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The Husband's Power of Divorce under Classical Islamic Law and its Reforms in the Modern World

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1. Introduction

Marriage under Islamic family law is generally considered as a contract between two persons. This feature of marriage under Islamic law makes it unique for its simplicity. Yet there are some religious aspects of such a contract as well. Probably that is one of the reasons why some jurists have preferred to draw a line of distinction between a pure civil contract and a contract of marriage under Islamic family law. Thus, though marriage is treated as one type of contract, yet unlike the parties to a civil contract, the parties to a contract of marriage do not enjoy absolute liberty to settle the obligations. For example, the parties to a contract of marriage cannot waive the dower or maintenance through marriage deed or cannot settle any specific duration of the marriage after which it will come to an end. As a part of religious aspect of the contract of marriage *sharia* imposes certain obligations, fixes the nature and limits of certain powers and mentions some powers specifically to belong only to one of the parties to the contract irrespective of the agreement between the parties. Husband's power of divorce is strictly given by the *sharia* putting him in a clearly superior position in comparison to his wife, another party to the contract. Husband's power to terminate the marriage, under sharia law, generally speaking, thus is inherent, as it is not dependant on the terms of the agreement, absolute because no one can question this power, and unconditional in the sense that he can exercise this

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power unilaterally without showing any reason whatsoever. It is argued that '[w]hen the discussion of Talaaq is raised in the Qur'aan Majeed, then this act is attributed to men, which makes abundantly clear that the right to issue Talaaq is vested in the husband only.'[1] Thus, the husband enjoys a primary power to terminate the contract of marriage in comparison to the wife whose power is really secondary in the sense that either she has to obtain it from the husband through proper delegation or has to seek it from the husband by way of a compromise. Alternatively, she can go to the court where she can be granted with a divorce only on satisfaction of certain grounds. Marriage under Islamic law is not a permanent bond that cannot be separated even for genuine causes. The provision for divorce has generally been appreciated by the jurists: 'Had it been that Islam did not legislate divorce to serve as a way-out of unhappy situations, life would certainly be unbearable and an intolerable prison that is full of pain and torment.'[2] However, '[t]he Islamic law of divorce has generated much academic writing and is probably the largest aspect of Muslim matrimonial law, with a split attitude among the scholars, resulting from tension between religious ideals and social reality'.[3] The present article will be confined only to the examination of the power of divorce of the husband under classical sharia law and its modified versions in different states.

The object of writing this article is to find out the sharia law regarding power of divorce of the husband and then to examine the modern reformation made by different states in this field. In doing so, first, a general discussion will be made comprising opinions of

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[1] Qasmi, Mufti Abdul Jaleel; *The Complete System of Divorce*, 2003, Adam Publishers, New Delhi; p.42.

[2] Ayoup, Hassan; *Fiqh of Muslim Family*, 1999, Islamic Inc., Egypt; p. 182.

different sects and schools of law along with an analysis of the primary sources as and when required, and then the relevant statutes and case laws in different states will be presented so as to show which of those affect the sharia law as reformation *de novo* and which of them are the product of *ijtihad*. Lastly, the impact of modern reforms on the husband's power of divorce under Islamic family law will be assessed.

A brief analysis of husband's power of divorce under sharia law

In this section, a brief analysis of husband's power of divorce under sharia law will be made as '[t]he incidents of the law of talaq are closely interdependent and it is difficult, therefore, to realize their true effect unless a bird's eye view is taken of the law as a whole.'[4] In the absence of detailed Quranic injunction, different modes of talaq have been developed through juristic efforts. According to the sharia law, the power of talaq inherently belongs to the husband . The jurists, generally, 'have given men the power of divorce for cause or no cause and denied it to women.'[5] However, in Islam, '[t]he termination of marriage is regarded by law as an abomination in the sight of Allah, and arbitration is counseled when serious difficulties arise'.[6] The Holy Qur'an emphasized the need to go for conciliation if any dispute arises between husband and wife:

> 'And if you have reason to fear that a breach might occur between a married couple, appoint an arbiter from among his

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[4] Tyabji, Faiz Badruddin, ibid.

[5] El Fadl Khaled Abou, *Speaking in God's Name: Islamic Law, Authority and Women*, First South Asian Edition 2006, One World, Oxford, p. 288.

[6] Waines, David; *An Introduction to Islam*, 2004, Cambridge University Press, p. 95.

> people and one from hers; if they both want to set things aright, Allah may bring about their reconciliation'.[7]

However, in many countries, this provision of conciliation has been ignored in the whole process of divorce. It is commented that 'in no area of Muslim law has social custom prevailed over the spirit and letter of Qur'anic legislation as in the law of divorce'.[8] In exercise of of the inherent power of divorce, a husband can divorce his wife even against her will[9] without any judicial intervention.[10] Ameer Ali commented that '[a]s a general rule, the power of talaq under the Sunni doctrines is larger than that under the Shiah Law.'[11] However, talaq, according to general Sunni opinion, may be of two types—sunna and bida. Sunna is the recognized mode of talaq, and talaq al-bida is not approved form of talaq. Interestingly, though talaq al-bida is not an approved mode of pronouncing talaq, yet, talaq pronounced in this mode is treated as an effective talaq.However, the shias do not recognize talaq al-bida at all. Talaq as-sunna, the approved form of talaq, can be pronounced only during the unconsummated period of purity of the wife by making a pronouncement which is single and revocable in nature. However, in case of a non-menstruating wife or where the marriage has not been consummated, the condition regarding purity is not applicable. Thus, in those cases, talaq may be pronounced at any time. According to the majority of *sunni* schools, talaq as-sunna may be of two types—ahsan and hasan. However, Imam Malik does not recognize hasan as the sunna form

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[7] The Holy Qura'n, 4:35.

[8] Ayoub M., Mahmoud; *Islam: faith and History*, First South Asian Edition 2006, One World, Oxford, p. 189.

[9] Saksena, K Prasad; *Muslim Law as Administered in India and Pakistan*, 4th edition, 1963, Eastern Book Company, Lukhnow, p. 260.

[10] Wilson, R.K.; *Anglo-Muhammadan Law*, 5th edition 1921, Thacker, Spink & Co., London, p.135.

[11] Ali, Syed Ameer; *Mahommedan Law*, 1929, Delhi, vol.2, p. 477.

of talaq.[12] What is talaq ahsan? If only one revocable talaq is pronounced during the purity and the husband does not revoke it during the idda period then the talaq becomes effective after the expiry of iddah. A talaq thus becomes effective is called talaq ahsan. There is no dispute among the jurists in considering this talaq as a valid and an approved form of talaq. Now, what is talaq hasan? Hasan in constituted of three single revocable pronouncements made at three different periods of unconsummated purity, where the first two have been revoked either verbally or by consummation. Such a talaq becomes effective at the moment the third pronouncement is made. The third pronouncement thus pronounced cannot be revoked any more and this form of talaq is known as talaq hasan. Most of the authorities believe that three pronouncements in talaq hasan are to be made in three consecutive periods of purity or in cases of non-menstruating wives in three months consecutively. This is true, that unless each of the three pronouncements is made with an interval of one menstruation talaq will not be hasan; rather that will be treated as an anomalous form of talaq al-bida. But what will happen if some one makes a pronouncement in a purity and revokes it before the expiry of idda, and then after having a gap of two menstruations or more, makes another pronouncement and revokes it. After revoking two such pronouncements, if he makes another interval longer than one menstruation and pronounces the third talaq—will it be treated as talaq hasan? Or will it fail to be treated as hasan for the lack of the satisfaction of the condition of 'consecutive' three periods of purity? The issue here is that—whether the husband's first two pronouncements will be counted as first two stages of hasan or each of those will be treated independently? If the first possibility is taken then the third pronouncement will be the final pronouncement to constitute

[12] Mahmood, Shaukat; *Principles and Digest of Muslim Law*, 1960, Ilmi Kitab Khana, Lahore; p. 71.

hasan, which cannot be revoked any more. But, if the second possibility is taken then a husband as such can pronounce and revoke talaq hundred times during the continuation of the marital tie with his wife. If the second opinion is accepted that frustrates the popular objective of sharia that preferred to abolish the practice of talaq in the way that a husband can pronounce talaq and get back the wife at his sweet will without any restriction for unlimited time. It is worth mentioning here that in the pre-Islamic Arab society a husband could pronounce talaq for unlimited times and could revoke the same at their sweet will without any restriction. One major improvement done by Islam is that now a husband can pronounce talaq only for two times; and the third one will be the final without any chance of revocation. Thus, husband's excessive power of divorce for unlimited times prevailed in the pre-Islamic Arab society was restricted. The Qur'an categorically mentioned that 'at-talaaqu marrataan' or 'talaq can be twice'. Again, the husband may go for khul' or mubarat with a view to having the waiver of dower, as is popularly believed by many Muslims. The fact is that relinquishment of dower or payment of compensation by the wife in other forms solely depends on the will of the wife, on her consent to be given in this regard. But, in many instances, in practice, many Muslim husbands try to misuse the form of khul' or mubarat as a device to evade the dower fraudulently and forcefully in the guise of misunderstanding and lack of proper knowledge about Islamic law.

Hanafi school takes an extreme stand declaring that a talaq will be effective even if it is pronounced under intoxication where no intention in that regard is proved.[13] All other sunni schools[14] and

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[13] Rahman, Tanzilur*; A Code of Muslim Personal Law*, 1984, Islamic Publishers, Karachi; pp.361-71.
[14] Rahman, Tanzilur, Ibid.

shias[15] do not accord validity to such a talaq that is pronounced in an intoxicated mode or under compulsion[16] and they require the presence of actual intention in this regard.[17] Hanafis accept a talaq as valid even if that is made under duress, or by way of mistake or jest.[18] No definite form of pronouncement of talaq has been prescribed by sunni schools, whereas shias prescribe a definite mode and form of pronouncement and that is to be made in presence of two witnesses.[19] Analyzing all relevant primary sources and their different interpretations, Tanzilur Rahman[20] concluded that according to the sunni schools, requirement of witnesses is an optional one and the validity of talaq does not depend on it.

Sunni form of talaq al-bida is any talaq that is given violating the rules of ahsan and hasan, which usually takes the form of three pronouncements at the same meeting or single irrevocable pronouncement. Both such pronouncements become final and irrevocable at the moment the pronouncement is made. 'It is heretical for a man to pronounce a triple repudiation in a single

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[15] Baillie, Neil B.E.*; Digest of Moohummudan Law: Complied and translated from authorities in the original Arabic*, 1958, Premier Book House, Lahore; p.108.

[16] Tanzilur Rahman rejects a talaq made under compulsion. See Supra note 13, p.398.

[17] Nawawi, M. Abu Zakaria yahya, Translated by Howard E.C. from the Freanch edition of Berg, Van Den L.W.C.; *Minhaj Et Talibin: A Manual of Muhammadan Law According to the School of Shafi*, W. Thacker & Co, London; pp.329-30.

[18] Fitzgerald, Seymour Vesey; *Muhammadan Law: An Abridgement According to its Various Schools*, 1931, Oxford University Press, London; p. 73.

[19] Mulla, edited by Hidayatullah; *Principles of Muhamedan Law*, 1989, 18th ed., Tripathi, India; p.327.

[20] Supra note 13, p.337.

utterance; but, if it be done, it will bind the husband.'[21] However, if a revocable pronouncement is made during the menstrual cycle of the wife, that will fail to be ahsan for violating the condition of 'purity', and thus will be treated as an anomalous form of talaq al-bida that is revocable.[22] It is argued that '[t]he bida divorce is a prohibited divorce because it is innovated in the religion and it contradicts the previous legal way of divorcing, that is, the sunna divorce'.[23] The Prophet (sm) himself made some substantial reforms restraining husband's excessive power in the pre Islamic era.[24]

Modern reformation regarding the husband's power of divorce

Common features: 'The fact cannot be denied that the interpretation of the Koran in the form of Shariat is extremely male-centred and negates the principle of equality between the sexes and therefore Muslim Personal Law cries for reform'.[25] Most of the reformations set the target to reform the sunni method of talaq al-bida. In doing so, generally speaking, *inter alia*, irrevocable pronouncement is made revocable, number of pronouncement has been made immaterial turning every pronouncement as single etc. The Hanafi view of validity of talaq under intoxication and compulsion have been generally rejected. One thing is very clear from different reformations that no state that brought such changes recognized the concept of strict adherence to '*madhab'* whichinstructs to follow all decisions of a

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[21] Al-Sad, Bakurat, translated by David Russell and Al-Mamun Suhrawardy; *First Steps in Muslim Jurisprudence*, 1963, Luzac & Co. Ltd., London; p. 23.

[22] Al-Sad, Bakurat, Ibid.

[23] Fattah, Abdul M.; *Simplified Islamic Jurisprudence Based on the Qur'an and the Sunnah*, 2004, Dar Al-Manarah, Egypt, vol. 2, p.829.

[24] Qureshi, M.A.; *Muslim law of Marriage, Divorce and Maintenance*, 1995, Deep and Deep Publications, New Delhi; p. 187.

[25] Gani, H.A.; *Reform of Muslim Personal Law*, 1988, Deep and Deep Publications, New Delhi; p.165.

single madhhab only rejecting others completely, though those are based on more firm sharia basis. In fact, the opinions of different jurists served as important sources for modern reformation. Hallaq rightly commented:[26]

> At the end of the day, the solution to the very problematic created by the multiplicity of opinion in the formative and even post-formative periods turned out to be itself the salvation of the legal system during the later stages of its development. Without this multiplicity, therefore, legal change and adaptability would not have been possible. The old adage that in juristic disagreement there lies a divine blessing is not an empty aphorism, since critical scrutiny of its juristic significance proves it to be unquestionably true.

Tools and policies: Islamic law recognized the provision of ijtihad which enables the sharia to accommodate new rulings about new situations. It is argued that

> [a]n in depth study of the Grand Qur'an and the precepts of the Prophet (PBUH) reveals that divine instruction is comprehensive enough to take care of the time changes to maintain the necessary co-relation between the laws and the circumstances and conditions obtaining in a society for the proper ordering of human affairs.[27]

Thus, '[i]nterpretation is not only permitted but required by the true nature of Islamic instruction.'[28] Majid Khaduri said:

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[26] Hallaq, Wale B.; *Authority, Continuity, and Change in Islamic Law*, 2001, Cambridge University Press, p.241.

[27] Amini, Taqi M.; *Time Changes and Islamic Law*, 1988, Idarah-I Adabiyat-I Delli, New Delhi; p.1.

[28] Amini, Taqi M.; *Fundamentals of Ijtihad*, 1986, Delhi; p. 3.

> God, Glorified and Praised be He, has endowed men with reason by which they can distinguish between differing viewpoints, and He guides them to the truth either by explicit texts or by indications on the strength of which they exercise *ijtihad*.[29]

Closure of the gate of *ijtihad* is an opinion that is not acceptable, 'the argument that the founders of the schools (*madhhabs*) reached solutions to problem from which no one could deviate so that all that remained for subsequent generations was to emulate or copy is not tenable'.[30] 'The variety of schools within this great juridical system implies a wealth of judicial elements and remarkable techniques, allowing this Law to respond to all needs of adaptation required by modern life.'[31] 'The teaching of the Qur'an that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems.'[32] It is argued that

> [a]s history progresses and as the Muslims recede from the original sources, their task in one sense becomes weightier, because in addition to possessing the essential intellectual equipment, the historical materials that they have to study increase every day.[33]

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[29] Khaduri, Majid; *Islamic Jurisprudence: Shafi'i's Risala*, 1961, The John Hopkins Press, Baltimore; p. 302.
[30] Gerber, Haim; *Islamic Law and Culture: 1600-1840*, 1999, BRILL, Leiden, The Netherlands; p. 71.
[31] Muslehuddin, M.; *Philosophy of Islamic Law and the Orientalists: A Comparative Study of Islamic Legal System*, Islamic Publications, Lahore; p. 96.
[32] Ramadan, Said; *Islamic Law: Its Scope and Equity*, 1961, P. R. Macmillan Limited, London; p. 53.
[33] Ali, Muhaamd Athar; *Shah Wali Allah's Concept of Ijtihad and Taqlid*, 2001, BIIT, Dhaka; pp.55-6.

Modern legislation in different states, generally speaking, at first did not intend to introduce any reformation de novo so as to import a foreign element in the corpus of Islamic law; rather it tried to accept more favourable view in between sunni and shia, and sometimes to accept the most reasonable view from among different schools even within sunni coming out of the concept of strict adherence to '*madhab'*. By such process unification of Islamic society is also prescribed by certain jurists.[34] In fact, accepting conflicting views of different schools at the same time sometimes may create practical difficulty. If the husband and wife belong to two different schools then the problem may arise regarding the regulation of their family matters including divorce. Such a critical situation has been explained by *Khaled Abou El Fadl* with reference to *Al-Juwayni* in the following words:

> Assume there is a shafi husband who in a moment of anger yells at his Hanafi wife "You are divorced." Since the husband is shafi he might believe that since the pronouncement of divorce was uttered in anger it is ineffective and his wife is still his wife. However, since the wife is Hanafi she might believe that a divorce pronounced in a moment of anger is effective. According to the husband's preponderance of belief, they are still married but according to the wife's preponderance of belief they are no longer married. … … Al-Juwayni poses the question: what is the law of God in these situations? He argues that the command of God as to both of them accords with their sincere beliefs. However, since there is a conflict of interest among the different parties, the law of God becomes one of suspension until a judge decides the matter. In other words, since the different

[34] Khan, Hameedullah; *The Schools of Islamic Jurisprudence: A Comparative Study*, 1997, Kitab Bhaban, New Delhi; pp. 135-39.

> parties have conflicting interests, the law of God is suspended until the matter is referred to a judge. The judge's verdict will then be the law of God. However, that that verdict is not the law of God because it is more correct than any other ruling, it is the law of God as a matter of procedural justice.[35]

Ijtihad or 'the use of reasoning in matters of law met with opposition, and this took the form of producing anecdotes about Muhammad (PBUH) to show that he expressed some other view or that his practice was different'[36] as 'some say, the faith of Muhammad is a *cul-de-sac*, it is certainly a very long one; off it many courts and doors open; down it many peoples are still wandering.'[37] However, in an analysis, some of the reformations have been termed as the product of '*ijtihad'*, whereas some others have been termed as 'neo *ijtihad'* and the rest as 'reformation *de novo*'. Obviously jurists are widely divided in classifying these reforms. In fact, this division is founded based on the boundaries of '*ijtihad'* and its limitations. While a legislation has been termed as *ijtihad* by some jurists, there are others who criticized terming it as 'reformation de novo'. ''The findings of *ijtihad* are liable to err, and they require to be checked and corrected if necessary by subsequent *ijtihads'*.[38]

An analysis of the statutes in different states

Chibli Mallat said:

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[35] El Fadl Khaled Abou, Supra note 5, pp.149-150.

[36] Watt, William Montgomery; *The Formative Period of Islamic Thought*, First South Asian Edition 2006, One World, Oxford, p. 181.

[37] Macdonald, Duncan B.; *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, 1965, Russell & Russell, New York; p.6.

[38] Ahmed, Moinuddin; *The Urgency of Ijtihad*, 1992, Kitab Bhaban, New Delhi; p.41.

> The process of codification, which started haltingly in the *qanunnamehs* of the early Ottoman empire, was established, and the debate over the place and role of the sharia extended to all the artisans of legal literature in the contemporary period: legislators, judges and scholars.[39]

The Modern reformation in the field of divorce under Islamic law starts in Turkey in 1917, which basically dealt with the wife's power of divorce under Islamic family law keeping the objective to increase the grounds of talaq. 'The Turkish civil code makes no distinction between men and women in applications for divorce (Arin 1997).'[40] 'Divorce by repudiation, even among devout Muslims, is rare in Turkey, and is used only as last resort (Vergin 1985).'[41] Egypt[42] is the first country that brought any statutory reformation through the process of codification of Islamic law affecting the husband's power of divorce under sharia law as interpreted by traditional jurists. Egyptian reforms 'which have in most cases reappeared in the Sudanese Circulars, the Jordanian Law of Family Rights, 1951, the Syrian Law of Personal Status, 1953, and the Moroccan Law of Personal Status, 1958—could find ample justification in the doctrine of one or more of the Sunni schools'.[43] Reformation starts in Egypt that adhere to the principle of codification of laws and that brings the changes in its Islamic family law also through the process of codification. Later, different states brought different types of reforms in their

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[39] Mallat, Chibli; *The Renewal of Islamic Law*, 1995, Cmabridge University Press; p.3.
[40] An-Naim, Abdullah A.; *Islamic Family Law in a Changing World: A Global Resource Book*, 2002, London & New York; p. 33.
[41] Ibid.
[42] Nyazee, Imran Ahsan Khan; *Theories of Islamic Law*, 1996, Adam Publishers, Delhi; p. 295.
[43] Anderson, J. N. D.; *Islamic Law in the Modern World*, 1959, Greenwood Press, Westport, Connecticut; p. 54.

respective laws, which will be analyzed below under different headings:

Intention of talaq: 'Hanafi law, which is applied in many Muslim countries from South Asia to Central Europe, allows the man to divorce his wife under any circumstances, even in a state of drunkenness, by simply pronouncing the divorce formula'.[44] Though the traditional Hanafi law does not require presence of actual intention in any pronouncement to make a talaq effective, it has been reformed greatly by Egyptian law at first. Article 1 of the Law No. 5 of 1929 clearly says that 'any divorce uttered in intoxication or under compulsion is henceforth invalid'. Thus, the Egyptian law takes away husband's power of divorce under intoxicated mode. It also declared talaq that is pronounced under compulsion as ineffective. It is commented that

> [i]t was easy enough to provide, in the Ottoman Law of Family Rights, that formulas of repudiation uttered under the influence of intoxication or intimidation would no longer be given any legal effect, since ample authority for this limited reform could be found in the Sunni schools.'[45]

Again, traditional Hanafis accepted a talaq as valid even if it is pronounced in any vague or ambiguous terms. This was abolished by article 4 of the above Egyptian law: 'ambiguous expressions which might or might not imply divorce shall only have the effect which the speaker actually intended'. Thus, in the Egyptian law, intention of the husband is an important factor for validity of a talaq. Syrian law in 1953 and the Jordanian law in 1951 have

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[44] Ayoub M., Mahmoud , Supra note 8, p.193.
[45] Anderson, J. N. D., Supra note 43, p.56.

adopted the same law.[46] Obviously, such reformations are the product of *ijtihad* and cannot be alleged to import new ideas into the corpus of Islamic law, as it already existed in the domain of existing interpretations of sharia law. Unfortunately, the Muslim Family Laws Ordinance (MFLO) 1961, which is effective in Bangladesh and Pakistan, is totally silent about intention of the husband . The MFLO merely prescribes a notification procedure to observe after pronouncing talaq in any form whatsoever. 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 a talaq under intoxicated mode, such a pronouncement is void *ab initio,* which can never turn into a valid talaq in Egypt. But such a pronouncement can be converted into an effective talaq in Bangladesh, if such a talaq is notified to the authority concerned according to section 7 of the MFLO. Talaq by an intoxicated person has been declared as void also in Iraq, Morocco and Sudan.[47]

Nature of talaq and revocability: In Egypt, Article 5 of the Law No. 5 of 1929 says :

> Every repudiation is revocable except a repudiation pronounced for the third time, a repudiation pronounced before consummation of the marriage, a repudiation in exchange for compensation, and repudiations considered irrevocable by the 1929 Law and the 1920 Law.[48]

[46] Pearl, David and Menski, Werner; *Muslim Family Law*, 1998, Brite Books, Pakistan; p. 288. See also Anderson, J.N.D., *Supra note* 43.
[47] Rahman, Tanzilur , Supra note 13, p. 372.
[48] Sudanese Sharia Circular No. 41/ 1935 embodies the same provision. See Nasir, Jamal J.; *The Islamic Law of Personal Status*, 1986, London; p.109.

Thus, the unrestricted power to pronounce an irrevocable talaq, as was generally granted by sunni schools, had been restricted by Egyptian law by recognizing only three types of talaq as irrevocable. This law seems to recognize only sunna form of talaq. It does not recognize the validity of talaq al-bida, as it considers a talaq al bida pronounced in any irrevocable form as revocable. Talaq pronounced in an unconsummated marriage becomes irrevocable according to Hanafi.[49] The MFLO in Bangladesh declares every talaq as revocable.

Number of talaq : Considering more than one talaq as a single talaq*:* Unlike shias, according to sunnis, if three talaq are pronounced at the same meeting or even without following the minimum interval of at least one menstruation in between two pronouncements, talaq will be effective in bida form, though this is not an approved form of talaq.. This is an area of misconception about Islamic law as 'common belief is that by just uttering three times consecutively *I divorce you*, a man divorces his wife in Islam which is not the exact case'.[50] 'Examining relevant verses from the Qur'an one finds different rules than what people perceive of man's edge over women to divorce.'[51] The third impact of the Law No. 5 of 1929 in Egypt is to count more than one talaq as a single pronouncement. Article 3 of Law No. 5 says that 'a repudiation coupled with words or gestures indicating a number is equivalent to a single repudiation'. It has thus recognized only talaq as-sunna, which considers more than one talaq even in bida form as a single talaq. Thus, it abolished talaq al-bida taking away the scope of husband to make a talaq final and irrecoverable instantly. also It is submitted that this legislation cannot be termed as a reformation *de*

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[49] Hamilton, Charles; *Hedaya*, 1985, Delhi; p. 233.

[50] Ahmed, Giasuddin; *Women's Rights and Family Values: Islamic and Modern Perspectives*; 1997, Dhaka; p. 33.

[51] Ahmed, Giasuddin , Ibid.

novo. Syria[52], Morocco and Iraq adopted the same principle.[53] Family Law of North Yemen of 1978 also treats triple talaq as a single pronouncement. According to the Somali Family Law of 1975, the court can never grant more than one talaq at a time when application for divorce is made before it.[54] Pakistan, Bangladesh and Philippine also recognize all talaq as a single and revocable one irrespective of the form of talaq in which it was pronounced. The MFLO is effective in Bangladesh and Pakistan, which abolished husband's unilateral power of pronouncing an arbitrary and instantaneous triple divorce, which is one of the major ills of the Muslim society.[55] In Libya, any talaq to which a number is attached is treated as a single revocable talaq except the third of three.[56] There is an opinion of Imam Ibn Taymiyya, which is also followed by the minority jurists in Saudi Arabian courts, which counts triple talaq pronounced at the same time as a single talaq. 'Ibn Taymiyya's knowledge of the complicated webs and entanglements of the sectarian views of Muslims that developed over the centuries is so highly nuanced that it defies description.'[57] Ibn Taymiyya's view that counts triple divorce by a single expression as single talaq is undoubtedly a progressive attitude in interpreting divorce laws. This opinion of Ibn Taymiyya and its influence in Saudi Arabian legal system has been summarized in the following words:[58]

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[52] Syrian Law of Personal Status of 1953, See David Pearl (Supra note 1, p.288).
[53] See Nasir, Jamal J.; *The Islamic Law of Personal Status*, 1986, London; p.110.
[54] Pearl, David and Menski, Werner, Supra note 48, p. 290.
[55] Serajuddin, Alamgir Muhammad; *Sharia Law and Society: Tradition and Change in the Indian Subcontinent*, 1999, Asiatic Society of Bangladesh; p.248.
[56] An-Naim, Abdullah A., Supra note 40, p. 176.
[57] Rahman, Fazlur; *Revival and Reform in Islam*, First South Asian Edition 2006, One world, Oxford; p. 163.
[58] Masud, Khalid Muhammad; *Islamic Legal Interpretation Muftis and their Fatwas*, 2005, Oxford University Press, Karachi; p.265.

> In Saudi Arabia this view of triple divorce has always been the majority view, being early endorsed by leaders of the Wahhabi movement (Ibn Qasim 1965, 8:379-380). It is the rule applied by most qadis in the shari'a courts. There is, however, a minority view, even in the courts, that owes its persistence to the great Hanbali Taqi al-Din Ahmad Ibn Taymiyya (d.1328), whose influence over the Wahhabis of Arabia has always been great. In one of his most famous opinions, Ibn Taymiyya held that the triple divorce should be counted only as a single, revocable *talaq*. He was able to cite as authorities in his favor the earliest practice of the Muslim community and the opinions of a number of Companions, successors, and early jurists (Ibn al-Qayyim al-Jawaziyya 1973, 3:30-50).

'Once again, the Board of Senior Ulama chose this issue for study and adopted a decision endorsing the majority view (Board of Senior Ulama 1977a) and, once again, a minority of the Board differed, among them Shaykh Ibn Baz'.[59] 'Ibn Hanbal has a tradition through Ibn Abbas from the prophet, who declares that the triple divorce, pronounced in one session, counts as a single divorce and is revocable.'[60]

Talaq during menstruation: Sunna talaq requires the pronouncement to be made during the unconsummated purity if the marriage is consummated. Thus if a talaq is pronounced during menstrual cycle of the wife in a consummated marriage, the talaq will be treated as bida which is an effective talaq under sunni law. Article 47 of Moroccan law says that 'if repudiation is pronounced while the woman is during menstruation, the Judge shall force the husband to revoke repudiation'. Thus, it curtails the power of a

[59] Masud, Ibid., 266.

[60] Schacht, Joseph; *The origins of Muhammadan Jurisprudence*, 1967, Oxford at the University Press; p. 146.

sunni Muslim male to pronounce talaq during the menstrual cycles of his wife. Bangladeshi law does not make any condition regarding the time during which a talaq may be pronounced to be an effective talaq. Thus, a talaq pronounced during the menstruation of a wife is valid in Bangladesh.

Talaq by oath: This is one type of conditional talaq, which depends on happening or not happening of a future event. 'A long-standing practice in Muslim societies is the fortifying of vows by invoking the penalty of divorce from one's wife should vow be broken.'[61] "This can be done by conditional talaq: for example, 'My wife is divorced if I ever drink wine again' or 'if my wife ever talks to so-and-so'."[62] This was a generally recognized mode of talaq by the early jurists and this is also generally applied in the Saudi Courts where the whole legal system is governed by the traditional Islamic law. But, interestingly, one view exists also in Saudi Arabia that does not recognize it as a method of valid divorce. The Board of Senior '*Ulama'* studying this issue adopted the view in favor of the validity of such a talaq. But, a minority of the board, including Shaykh Ibn Baz dissented with the above majority ruling. Thus, the minority view is that if someone makes such a conditional talaq, talaq will not be effective. The minority opinion along with the question is as follows:[63]

> Reader Kh. Kh. H. from al-Qasim sends us a question in which he states: I made an oath against my younger brother upon divorce [talaq] if he went out of the house. Despite this he went out. When I made this oath upon divorce, I did not intend divorce, but merely intimidation, and I was in great anger. But after my anger subsided, I forgave him. I

[61] Masud, Supra note 58, p. 263.
[62] Masud, Ibid.
[63] Masud, supra note 58, p.264.

> request a fatwa: has a divorce occurred or not? May God preserve and keep you.
>
> Answer: If the facts, questioner, are as you have described them, and you did not intend the occurrence of the divorce if your brother went out, and you intended only to restrain and frighten him, then you are obliged to perform the atonement (kaffara) according to the more correct of the two opinions of the ulama, and no divorce of your wife occurs thereby … God is the giver of good fortune. (Ibn Baz 1986a).

Thus, it reflects the modern attitude even among some Saudi Arabian jurists. However, some other countries reformed such a talaq by oath:

> It was much bolder to decree that formulas of divorce uttered as an oath or threat should be carried into effect only if the husband really so intended—as in the Egyptian, Sudanese, Jordanian, and Syrian legislation—or should in all cases be disregarded, as in the Moroccan Code; for these reforms cut right across the alleged consensus of Sunni Islam and could only claim a far more tenuous juristic justification.[64]

Notification of talaq: Sharia law does not require witnesses or even presence of wife at the time of pronouncement of talaq for its validity. Thus, even if the wife is not notified of talaq, still the talaq will be effective. Egyptian law of 1979 requires a talaq to be notified to the wife and the talaq will not effective unless the notice reaches to the wife. But, subsequently in 1985, this law was repealed on the ground of unconstitutionality for alleged violation of the sharia provision. Pakistan adopted this notice requirement before Egypt but in a somewhat different form. Section 7 of the

[64] Anderson, J. N. D., Supra note 43, p. 56.

Muslim Family Laws Ordinance, 1961 requires certain procedural formalities to be performed. Notification to the wife is one of those formalities. However, the MFLO remains silent, unlike 1979 Egyptian law, whether talaq will be effective or not if such notice is not made to the wife. Then, it may be presumed that unless a statute expressly mentions otherwise regarding any sharia provision, sharia provision will be applicable there according to the Shariat Application Act, 1937 in such matters. Since validity of a talaq has not been made dependent on the notice requirement, so it cannot be termed as a foreign element. The same laws are also applicable in Bangladesh like Pakistan. However, there are certain case laws both in Bangladesh and Pakistan regarding the observance of total procedural formalities as are mentioned in section 7 of the Muslim Family Laws Ordinance, 1961 (MFLO), which will be discussed later under the heading of interference of arbitration council.

Registartion of talaq: Registration of talaq is another provision which was not mentioned as a requirement under the sharia while it was adopted in different states. Egyptian law in 1979 adopted it as a precondition for the validity of a talaq, which was subsequently repealed on the ground of unconstitutionality in 1985 as violative of sharia law. Pakistan and Bangladesh also require such a talaq to be registered but the validity of a talaq there have never been made dependent on it. So, this is not a reformation de novo; rather it seems to be in line with the Qur'anic policy that encourages every transaction to be made in written form. Iraqi law is really of significant interest in this regard as it says that in case of an extra judicial talaq, where judgment is not obtained in its favor, if the husband after pronouncing talaq registers it during the idda period of his wife, then the talaq will be effective. Thus, it appears that registration confers validity to extra judicial talaq in Iraq. But, again Iraqi law is silent about the effect of such a talaq

that has not been registered. Algerian law also contains the same position.[65] Sri Lankan law requires a divorce to be registered though non-registration does not invalidate a talaq.[66] The husband who pronounces divorce must report it to the registrar within seven days in Brunei.[67]

Scrutiny of ground of talaq:Provision for compensation: 'An arbitrary and unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Qur'an and the reported sayings of the Prophet (hadis) and is treated as a spiritual offence.'[68] However, legally speaking, the husband in exercise of his inherent and absolute power of divorce may pronounce a talaq on whatever ground, which is set beyond any challenge by any authority under the sharia. Thus, the reason of talaq cannot be investigated so as to determine the ground of a particular talaq as unjustified or not, as his power in this regard has generally been considered as unrestricted. The first ever reformation in this regard was made in Syria, which has been termed as 'a novel and highly significant concept.'[69] Article 117 of Syrian law says that if it appears before the Qadi that the husband has repudiated his wife without any reasonable cause, and it is found that the wife suffered material damage in consequence of it, the Qadi may order the husband to pay compensation which is equivalent up to one-year maintenance.[70] Thus, this is the first legislation that at least keeps

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[65] Pearl, David and Menski, Werner, Supra note 46, p. 290.

[66] *Knowing Our Rights: Women, family, laws and customs in the Muslim World* 2003 Women living under muslim laws, London, UK; p. 257.

[67] An-Naim, Abdullah A., Supra note 42, p. 262.

[68] Verma, B.R.; *Muslim Marriage and Dissolution*, 1975, Law Book Co., Allahabad; p.140.

[69] Pearl, David and Menski, Werner, Supra note 46, p. 288. See also *Anderson*, *Supra note* 43.

[70] See for reference Coulson N.J.; *A History of Islamic Law*, 1964, Edinburgh University Press; p. 209.

the option open to investigate the reason of the husband's talaq so as to determine the reasonableness of the cause. Though the law does not invalidate the divorce on the ground of unreasonable cause, it obliges the husband to pay compensation to the divorced wife in appropriate cases. This law though does not curtail husband's ultimate power of divorce, it at least hampers it to some extent making the provision for a scrutiny. Obviously this is a check against the popularly believed absolute and unchallengeable unilateral power of the husband. David Pearl and Werner Menski rightly commented:

> The reform, of course, did not affect the man's right to repudiate his wife. Notwithstanding its limited nature, however, this reform does serve as a valuable expedient in discouraging men from unilaterally and unjustly divorcing their wives.[71]

The comment and observation made by Professor Coulson about this Syrian reformation is also worth mentioning here:

> With regard to repudiation (talaq), … the Syrian Law introduced a bold innovation when it provided that a wife who had been repudiated without just cause might be awarded compensation from her former husband to the maximum extent of one year's maintenance. This reform represented the implementation of the spirit of those Qur'anic verses which enjoined husbands to "make a fair provision" for repudiated wives and to "retain wives with kindness or release them with consideration"; but these verses, again, had been largely regarded by traditional jurisprudence as moral rather than legally enforceable injunctions. A limited practical effect had been given to them by those jurists who regarded the provision

[71] Pearl and Menski, supra note 46.

> of a small gift of consolation (mut'a) for divorced wives, as obligatory on the husband; but the Hanafis maintained that this mut'a was payable only when no dower had been specified in a marriage and a repudiation had been pronounced before consummation. In any event the Syrian Law certainly provides the first instance of a husband's motive for repudiation being subject to the scrutiny of a court, which may then penalize him for abuse of his power.

However, some critics may term it as a reformation de novo since it empowers an authority to investigate into the reason of talaq that affects the unfettered rights of the husband to pronounce talaq. But, such a criticism would seem to be baseless as the statute ultimately did not take away the power of talaq. Jordanian law

> rules that if the husband repudiates his wife in an arbitrary manner, e.g. without a reasonable cause, and she applies to the judge for compensation, the judge shall order for her against her ex-husband the compensation deemed by the judge to be fair, provided that it shall not be in excess of the equivalent of the maintenance due to her for a year.[72]

Egyptian law also contains the similar provision where the 'legislator steers a middle course between the Syrian and Jordanian provisions in terms of the amount due.'[73] Tunisian law though declares extra judicial divorce as void it remains silent about scrutiny of the grounds so as to deny the husband to grant divorce on any unreasonable ground. Article 44[74] of the Somali Family

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[72] Nasir, Jamal J.; *The Status of Women Under Islamic Law and Under Modern Islamic Legislation, 1990, Graham and Trotman, London*; p.97.

[73] Nasir, Jamal J., Ibid.

[74] Article 44 reads as follows: Where divorce (talaq) or dissolution (faskh) results through the fault of the husband, the Court shall order him to maintain the former wife for a period not less than three months and not more than one year.

Law No. 23 of 1975 empowers the court to award maintenance for a period up to one year to be paid by the husband to the divorced wife, if it is proved that the divorce took place due to a fault of the husband. Thus, though the Somali law does not take away husband's ultimate arbitrary power to pronounce divorce, it puts husband's act of divorce at dock so as to scrutinize its fairness and compels husband to pay compensation in appropriate cases. However, in Kuwait,

> 'if a valid marriage is dissolved after consummation, the wife shall be entitled, over and above her iddat maintenance, to a mutat in an amount not in excess of a year's maintenance, according to the condition of the husband, which shall be paid to her on monthly installments, on the completion of her iddat, unless the two parties agree otherwise in terms of the amount or method of payment.'[75]

Algerian law awards damages to be paid to the wife by the husband if it is proved that the husband pronounced talaq arbitrarily abusing his power of talaq.[76] Iran's position is highly curious and significant in this regard, which makes a completely new concept of compensation after divorce to be paid to the wife, irrespective of the justifiability of talaq. Thus, in Iran, according to Article 1 of the amendment of the Divorce law, a wife after divorce may ask for remuneration for her household activities done during the continuance of their marriage. Thus, this amount is not payable in the form of compensation though it reasonably compensates the wife in fact. Rather, this is just the wages for what she has done which she was not bound to do as a legal consequence of their marriage. Such additional household affairs done by her have to be assessed in terms of monetary benefits and that amount will be payable to her in the form of her unpaid wages.

[75] Nasir, Jamal J, Supra note 55, p. 71.
[76] An-Naim, Abdullah A., Supra note 40, p. 167.

In Iran, unless all financial settlements are made including the payment of such wages, the authority issues no certificate of divorce. Thus, this provision acts as an indirect check, in at least some cases, against the arbitrary exercise of husband's divorce power, where he may think twice before talaq as he may have to pay a huge total to the wife as wages.

Interference of court: There are some countries which do not recognize any talaq except the interference of the court.[77] There are

[77] *Knowing Our Rights*, Supra note 66, p. 255. The book *Knowing Our Rights: Women, family, laws and customs in the Muslim World* (Supra note 68, p. 262) also contains the following short descriptions of talaq procedure through the court in Indonesia, Tanzania, Yemen, Algeria and Iran:

Indonesia: under the ML, all divorces must go through the court. A husband married under Muslim laws must provide the religious court with a written notification of his intention to divorce, which must include his reasons for wishing to do so. If the reasons accord with one of the six grounds available to husband and wives, both parties are called separately for reconciliation meetings with counselors. If reconciliation fails, the court will call the parties to witness the divorce. Revocable divorce is not recognized. A minimum three-month period must lapse between the admission of a suit and public notification.

Tanzania: Under s. 107, for Muslim marriages a pronouncement of talaq is teated as an announcement of the intention to divorce, but the divorce is not final until a Marriage Conciliatory Board has met the spouses, and the court has issued a decree of irreparable breakdown.

Yemen (South Yemen, prior to reunification): Unilateral divorce was prohibited, and all divorces were required to go through the courts. Violation of these laws was punishable by a fine or imprisonment, or both. Husbands and wives were given access to the same grounds for divorce. Violation of these provisions was punishable with a fine up to 100 dinars or imprisonment of up to 1 year, or both.

Algeria: under A. 48 of the CF, one of the grounds for divorce is 'the will of the husband.' Under A. 49, divorce can be established only through a court judgment, which must be preceded by a judge's attempt to reconcile the couple. (The time period in which reconciliation is attempted shall not exceed the period of three months.) The court's rulings are not subject to appeal. Revocation is permitted only during the reconciliation period.

some other countries that also require interference of the courts but do not declare extra judicial divorce as void. 'Any earlier pronouncement or declaration regarding talaq made by the husband is considered immaterial and does not affect the status of the marriage (At the most, such statements are viewed as a declaration of the intention to pronounce talaq, as in Tanzania).'[78] 'Qur'an ensures that the divorce is not arbitrary since arbitrariness is remedied by making the procedure of divorce spread over almost a period of three months during which he has the right to revoke the divorce.'[79] It has been mentioned in Sura an-Nisa of the Holy Qur'an that if any discord arises between the spouses then an arbitrator should be appointed who will try to reach to a conciliation calling the representatives from both sides. This is not obligatory but mere directive in nature. Based on this Qur'anic instruction, Tunisia has gone far ahead declaring every divorce pronounced outside the court as void. Article 30 of the Tunisian Law of Personal Status, 1956 says : 'Any divorce outside a court of law is without legal effect.' Thus, it has abolished every extra judicial divorce. 'Perhaps there is no modern law of divorce today that enshrines more positively and more unequivocally than the Tunisian code the philosophy that divorce should be available

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Iran: Under Article 1133 of the CC (law amended in 1993 following women's activism), the husband can divorce his wife without ascribing any reasons, provided he first settles all her financial rights. All divorce cases have to go through the court. The Registrar can only register a divorce after permission has been issued from a court and after any mahr, maintenance, and /or wages for housework have been paid to the wife. But A. 1133 interpreted to mean that no court can force a man not to divorce his wife. Under A. 1145, if a man initiates divorce, it is revocable, unless before consummation, or aft6er the wife has reached menopause, or it is the third divorce between the same husband and wife.

[78] *Knowing Our Rights, supra note 66,* 256.

[79] Hussain, Aftab; *Status of Women in Islam*, 1987, Law Publishing Co., Lahore, p. 566.

when a marriage has in fact broken down.'[80] Tunisian argument in favor of its reformed law has been summarized by Coulson in the following words:

> 'In the case of 'discord' between spouses the Qur'an orders the appointment of arbitrators, … Yet, argued the reformers, what more obvious case of "discord" between spouses than a pronouncement of repudiation by the husband? And who then better qualified to undertake the necessary function of arbitration than the official tribunals?[81]

Interestingly, though it has been termed as a great reform, it also fails to prevent a husband to pronounce a talaq. Because, if a husband persists in his repudiation, the court cannot avoid granting divorce though it may order to pay compensation to the wife in appropriate cases.[82] However, it might be argued that if a divorce becomes otherwise valid it cannot be invalidated simply because it has not been completed through the court. Further complicated jurisprudential questions may arise in consequence of such an innovative approach. However, Tunisian law may be judged from another perspective where it appears that in fact it failed to curtail the husband's power substantially without merely recognizing the intermediary role to be played by the court. Article 32 of Tunisian law says: "the court shall not grant a decree of divorce until it has exhausted all means of establishing the causes of conflict between the spouses and has failed to reconcile them". Thus, it appears that Tunisian law empowers the court just to be the mandatory mediating authority that will try to conciliate but cannot deny divorce if the husband persists even arbitrarily without any reasonable cause. It is submitted that the Tunisian law did not

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[80] Coulson, Noel J.; *Conflicts and Tensions in Islamic Jurisprudence*, 1969, The University of Chicago Press, USA; p.49.
[81] Coulson, Noel J., Ibid.
[82] See Coulson for details, supra note 80, p.211.

curtail husband's power so as to challenge the ground of talaq and invalidate it rather merely imposes the condition of judicial intervention. Thus, if the husband just complies with this requirement of raising the issue before any court and persists on that, then no more obstacle can be set before the husband on the way of validity of talaq except an effort to reconcile. David Pearl and Werner Menski termed this Tunisian law as 'an example of social engineering'[83] and said that this Tunisian law 'has been justified by Tunisians themselves as being within the spirit of the Islamic jurisprudential process.'[84] Algerian law also requires judicial intervention for a talaq to become effective:

> It is noteworthy in this regard that an Algerian Ordinance of 1959, which followed the Tunisian Law in making all divorce judicial, apparently intends that a decree of divorce should be granted to the husband on his simple request, but to the wife only if she establishes the existence of proper grounds therefore.[85]

Thus, it appears that Algerian law, even in reforming the traditional law, favored the husband in comparison to the wife. However, Algerian law requires the court to arrange reconciliation after the application for divorce is made before it.[86] Iraqi law recognizes both judicial and extra-judicial divorces. According to the Personal Status Act of 1959, the husband requires to obtain a judgment in his favor to make a talaq effective. Iranian reformation declaring all divorce pronounced without intervention of the court as ineffective today serves only academic purpose as this

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[83] Pearl and Menski, Supra note 46, p. 289.
[84] Ibid.
[85] Coulson N.J, Supra note 80, p.211.
[86] For reference see Pearl and Menski *(Supra note 46, p. 290)* where it has been cited with reference to F. Ahmad, 1994, p. 119.

reformation has been abolished subsequently in 1967. This abolished law required the husband to make an application before the court that had to appoint the arbitrators. In case the reconciliation failed, the court could issue a certificate showing which the husband had to register it by a notary.[87] This Iranian law is significant in the sense that it compelled the husband to delegate the power of divorce to the court:

> An interesting aspect of the Iranian legislation was Article 17 which stated that the provisions of Article 11 were inserted by mandatory provision into all marriage documents drawn up in Iran. This factor enabled the Iranians to say that a divorce is still the right of the husband who, in his marriage contract, has delegated his right, first to the court, and second to the wife, in the event that she can prove one of the grounds of culpability.[88]

In Africa, the Somali Family Law of 1975 made it obligatory for a husband to obtain the permission of the court to divorce his wife if conciliation fails before the arbitrators.[89] South Yemen also requires judicial intervention for talaq:

> In South Yemen the Family Law not only forbids, and refuses to recognize, any divorce which has not been granted by the appropriate court—after the case has been referred to a People's Committee to attempt conciliation—but also, as in Iran, precludes the court from permitting a divorce to either party except on specified grounds.[90]

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[87] For details see Pearl and Menski, supra note 46, 290.
[88] Ibid.
[89] Anderson, J. N. D.; *Law Reform in the Muslim World*, 1976, University of London, The Athlone Press; p. 128.
[90] Anderson, J. N. D., Ibid., p.129.

Ethiopia abolished talaq and made all divorces judicial, under the Civil Code, and 'all divorce law is uniform regardless of whether the marriage was contracted under civil, religious or customary law'.[91] In Philippines, under A. 46 of the CMPL, pronouncement of talaq has to be filed as a written notification to the clerk of the Sharia Court on the basis of which an arbitration council will be constituted. Based on the report given by this council the court issues the order of divorce. In Malaysia[92], there is a provision for fine up to US$ 265 (approximately) or imprisonment up to 6 months or both for the offence of extra-judicial divorce. On the basis of application for divorce by the husband, the court shall call the wife to know whether she consents to such divorce or not. If she does not give her consent to such divorce, the court will appoint a committee for conciliation. If the court is then satisfied that the marriage in no way can continue, the court under such circumstance, will advise the husband to pronounce a single revocable talaq that is to be registered. Such a talaq will be effective after the expiry of *iddah,* which can be revoked during that period. In the systems, 'where all the dissolutions have to go through the courts, talaq continues to be conceptualized as an inherent right of the husband'[93] and such 'regulation can do little more than delay or put a check on the exercise of talaq, or increase the financial settlements (Iran, Malaysia, Singapore).'[94] In Lebanon, a husband is required to inform the judge of his exercise of talaq within 15 days and then the Department of Personal Status, but failure to comply with this requirement does not invalidate the talaq though such non-compliance is a punishable offence under

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[91] An-Naim, Abdullah A, Supra note 42, p. 78.

[92] *Knowing Our Rights*, Supra note 66, p. 263.
[93] *Knowing Our Rights* , Ibid., 256
[94] *Knowing Our Rights* , Ibid.

the law.[95] According to Article 28 of the Libyan Code, divorce shall not be established without a decree by the relevant court.[96]

Interference of arbitration council: Based on the same above Qur'anic principle regarding arbitration in case of a dispute arising between the spouses, Pakistan enacted the Muslim Family Laws Ordinance in 1961, which is now also applicable in Bangladesh. This Ordinance 'endeavors to incorporate the procedures for reconciliation before divorce to a limited extent in line with the Qur'an'.[97] 'Hadrat 'Uthman and Hadrat Ali (Allah be pleased with them) used to authorize the arbiters appointed by them with full powers to effect reconciliation or separation as required by the circumstances.'[98] 'Section 7 of the MFLO also requires the intervention of the Arbitration Council and seeks to curb unilateral divorces by Muslim men.'[99] This section of the MFLO prescribed an elaborate procedure to observe for a talaq to be effective. Though this law does not make any specific procedure or set any time to make a pronouncement to constitute a talaq, it generally declares that talaq pronounced in any form whatsoever will be treated as a single revocable talaq. Section 7 requires a talaq to be notified to the chairman, a local government authority, who will arrange a conciliation constituting an arbitration council in that regard. Whether any such conciliation is arranged or not, or if it fails to reach to revocation of talaq, the talaq will be effective on the expiry of 90 days on and from the day of receipt of notification by the chairman. It has been commented that '[t]he effect of the

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[95] An-Naim, Abdullah A., Supra note 42, p. 128.
[96] An-Naim, Abdullah A., Ibid.
[97] Patel, Rashida; *Woman versus Man: Socio-Legal gender Inequality in Pakistan*, 2003, Oxford University Press; p.83.
[98] Siddiqui, Muhammad Iqbal; *The Family Laws of Islam*, 2005, Adam Publishers, New Delhi; p.217.
[99] Monsoor, T.; *From Patriarchy to Gender Equity: family Law and its Impact on Women in Bangladesh*, 1999, The University Press Limited, Dhaka; p.111.

Ordinance is to render every talaq revocable by freezing it for ninety days during which time reconciliation is attempted by the Union Council Chairman.'[100] But, the law remains silent about the legal validity of a talaq that is pronounced unilaterally by the husband without following the notification requirement under section 7 of the Muslim Family Laws Ordinance 1961. However, such non-observance of procedural formalities has been made a punishable act. A vital question then arises: will a talaq without observing the procedural formalities under section 7 be valid? Can it be declared as ineffective on the ground of violation of section 7? In the absence of having any such clear direction in the statute in this regard, two trends are found in Pakistani[101] and Bangladeshi[102] Courts. One set of cases recognizes even a talaq

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[100] Hodkinson, Keith; *Muslim Family Law: A Sourcebook*, 1984, Croom Helm, London and Canberra; p.223.

[101] Some of the Pakistani cases that decided observance of section 7 as mandatory for the validity of a talaq are *The State Vs. Mst. Tauqir Fatima and another* (PLD 1964 W.P. Karachi 306); *Inamul Islam Vs. Mst. Hussain Bano and 4 others* (PLD 1976 Lahore 1466); Rashida Vs. Ghulam Raza (PLD 1977 Lahore 363); Syed Ali Nawaz Gardezi Vs. Lt. Col. Muhammad Yusuf (PLD 1963 Supreme Court 51); Mst. Ghulam Fatima Vs. Abdul Qayyum and others (PLD 1981 Supreme Court 460); *Shera and another Vs. the State* (PLD 1982 Federal Shariat Court 229). Following are a few Pakistani cases that denied the necessity of observance of section 7 for the validity of talaq: *Mrs. Parveen Chaudhry vs. 6th Senior Civil Judge, 1st Class, Karachi* (PLD 1976 Karachi 416.); *M. Zikria Khan Vs. Aftab Ali Khan* (PLD 1985 Lahore 319); *Muhammad Rafique Vs. Ahmad Yar* (PLD 1982 Lahore 825); *Chuhar vs. Mst. Ghulam Fatima and another* (PLD 1984 Lahore 234); *Noor Khan vs. Haq Nawaz and 2 others* (PLD 1982 FSC 265); *Mst. Bashiran and another Vs. Muhammad Hussain and another* (PLD 1988 SC 186 Shariat Appellate Bench); *Mst. Kaneez Fatima vs. Wali Muhammad* (PLD 1993 SC 901); *Ganhar Vs. Mrs. Ghulam Fatima and another* (PLD 1984 Lahore 124).

[102] *SiraJul Islam V. Helena Begum and others* (48 DLR 1996 HCD 48) decided that observance of section 7 is not mandatory for the validity of a talaq but the following cases decided observance of section 7 as mandatory for the validity of a talaq: *Abdul Aziz Vs. Rezia Khatoon* (21 DLR 733); *Safiqul Islam and others*

pronounced violating section 7 of the MFLO as valid while another set declares every talaq pronounced in violation of section 7 as totally ineffective in the eye of law. Most of the cases that considered observance of section 7 unnecessary for making a talaq effective have done it with a view to preventing the husbands from obtaining unfair advantages using this section as a shield against the women. Referring to Carroll and Coulson, Monsoor commented that '[t]he unilateral power of talaq was, however, left substantially unimpaired, it was only required that the husband should notify the action to the Council.'[103] However, *Allah Rakha* case in 2000 declared section 7 as unconstitutional as a part of Islamization process in Pakistan. This judgment further complicated the position section 7 in Pakistan.

Similar type of notification requirement has been embodied in Sri Lankan law. According to the 2nd Schedule of the MMDA, the Qazi has to attempt a reconciliation within thirty days of notification of talaq to him, and if such reconciliation is not made within thirty days, the talaq has to be recorded before two witnesses. The pronouncement has to be notified to the wife and such a talaq will be registered 60 days after this pronouncement. But, anomalously, although section 29 requires every divorce to be registered, section 16 recognizes even an unregistered talaq as valid and effective. Even certain case laws in Sri Lanka recognize a talaq as valid though the same is not communicated to the wife.[104] It is commented that such a system does not make clear the validity of talaq if the husband fails to follow the procedure and 'even where the talaq would not remain valid, such systems

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*V. State (*46 DLR 1994 HCD 700); *Dilruba Aktar vs. AHM Mohsin (*55 DLR 2003 HCD 568).

[103] Monsoor, T., Supra note 99, p. 113.

[104] *Knowing Our Rights*, Supra note 66, p. 264.

usually leave procedural loopholes that may be easily exploited by unscrupulous husbands'.[105]

Among others, the Palestinian system[106] is curious, where if the husband pronounces a talaq (a bare talaq under the sharia), the wife may file a complaint with the police and he will be liable to imprisonment for three months, though the talaq will remain valid. In Israel, the Muslims 'are governed by laws that penalize talaq in theory while permitting it to continue in practice and Israeli law does not permit a wife to be divorced against her will.'[107] In Israel, 'the Ottoman Law of Family Rights survives almost intact, the only country in the Middle East, aside from Lebanon, where it has been conserved.'[108] Talaq procedure in India does not seem to make any substantial change in the traditional modes. In India, though oral talaq is treated as valid and even a number of cases support the validity of talaq under intoxication, compulsion or anger as valid, the recent case laws tend not to recognize talaq al 'bida.[109]

Revocation of talaq: Another feature of husband's power under traditional sharia law is that he can revoke the talaq unilaterally like his pronouncement of talaq. Thus, the wife is given no option to consider whether she prefers to come back or not.[110] Once the husband revokes the talaq, talaq will be revoked automatically without asking wife anything and even without the husband being

[105] *Knowing Our Rights*, Ibid., 257.
[106] *Knowing Our Rights*, Ibid., 256.

[107] *Knowing Our Rights*, Ibid.
[108] Eisenman, Robert H.; *Islamic Law in Palestine and Israel*, 1978, Leiden, E.J. Brill, The Netherlands; p. 264.
[109] *Knowing Our Rights*, Supra note 66, p.264..
[110] Siddiqui, N.U.A.; *Studies in Muslim Law*, 1955, Dhaka; p. 276.

obliged to give her notice.[111] Wife's voice to choose to remain married with her husband who did start the process of discarding her is not tuned by any option to decide. Malaysia has brought a meaningful change in this regard according to which a unilateral revocation of talaq by the husband is not recognized and the court cannot compel a wife to return to her husband if the husband makes revocation of a talaq unilaterally.[112]

Conclusion

The regulation of talaq in different states gives one common impression that they do not desire to keep the power of talaq unaffected and unrestricted. However, the most of the reforms have not brought any fundamental change in the nature of power of talaq and still the husband enjoys an excessive power of divorcing his wife. It is true that certain aspects of the power of talaq under the classical Hanafai law have been reformed by the modern legislation. Another success of modern reformation is that it prevents unilateral talaq to take effect and now the intervention of the court or arbitration council is recognized though to a limited extent. However, in spite of all these reforms, still the husbands hold a clearly superior position under Islamic Law as regards the power of termination of marriage in comparison to the wives.

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[111] Rahman, Abdur A.F.M.; *Institutes of Mussalman Law: A Treatise on Personal Law According to the Hanafi School*, 1907, Thacker Spink and Co., Calcutta; p. 133.

[112] *Knowing Our Rights* , Supra note 66, p. 258.