
Provision of Notice for Divorce/Talaq after Pronouncement in Pakistan: An Analysis along-with Recommendations for Reform in Section 7 of the Muslim Family Law Ordinance, 1961

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Provision of notice for ‘talaq/divorce’ by either of the spouse for the purpose of effecting reconciliation between the parties by an arbitration council is a contentious issue in the Pakistani Law. This is evident from the turmoil faced by the Pakistani apex court in interpreting the provision of notice for talaq as enumerated in section 7 of Muslim Family Law Ordinance, 1961, when three triple talaq are announced by either of the spouses. The purpose of this paper is to propose reforms in the section 7 of Muslim Family Law Ordinance, 1961 pertaining to talaq divorce under Pakistani Law. The methodology adopted is case law analysis along with sharia appraisal of the issue. The findings of the paper mandate reform of section 7 of the Muslim Family Law Ordinance, 1961. The limitation of this study is a comparative analysis. The result of the reform proposed has a serious implication for the masses of Pakistan as people are majority Muslims and require a provision of talaq that is in accordance with their system of interpretation. A reformed section 7 has not been proposed before in this form.

Introduction

Section 7 of the Muslim Family Law Ordinance, 1961 requires serious reforms being an anomaly in being contrary to the demands of Islamic Law. Section 7 of muslim family law on talaq requires a new formation so that it conforms to the cross section of Muslims belonging to different schools of interpretation. This article will be a value addition for the law makers as it proposes a new legislation on the issue. The objective of the study is to reform section 7 of Muslim Family Law Ordinance, 1961 so that anomaly being faced by the superior courts of Pakistan in interpreting the provisions on talaq is resolved and a new legislation consistent with sharia can be proposed. The limitation of the

study is a comparative analysis of the provision of talaq with various Islamic countries and focus has been made on proposing a home grown solution.

Case Law Analysis

Section seven of the Muslim Family Law Ordinance, 1961 contains the substantive provisions on divorce/talaq in Pakistan and prescribes the procedure for it to be effective and binding. It states that soon after pronouncement of talaq in any form whatsoever, a notice in writing is to be sent to the wife and chairman arbitration council indicating the factum of divorce and thereafter chairman arbitration council shall within one month try to effect reconciliation between the spouses.¹ Contravening the provisions of this section is a punishable offence,² hence, the sending of notice after talaq is a mandatory provision which cannot be bypassed entailing penal consequences in case of default. The quagmire of Pakistani Courts in interpreting the provision of section 7 (1) of Muslim Family Law Ordinance, 1961 can be gleaned from the cases reported of the highest court of Pakistan delineating the scope for notice of talaq. It was held as far back in 1963 soon after the promulgation of the controversial Muslim Family Law Ordinance, 1961 in the case of *Syed Ali Nawaz Gardezi v Lt- Col. Muhammad Yusuf*,³ wherein a government officer enticed a foreigner married woman that, 'if husband opts not to give notice perhaps he may be deemed to have revoked pronouncement of talaq.'⁴ This was a unanimous five member bench judgment authored by justice S A Rahman for the majority with stalwarts judges of the likes of Justice Cornelius, Kaikaus, Fazl e Akbar and Justice Hamoodur Rehman concurring. The predominant view after this judgment had been that divorce is yet to be effective if no notice is given. Reliance in this regard may be made to cases of *Abdul Manan v Safurun Nessa*⁵ and *Mst Kaneez Fatima v Wali Muhammad and another*.⁶ In the latter case of Kaneez Fatima, the judgment has been pronounced by five member bench. In this case this was also held that failure to send notice of divorce leads to the conclusion that talaq is ineffective but not revoked.⁷ This means that the provision on notice of divorce has been relegated to the status of directory provision ignoring the fact that the language of statute was mandatory entailing penal consequences in case of default. It was also held in this judgment that provisions of Muslim family law ordinance could not be challenged by Federal Shariat Court or Shariat Appellate Bench of Supreme Court on the touchstone of repugnancy to injunctions of Islam or by any court on the touchstone of fundamental rights. This implies that only legislature is competent to initiate any reform and courts jurisdiction is ousted in the matter.⁸ The judgement further trying to escape the provisions of Muslim Family Law Ordinance, 1961 held that section 7 is not to be strictly construed where divorce is affected in writing with the consent of both the parties.⁹

In another case titled *Allah Dad v Mukhtar*,¹⁰ the three member Shariat Appellate Bench of Supreme Court of Pakistan though lacking jurisdiction in interpreting the family law ordinance in an adultery case further made redundant the provisions of notice of talaq by holding that,

‘It is now evident that a notice of talaq to the chairman is not mandatory under the injunctions of Islam and any divorce pronounced or written by a husband cannot be ineffective or invalid in shariah merely because a notice has not been given to the chairman, therefore, if a woman after obtaining a divorce from her husband and after necessary period of ‘iddat’ contracts a marriage with a third person, their marriage cannot be held as invalid marriage, atleast for the purpose of the ordinance. In the instant case, the respondents have contracted nikah after the petitioner had divorced, so even though petitioner has not given a notice to the chairman, the divorce became effective in shariah and the marriage contracted thereafter is a valid marriage, especially for the purpose of the ordinance and the cohabitation of the respondents cannot be held as zina/adultery.’¹¹

This view of effectiveness of talaq in the case of failure to send notice was again confirmed by a three-member bench of the Supreme Court of Pakistan in the case of *Mst Zahida Shaheen and another versus The State and another*.¹² Later again the Supreme Court of Pakistan takes a summersault and a division bench of Supreme Court of Pakistan holds in a case titled; *Mst Farah Naz vs Judge Family Court*,¹³ that;

‘Husband was required to send notice of divorce to arbitration council under Muslim Family Law, Ordinance, 1961 and also to send copy of such notice to wife by registered post. No such proceedings having been ever conducted, oral allegation of talaq would neither be effective nor valid and binding on the wife’.¹⁴

The uncertainty in the law regarding notice of talaq and its effectiveness for the purpose of reconciliation is evident from the rulings of apex court of Pakistan.

Sharia Validity on the Notice of Talaq/Divorce after its Pronouncement

Muslim personal law and rulings of talaq have been governed by the opinions of jurists of different sects of Islamic law since the most of entire period of Muslim history. Even the colonial masters recognized schools of the classical period as sacrosanct and immutable and accorded them respect.¹⁵ Classical jurists under Islamic law tasked themselves with the duty to interpret the sources of Islamic law i.e Quran and Sunnah therefore the literal interpretation of the sources of Islamic law may lead to misinterpretation without recourse to the work of these classical jurists who tried to arrive at a meaningful conclusion through holistic study of the texts. Most of the classical jurists including Hanafis have held that three divorces give rise to an irrevocable divorce; therefore, no question of notice for reconciliation arises in such a scenario.¹⁶ The Shiah do not recognize such a divorce.¹⁷ Some of the ahle hadith and hanbali jurists hold three continuous divorces as amounting to one thus giving three continuous divorces the status of a revocable divorce.¹⁸ Thus there is serious controversy regarding the

issue which is manifest from the diverse fatwas on this issue. Section seven of the Muslim Family Law Ordinance, 1961 requires meaningful amendment to that it conforms to the Muslim Personal Law of every sect and the controversy regarding 'notice' and its effectiveness is resolved. Continuous triple talaq though permissible is a disapproved and reprehensible act under Islamic shariah. Framers of the muslim family law just to countenance triple talaq, done away with it, however, such a solution is clearly against the dictates of majority opinion in Islamic law and its fallacy is evident from the provisions of notice under Islamic law wherein Supreme Court of Pakistan has given contrary opinions on the revocability of divorce. In a revocable divorce iddat or end of pregnancy is the cutoff date for the effectiveness of divorce, however, Muslim Family Law Ordinance, 1961 has fixed ninety days. To bring reform in the section seven of muslim family law it is therefore proposed that a new section in the following terms which is widely suitable for a cross section may be added by the legislature in place of the existing section 7 Muslim Family Law Ordinance, 1961.

Proposed Reforms

7. 'Talaq'.

(1) Repealed. 'Talaq' means severance of bond of marriage by either of spouses.

(2) Repealed. Whoever exercises the continuous right of divorce thrice shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to one lac rupees. Such a talaq once pronounced will be binding and irrevocable.

(3) Repealed. A talaq shall be pronounced singly or twice and shall not be effective until the expiration of third menstrual cycle.

(4) Repealed. Any man or woman as soon as after the pronouncement of single or two divorces shall give the Chairman notice in writing of his having done so and shall also supply the other spouse with whom the bond of marriage is being severed a copy thereof.

(5) Repealed. Before the expiry of third menstrual cycle, the Chairman shall carry out meaningful reconciliation and for this purpose take all steps necessary to bring about such reconciliation.

(6) Repeal. If the wife be pregnant at the time one or two talaqs are pronounced than the talaq shall not be effective until the pregnancy or third menstrual cycle whichever is later ends.

(7) Inserted. A marriage that is dissolved by talaq effective under this section shall debar a wife from marrying the same husband without an intervening marriage.

Currently section 7 of Muslim Family Law Ordinance, 1961 reads as:

"7. Talaq. (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 a 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 with both.

(3) Save as provided in sub-section (5) talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from day on which notice under subsection (1) is delivered to the Chairman.

4) Within thirty days of the receipt of notice under Sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) 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 later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under his section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.”¹⁹

The new provision of section 7(2) prescribing punishment for three continuous talaqs will be in accordance with Hanafi methodology, “as trade is exclusively permitted but states prohibit by regulation smuggling; moreover, sex with a slave girl is permitted but we prohibit by regulation the right to buy slave girl from foreign countries. Right of marriages is unfettered but registration is introduced in the law. Furthermore, right to bear arms is restricted to a privileged few through legislation when Quran states clearly that everyone shall bring his own horses and weapons to the war.”²⁰ In addition it is also proposed that requirement of two witnesses for pronouncement of talaq by either spouse may also be considered by the lawmakers in their wisdom, if deemed appropriate, to be incorporated in this new proposed section 7 on talaq as it is considered a recommended act under Islamic law by all the schools.²¹

Conclusion

Section seven of the Muslim Family Law Ordinance, 1961 contains the substantive provisions on divorce/talaq in Pakistan and prescribes the procedure for it to be effective and binding. It states that soon after pronouncement of talaq in any form whatsoever, a notice in writing is to be sent to the wife and chairman arbitration council indicating the factum of divorce and thereafter chairman arbitration council shall within one month try to effect reconciliation between the spouses. Section 7 is against the dictates of sharia as three continuous talaqs in the hanafi system of interpretation takes effect soon on its pronouncement and no reconciliation can be carried out thereafter. Pakistan is a predominant hanafi country therefore section 7 must conform to the hanafi interpretation of talaq. A new legislation on

section 7 of muslim family law is the need of time that dispenses away with provision of notice after three continuous talaq/divorce by either of the spouse.

Notes and References

- ¹ Section 7, Muslim Family Law Ordinance, 1961.
- ² Section 7(2), *ibid*.
- ³ *Syed Ali Nawaz Gardezi v Lt- Col. Muhammad Yusuf*, PLD 1963 SC 51.
- ⁴ *Ibid*.
- ⁵ *Abdul Manan v Safurum Nessa*, 1970 SCMR 845.
- ⁶ *Kaneez Fatima v Wali Muhammad and another*, PLD 1993 SC 901.
- ⁷ *Ibid*.
- ⁸ *Ibid*, p.914, p.915.
- ⁹ *Ibid*, p917.
- ¹⁰ *Allah Dad v Mukhtar*, 1992 SCMR 1273.
- ¹¹ *Ibid*.
- ¹² *Mst Zahida Shaheen and another versus The State and another*, 1994 SCMR 2098.
- ¹³ *Mst Farah Naz vs Judge Family Court*, PLD 2006 SC 457.
- ¹⁴ *Ibid*.
- ¹⁵ Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia a Study in Judicial Activism* (Karachi: Oxford University Press, 2011), 15.
- ¹⁶ Tanzil-ur-Rahman, *A Code of Muslim Personal Law* (Karachi: Hamdard Acad., 1980). Qādī Naṣīr-ad-Dīn Aḥmād and S. Anwar-ul-Haq, *The Muslim Law of Divorce* (Pakistan: Islamic Research Institute, Islamabad, 1972). Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia a Study in Judicial Activism* (Karachi: Oxford University Press, 2011).
- ¹⁷ *Ibid*.
- ¹⁸ *Ibid*.
- ¹⁹ Section 7, Muslim Family Law Ordinance, 1961.
- ²⁰ "The CII Ruling Recting Permission of Existing Wife Is Wrong," accessed June 26, 2018, https://www.bing.com/cr?IG=C4B3757781EF4FAF8AE9F4632AC53EBE&CID=369100BC2F806A971DFE0CA62E7D6B65&rd=1&h=iEJ60KHs2s1QEb9oF5odVWXz0eFEiI1DnBEL0m6qjo&v=1&r=https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2409084_code637748.pdf?abstractid=2409084&mirid=2&p=DevEx.LB.1.5565.1.
- ²¹ Tanzil-ur-Rahman, *A Code of Muslim Personal Law* (Karachi: Hamdard Acad., 1980).

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