



REVIEWING *the views*

TRADITION VERSUS REFORMS

The gender power-play in Sharia divorce

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EVEN on paper, divorce is a messy business. This is particularly a problematic area in most Muslim-majority States, where family matters are governed by personal law. There is an inherent tension between the traditional approach (marked by very literal- and often misconceived- interpretation of *sharia* law) and the modernist approach (tinged with feminism, human rights, custody issues and so on).

Legally speaking, marriage is a contract; but it is one in which the husband is clearly the stronger party, specifically when it comes to terminating it. A husband's power being inherently vested by the *sharia*, permitting even unilateral dissolution of marriage without offering any reason whatsoever, clearly overshadows that of the wife. By contrast she has no right to declare a divorce unilaterally. Moreover, unlike the husband, she cannot exercise any form of extra-judicial repudiation, save where the power has been delegated to her by the man. Even with the court as her last resort, her right to dissolve the marital tie is conditional- i.e. she must provide reasonable grounds for seeking the divorce.

In the light of such limited power, however, many reforms have been proposed and incorporated. The thrust for these reforms have primarily been to

expand the women's rights and to safeguard their interests, all the while harnessing the husband's otherwise unfettered power.

Egypt has been one of the reform pioneers. Law No.5 of 1929 codified the law regarding the husband's power of divorce. Article 1 began by invalidating any *talaq* pronounced by the husband under intoxication or compulsion, which was traditionally accepted by Hanafi law. Article 4 suggested that any *talaq* pronounced using vague or ambiguous expressions was unacceptable. In general, greater emphasis was placed on the intention of the speaker. Similar provisions have been made in Iraq, Morocco and Sudan.

Unfortunately, the Muslim Family Law Ordinance 1961 that is effective in Pakistan and Bangladesh does not deal with any such academic aspect concerning the nature of the pronouncement. It merely prescribes a procedure for the registration of a *talaq* that has already been pronounced. It appears that unlike Egyptian law, Bangladeshi law accepts any divorce *prima facie* and the only condition is as regards its notification towards an authority. Thus if a person pronounces *talaq* under intoxication, such a pronouncement is void ab initio in Egypt, but can be effective in Bangladesh if the procedural requirements of notification



under section 7 MFLO 1961 are observed.

As regards the husband's absolute and inherent power to repudiate his wife, the first reform took place in Syria. If it appears before the *qadi* (judge) that the husband has repudiated the wife without reasonable cause, and consequently she suffers material damage the *qadi* may order the husband to pay compensation that is equivalent up to one year's maintenance.

This could discourage men to unilaterally and unjustly repudiate their wives. Nonetheless, it is pertinent to note that it merely compels the husband to pay compensation and does not invalidate the divorce itself.

There are also many indirect restraints on the husband's power. Iran devised a novel concept of post-divorce compensation payable to the wife irrespective of the justifiability of the *talaq*. A wife may ask for

remuneration for her household activities done during the course of their marriage. This is the wage for the work she has done which she was not bound to do as the legal consequence of their marriage. Again, while this does not nullify the husband's right, it provides a husband a scope to think twice, because he may have to pay a large sum in compensation.

Reforms have also touched the issue of extra-judicial divorce.

Many legal systems have rejected such forms of repudiation altogether, such that the husband can now exercise his power through the court only. Indonesia, for instance, requires the husband to send a written notification to the court, stating the reasons for seeking dissolution. It makes the same grounds available to both men and women, which goes further to remove gender inequality.

Malaysia, a modern Muslim state, has brought some significant changes in this regard. Following an application filed by the husband, the court would call upon the wife to know whether she consents to the divorce or not. If not, it will call for reconciliation. If the court is then satisfied that the marriage in no way would continue, it will advise the husband to pronounce a single revocable *talaq* that is to be registered, which will be effective after the expiry of the *iddat* (ie, a period of three menstrual cycle and if pregnant, until the delivery of the child). This appears to be a fine measure, in that it strikes a balance between the classical *sharia* position and the needs of the modern society. While it does not reject extra-judicial divorce, it emphasizes the wife's consent, and the penalty acts as an indirect check on the husband's exercise of power. Thus, what has been the impact of similar legislation in

other countries, has been directly incorporated in Malaysia. Similar provisions have been made in Morocco by virtue of the 2004 Code of Family Law that allows divorce on the ground of "discord" between the parties.

All in all, some positive steps have been taken in connection to *sharia* divorce law. Nonetheless, it is unfortunate that her rights remain secondary- i.e., she still has no right of unilateral pronouncement of *talaq* without judicial assistance. Moreover, her powers remain conditional, although the grounds for seeking dissolution have increased considerably. On the other hand, it can be refuted that under the present laws and modern developments, the grounds are being drafted using broad terms to encourage liberal interpretation. This could offer much relief to women, especially in Hanafi-majority countries where strict interpretation of the *sharia* provisions can lead to disregard to their basic human rights (such as freedom from torture, right to free movement, etc.). A relaxed construction of the words such as "cruelty" and "ill-treatment" would thus harmonise the law with the modern codes of human rights such as the Universal Declaration of Human Rights and the Convention Against Torture.

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LAW *campaign*

Consumer Rights Protection Act needs revision

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WHEN Consumer Rights Protection Act (CRPA) was promulgated, conscious consumers expected a change in trading system. The Consumer rights protection department has recently been set up in line with the Consumer Rights Protection Act which was passed in parliament last year. The 21-member national consumer rights protection council was also formed in the light of the law. The hope of the consumers shattered quickly as the law proves inadequate to protect the interest of the consumers.

Limitations of the Act

There are not only unfavourable provisions in the law, but there is a section impeding individual's access to justice also. The law does not provide consumers a scope to file allegation directly to a magistrate seeking justice. Limitations of the act also include:

Permission to suit a file
It has been made mandatory in the act for the aggrieved person to get permission from the National Consumer Rights Protection Directorate in order to file a suit. Section 71(1) of the CRPA stipulates no individual can make any complaint about violation of consumer rights to the court of a 1st class magistrate or the

CMM. This provision simply impedes access to justice.

Tenure of punishment

Interestingly, this act covers some aspects of health services. There has been a provision of 3 years of imprisonment and/or fine of Tk. 300,000 for selling illegal drugs in the Section 41 of the CRPA. Apart from health services, the act however remains silent related to other utility services like gas, electricity and water.

Lack of provision for compensating the consumer

There is no provision for the consumer to get compensation for the damaged done. The act is silent in this aspect. On the contrary, the act provides that if a seller sells any defective product with bona fide intention, he is not to be liable.

Dependent on Bureaucracy

The CRPA has been enacted such a way that the implementation largely depends on the action of bureaucracy. Bureaucrats employed by the government hold different positions in the department and council. Many of them have additional responsibilities and lack effort in ensuring rights of the consumers.

Consumer Protection Act in India

In India, there exists the Consumer Protection Act 1986 laying down the rights of the consumers.

To provide inexpensive, speedy and summary redress of consumer disputes, quasi-judicial bodies have been set up in each district and state.

Each District Forum is headed by a person who is or has been or is eligible to be appointed as a District Judge and each State Commission is headed by a person who is or has been a Judge of High Court. The National Commission is headed by a sitting or retired Judge of the Supreme Court of India.

The provisions of this Act cover 'goods' as well as 'services'. The remedy under the Consumer Protection Act is an alternative in addition to that already available to the aggrieved persons/consumers by way of civil suit. In the complaint/appeal/petition submitted under the Act, a consumer is not required to pay any court fees but only a nominal fee.

Alternative Dispute Resolution for Consumers in UK

In UK, there are 3 types of ADR to deal with consumer disputes. They are conciliation, arbitration and mediation. There is also a Financial Ombudsman Service (FOS) for services provided by insurance companies, banks and building societies in UK. A matter could only be referred to FOS when consumers have already completed the supplier's internal complaints procedure.

The suppliers in UK usually accept a recommendation or a ruling by FOS, but directives are not legally binding upon them. Consumers can still take court action if they are not satisfied. However, the court will take the Ombudsman's ruling into account when deciding the claim.

To recapitulate, some sections of CRPA require amendments to make the law effective and the government should carry out the task expeditiously in consultation with consumer rights groups. While reviewing the act, a process of alternative dispute resolution needs to be incorporated. The number of pending cases is quite high in our courts and benches should not be further burdened with cases. Alternative dispute resolution mechanism if incorporated in the CRPA would provide an opportunity for consumers to settle dispute even without going to council or court.

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HUMAN RIGHTS *monitor*

The hazard of toxic wastes on human rights

ACCORDING to the UN Special Rapporteur on the adverse effect of toxic wastes on human rights, Okechukwu Ibeanu every year some 47,000 people die as a result of acute poisoning from hazardous chemicals, while many others develop life-threatening diseases such as cancer.

In modern societies, harmful chemicals have become part of people's lives and a constant threat to their health and the environment. However, the threat to human rights of hazardous products such as chemicals, pesticides and toxic waste remains to be adequately recognized.

At the Human Rights Council in Geneva, a group of experts held a panel discussion which aimed to identify practical measures to reduce and eradicate the negative impact of the movement and dumping of toxic products on human rights. Recalling what happened in his country in August 19 2006, the President of the Ivorian League for Human Rights, André Banhouman Kamate said that 528 cubic metres of toxic waste were discharged by the "Probo Koala" ship in the port of Abidjan, directly killing an estimated 17 people and aggravating to lethal levels the pre-existing health conditions of scores of others.

Kamate advocated for better controls of transnational traffic and new structures to treat dangerous products locally in order to mitigate the noxiousness of such wastes and to promote the rights to life, to the best obtainable health possible and to a safe environment.

In a written statement, UN Special Rapporteur Ibeanu noted that since the 1970s, the increased generation of toxic wastes had made people more aware of the potential dangers to their health and the environment. This prompted the introduction of new laws in industrialised countries where the cost of disposing of toxic wastes increased. Companies producing toxic wastes opted to dispose of them for less in developing countries.

"Today, the situation is more complex. Certainly, hazardous wastes generated in the

northern hemisphere continue to be illegally dumped in developing countries by unscrupulous companies, as the Probo Koala case proved", the statement indicated. "However, we need to acknowledge that toxic and dangerous products and wastes know no boundaries, and are transferred not only from the "north" to the "south", but also and increasingly between developing countries and between developed countries themselves."

Treaties such as the Basel Convention, with its 172 signatories, provide a legal realm for the movement and disposal of toxic materials worldwide. Although the Convention's main goal is to protect human health and the environment, the treaty can also be applied to the protection of human rights. The Convention has put in place a prior and informed consent system aimed at ensuring that only countries



with the will and capacity to dispose of, in an environmentally sound manner, hazardous wastes originating from another country actually receive such wastes. Illegal transport is a crime according to the Convention, however it still remains uncontrolled.

In the course of the discussion, experts called for concerted international action to address the effects of toxic and other wastes, as well as concrete measures to put an end to their transfer. They also advocated for the development of general guidelines on the management and disposal of toxic waste from a human rights perspective. Reparations for victims of dumping should also be envisaged.

Source: Office of the High Commissioner for human rights.

