op. cit. supra* note 4.

6. "A barren wife may be superseded in the eighth year; she whose children all die in the tenth year; she who bears daughters only in the eleventh year; but she who is quarrelsome, without delay." (Manu, IX: 80).

7. The *Qur'ān*, IV : 35.

the future generations, that in their regulation the law considers it expedient to allow more or less predominance over that of the other. This, which is regarded as involving the practical subordination of one of the partners to the other, is spoken of as the alienation of conjugal society. . .by the subordinate partner to the predominant partner with the effect of placing the marital freedom of one at the disposal of the other. As regards the next question, that is, which of the two partners should have the right to predominance, the law decides in favour of the husband because generally speaking he is mentally and physically superior of the two; and some theories would treat the dower payable to the wife as consideration for the alienation of her marital freedom.⁸

This explains why despite the expanding ideas of the meaning and purpose of marriage in other matrimonial laws, the Muslim law of marriage still remains unelevated to a higher plane of thought.

III. Restraints on divorce under the traditional law

Some Muslim jurists and scholars point out that from the very beginning of the recognition of the principle of unilateral divorce, forces have been at work which have restricted and limited its free and unnecessary use. As observed by Abdur Rahim:

(I)f the exercise of a particular right is likely to lead to abuses, the law would guard against such a contingency by imposing conditions and limitations. There are certain limitations imposed by the law upon the right of the husband to dissolve the marriage.⁹

The first restraint is implied in the doctrine of *halala* which requires that a man who has irrevocably divorced his wife can remarry her only after the divorced woman has married another man and the second marriage has been lawfully terminated after consummation. This restraint acts powerfully on ignorant minds by appealing to their sense of jealousy and honour. It was a device for arresting "the scandal of indefinitely repeated divorces and re-marriages which had become frequent in Arab society and were opposed to the interests of public morality".¹⁰

As observed by Wilson :

It may have been about as powerful a check on marital caprice as could have been devised without limiting the power of divorce itself or making it absolutely irreversible.¹¹

8. Abdur Rahim, *Muhammadian Jurisprudence*, 327 (1948).

9. *Id.* at 333.

10. Amzer Ali, II, *Personal Law of the Muhammadans*, 324 (1865).

11. R. K. Wilson, *Digest of Anglo-Muhammadian Law*, 179 (1930).

The second restraint which may effectively, though indirectly, clog the husband's right to divorce, is a stipulation fixing the dower at the time of marriage at a sum "out of all proportions to the means of the husband, as is the custom in India."¹² It compels the husband to fulfil the terms of the marriage contract in their entirety,¹³ and also serves as "a check upon the capricious exercise of his unlimited power of divorce."¹⁴

The third restraint is provided by the doctrine of *talaq al-tafwid* (delegated divorce), which provides that the wife may at the time of entering into a marriage-contract, secure the right of divorce from the husband. This doctrine "is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court."¹⁵

The fourth restraint is found in the provision that if *talaq* is pronounced by the husband during his *marad al-maut* (death-illness) and he dies before the expiry of the 'idda, the wife remains entitled to inherit from him.¹⁶ The reason of the rule is that a repudiation by a husband in his death-illness may be nothing but a device to defeat the wife's right of inheritance.

These salutary provisions in the laws of marriage and inheritance act as effective and potent safeguards against any rash and ill-considered exercise of the right of divorce.

There is a large and influential body of Muslim jurists who regard *talaq* emanating from the husband as really prohibited except for necessity and only with the sanction of a judge administering the Muslim law.¹⁷ A similar view has been recently expressed by Justice V. R. Krishna Iyer of the Kerala High Court, authority for which is found in the texts and the writings of some Muslim scholars.¹⁸ The *Qur'an* enjoins :

It they (women) obey you, then do not seek a way against them.¹⁹

On this Galwash comments :

The *Qur'an* expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him. The

12. Abdur Rahin, *Muhammadian Jurisprudence*, 333 (1918). Also W.H. Macnaghten, *Principles and Precedents of Moohummudan Law*, 15. (1925) where the author has said:

Dower is demandable on divorce, and with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than can ever be in the power of the husband to pay.

13. Ameer Ali, II, *Mohammadan Law*, 393 (1965).

14. A.A.A., Fyzee, *Outlines of Muhammadian Law*, 127, (1964).

15. *Id.* at 151.

16. D.F. Mulla, *Principles of Mohammedan Law*, 336 (15th ed. 1968).

17. Ameer Ali, *supra* note 13 at 432.

18. *A. Yusuf v. Sowramma*, A.I.R. 1971 Ker. 261.

19. The *Qur'an*, IV : 34.

law gives to the men primarily the facility of dissolving the marriage, if the wife by her indocility or bad character renders the married life unhappy; but in the absence of serious reasons no man can justify a divorce either in the eyes of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger—for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously.²⁰

Another Qur'anic injunction pertinent to the point in issue is:

And if ye fear a breach between husband and wife, send a judge out of his and another from her family: if they are desirous of agreement, God will effect a reconciliation between them; for God is knowing and apprised of all.²¹

On this verse, Maulana Mohammad Ali, comments:

This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made too public. The judge is required to appoint two arbitrators, one belonging to the wife's family and the other to the husband's. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam.²²

The Prophet had also declared *talāq* to be "the most detestable to God of all permitted things." As pointed out by Ameer Ali :

He restrained the power of divorce possessed by the husbands. . . and towards the end of his life he went so far as practically to forbid its exercise by the men without the intervention of arbiters or a judge.²³

On another occasion, the Prophet said :

Let the case be referred to two Muslim arbitrators, free and just, one chosen from the family of each of the parties; and they shall see

20. Galwash, *The Religion of Islam*, 104.

21. The *Qur'ān* VI: 35.

22. Mohammad Ali, *Commentary on the Holy Qur'ān* (IV : 35).

23. Ameer Ali, *supra* note 13 at 432.

whether in that particular case reconciliation or separation is desirable; and their decision shall be binding upon them both.²⁴

Besides these Qur'anic injunctions and Traditions of the Prophet, the prescribed form of *talāq al-sunna* itself affords to the parties opportunities for reconciliation, if so desired. In the *ahsan* form of *talāq*, there is one single pronouncement of divorce during a *tuhr* (period of purity), followed by abstinence from sexual relations during the period of *'idda*. It becomes irrevocable only after *'idda*. In *hasan* form of *talāq*, there are three pronouncements during three successive *tuhrs*, there is no sexual union during any of these *tuhrs*, and the divorce becomes irrevocable after the third pronouncement. Abdur Rahim has said :

In the first (*ahsan*) form there is a greater guarantee than in the second against hasty and ill-advised action.²⁵

Both forms of *talāq* must be pronounced during *tuhr*. Two reasons are given for this requirement. First, the physical disability during menstruation leads a woman sometimes to act and behave in a manner which she herself does not approve of on becoming clean. Secondly, the normal sexual relations between the husband and wife are suspended during menstruation period and sexual relations are generally the basis of mutual love and amity. It is possible that when sexual union is restored, the couple may resume their normal attitude to each other and forget their differences. Thus the requirements of *tuhrs* and abstinence allow the husband an opportunity to reconsider his decision about the divorce so that should he repent he may exercise the right of return before the expiry of the term.

Talāq al-bid'a, as its name suggests, is the heretical or irregular mode of *talāq*, in total disregard of the aforesaid considerations and opposed to the Islamic injunctions. It was introduced in the second century of the Muslim era when "the Omayyid monarchs, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found . . . a loophole to effect their purposes".²⁶

Tyabji points out that in *Hanafī* law this sinful form of *talāq* has become most prevalent because "Men always have moulded the law of marriage so as to be most agreeable to themselves."²⁷

Lastly, it may be mentioned that the very concept of marriage in Muslim law negatives the right of unilateral divorce exercised by husband arbi-

24. As quoted in Galwash, *The Religion of Islam*, 135.

25. Abdur Rahim, *Muhammadan Jurisprudence*, 336 (1918).

26. Ameer Ali, *supra* note 13, at 435.

27. F.B. Tyabji, *Muhammadan Law*, 221 (3rd ed.).

trarily. Divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by *talāq* or *khul'*.

From the aforesaid discussion it is clear that the permission of divorce given in the *Qur'ān*, though it gave a certain countenance to the old customs, has to be read "in the light of the lawgiver's own words".²⁸ Justice Iyer concludes :

It is a popular fallacy that a Muslim male enjoys under the Qur'anic law, unbridled authority to liquidate the marriage. . . . The view that the 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 *Qur'ān* laid down and the same misconception vitiates the law dealing with the wife's right to divorce.²⁹

V. Modern trends

Since the "common misconception" about unilateral divorce has been brought to light and the "popular fallacy" about it exploded, it is time that measures were taken to abolish the practice of arbitrary and unilateral divorce prevalent in India. Justice Iyer points out:

Commentators on the *Qur'ān* have rightly observed—and this tallies with the law now administered in some Muslim countries like Iraq—that the husband must satisfy the court about the reasons for divorce.³⁰

A *talāq* should not be given effect to if it is pronounced under compulsion, or in a state of voluntary intoxication, jest or anger. Fyzee denounces such *talāqs* as "absurd and unjust", and suggests that the proper remedy should be to do away with them by a statute.³¹ Ameer Ali suggests that in such cases, where the parties happen to be *Hanafī*, the court should, on grounds of equity, apply the *Shāfi'ī* law.³² Criticising such forms of *talāqs*, Abdur Rahim says :

I may remark that the interpretation of the law of divorce by the jurists, specially of the *Hanafī* school, is one flagrant instance where because of literal adherence to mere words and a certain tendency

28. Ameer Ali, *supra* note 13 at 432.

29. *Supra* note 18 at 264.

30. *Ibid.*

31. Fyzee, *supra* note 14 at 149.

32. Ameer Ali, *supra* note 10 at 416-417.

33. Abdur Rahim, *Muhammadan Jurisprudence*, 337-338 (1918).

towards subtleties they have reached a result in direct antagonism to the admitted policy of the law on the subject.

Far-reaching reforms relating to unilateral repudiation of marriage have been introduced, during the recent years, in a large number of Muslim countries including, besides the major Arab States, Iran and Pakistan. A thorough account of these reforms and their sources *etc.*, will be found in Tahir Mahmood's *Family Law Reform in the Muslim World*.³⁴ The authorities cited by the author of this book in support of the changes introduced in various countries must be given due consideration.

In the end, it is submitted, that changes in the Muslim law relating to divorce, as applicable in India, are called for. Such changes would accord with the Islamic injunctions and the ethos of the Muslim community and tally with the law now administered in many Muslim countries.

34. Indian Law Institute publication, 1972.