

Reforms in triple *talaq* in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change

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ABSTRACT

This work analyses the reforms carried out in some of the Muslim states regarding the issue of triple divorce in one session. According to a majority of Sunni jurists, pronouncing the word “*talaq*” three times in succession, equates with three “*talaqs*.” On the contrary, according to Ibn Taimiyah, Ibn al-Qayyim, and the Shi’a Imamiyah, three pronouncements of the word *talaq* in one session equals only one *talaq*. Most Arab, as well as many Muslim states such as Egypt, Syria, Jordan, Iraq, Sudan, Morocco, Kuwait, Yemen, Afghanistan, Libya, Kuwait, Qatar, Bahrain, and the United Arab Emirates, have, while formulating their own laws, followed Ibn Taimiyah’s and Ibn al-Qayyim’s positions on this issue. In this regard, Sri Lanka’s Marriage and Divorce (Muslim) Act, 1951, as amended up to 2006, seems to be the most ideal legislation on triple *talaq*. In Pakistan, the Muslim Family Law Ordinance 1961, has abolished triple *talaq*, as the procedure laid down in section 7 is largely applicable to one or two pronouncements only and excludes three pronouncements. Furthermore, some portions of section 7 are in clear contravention of the dictates of Islamic law, which adds to this precarious section’s peculiarity. The superior courts in Pakistan and Bangladesh have not been consistent in interpreting the law on this important subject, while on the other hand, some Indian High Courts have treated triple *talaq* as invalid.

Keywords: triple *talaq*, divorce in Islamic law, classical Islamic law on divorce, modern legislation on divorce, reforms in divorce law, Arab states, Muslim states, changes in divorce law

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INTRODUCTION

Many Muslim states have carried out reforms in their personal laws in response to the juristic debate on whether three repudiations of “*talaq*” in one session amount to “one” repudiation. Various schools of thought in Islam have, historically, differed considerably on this issue and this has been one of the hottest topics of debate between a majority of the Sunni jurists who favor the three-is-three position, facing a strong opposition from a small but very vocal minority of those Sunni jurists who favor the three-is-one position.¹

This work gives an overview of reforms carried out by many Muslim states and Muslim communities living in non-Muslim states regarding the implications of this very sensitive issue of three pronouncements in one session. Some of the important questions that need a thorough analysis are whether section 7 of the Muslim Family Law Ordinance (hereinafter the MFO), in Pakistan, is rooted in Islamic Law or not; why it has been, and still is, criticized so much; and whether that criticism is valid or not. Moreover, how has the judiciary in Pakistan and Bangladesh interpreted this section and whether the higher courts in both countries have been consistent in their interpretation? What is the position in other Muslim countries and of Muslim communities living in non-Muslim states? These are some of the questions that are answered in this work. The work also critically evaluates Indian cases on *talaq* to discover the status of similar law(s) in that country viewed through the lens of the Islamic law. Related legal topics with bearing on this issue are also discussed along the way.

REFORMS IN DIVORCE LAWS OF MUSLIM STATES

The position of Ibn Taimiyah on this issue has influenced most of the legislation in a majority of the Muslim states regarding personal laws since the beginning of the twentieth century. Egypt was the first country to deviate from the position of *jamhur* (the majority of Muslim Jurists) in 1929, when it provided that a divorce accompanied by a number expressly or implied, shall count only as a single divorce and such a divorce is revocable except when three *talaqs* are given, one in each *tuhr*.² The Sudanese law of 1935 provides that pronouncement of all divorces by the husband is revocable except the third one, along with a divorce before consummation of marriage, and a divorce for consideration.³ The Syrian law of 1953 combined the provisions of the Egyptian and the Sudanese laws by providing that if a divorce is coupled with a number, expressly or implied, not more than one divorce shall take place and every divorce shall be revocable except a third divorce, a divorce before consummation, and a divorce with consideration, and in this law such a divorce would be considered irrevocable.⁴ Morocco,⁵ Iraq,⁶ Jordan,⁷ Afghanistan,⁸ Libya,⁹ Kuwait,¹⁰ and Yemen,¹¹ adopted similar laws in 1957/1958, 1959, 1976, 1977, 1984, 1984, and 1992, respectively. Besides these, many other Muslim countries have also adopted Ibn Taimiyah’s opinion as the guideline for their personal laws on this topic. These include the United Arab Emirates,¹² Qatar¹³ and Bahrain being the latest countries, respectively, to embrace Ibn

¹For a comprehensive treatment of the issue of triple *talaq*, see Muhammad Munir, *Triple Talaq in One Session: An Analysis of the Opinions of Classical, Medieval, and Modern Muslim Jurists*, under Islamic law 27 Arab L. Q. 29–49 (2013) [hereinafter *Triple Talaq in One Session*].

²See, Article 3 of Law No. 25 of 1929, as amended by Law No. 100 of 1985 Concerning Certain Provisions on Personal Status in Egypt. *Tuhr* in Arabic means the period of “purity” between menstruations.

³Article 3, Shariah Circular No. 41/1935 of Sudan.

⁴Article 92 of Law No. 34 of the Law of Personal Status of Syria of 1953.

⁵Article 51 Book Two of the *Mudawwana* of 1957 and 1958 of Morocco.

⁶Article 37(2) of Law No. 188 of 1959: The Law of Personal Status of Iraq.

⁷Article 90 of Law No. 61 of 1976: The Law of Personal Status of Jordan.

⁸Sections 145 and 146 of the Civil Law of 4 January 1977 of Afghanistan.

⁹Section 33(d) of Law No. 10 of 1984, Concerning the Specific Provisions on Marriage and Divorce and their Consequences.

¹⁰For Kuwaiti law, see section 109 of Law no. 51 of 1984 regarding “*al-Ahwal al-Shakhsiyah*” (Personal Law), < <http://www.gcc-legal.org/MojPortalPublic/DisplayLegislations.aspx?country=1&LawTreeSectionID=1386> > (last accessed Sept. 7, 2010).

¹¹See, Article 64 of the Republican Decree Law No. 20 of 1992: Concerning Personal Status of Yemen.

¹²For the UAE, see, section 103(1) of *Qanun al-Ahwal al-Shakhsiya* (Personal Law) of UAE No. 28 of 2005, < <http://www.gcc-legal.org/MojPortalPublic/DisplayLegislations.aspx?country=2&LawTreeSectionID=6107> > (last accessed Sept. 7, 2010).

¹³See, section 108 of the *Qanun al-Ushrah* (Family Law) of Qatar, No. 22 of 2006, < <http://www.gcc-legal.org/MojPortalPublic/DisplayLegislations.aspx?country=2&LawTreeSectionID=6107> > (last accessed Sept. 7, 2010).

Taimiyah's views on triple *talaq*.¹⁴ To this list may be added Pakistan and Bangladesh. Section 7 of the MFLO 1961, explained below, seems to have implied the abolishment of triple *talaq* because the procedure contained therein is not applicable to it. Thus, fifteen Muslim states have either explicitly or implicitly adopted Ibn Taimiyah's position.

Tunisian law has gone one step further. Under Article 30 of the Tunisian Code of Personal Status, 1956, divorce pronounced outside a court of law will not have any validity whatsoever, and under Article 32, no divorce shall be decreed except after the court has made an overall inquiry into the causes of the rift and failed to bring about a reconciliation. In Algerian law "divorce may only be established by a [court] judgment preceded by an attempt at reconciliation by the judge which shall not exceed a period of three months."¹⁵ Similarly, Sri Lanka's Marriage and Divorce (Muslim) Act, 1951, as amended up to 2006, provides that a husband intending to divorce his wife "shall give notice of his intention to the Qauzi [sic. *Qadi*]" who shall attempt reconciliation between the spouses "with the help of the relatives of the parties and of the elders and other influential Muslims of the area." However, if after thirty days of giving notice to the *Qadi*, attempts at reconciling the spouses remain fruitless, "the husband, if he desires to proceed with the divorce, shall pronounce the *talak* [sic. *talaq*] in the presence of the *Qadi* and two witnesses."¹⁶

Under the family law of the Malaysian state of Sarawak, a husband who desires to divorce his wife has to request a court to look into the causes of proposed divorce and advise the husband not to proceed with it. However, if the differences are irreconcilable, then the husband may pronounce one divorce before the court.¹⁷ The procedure laid down in the laws of Algeria, Sri Lanka, and the Malaysian state of Sarawak, seem to be in harmony with the procedure of *talaq* in Islamic law.

TALAQ AND THE MUSLIM FAMILY LAW ORDINANCE, 1961 IN PAKISTAN

The 1961 Muslim Family Law Ordinance is the most significant but also controversial reform law in Pakistan. The same law was also inherited by Bangladesh. Background of the MFLO is rather interesting. In 1955, Muhammad Ali Bogra, the then Prime Minister of Pakistan, married his secretary while still legally married to his first wife. Thereafter, the All Pakistan Women's Association (APWA), an elitist women's organization, began an organized agitation throughout the country.¹⁸ On August 4, 1955, the government of Pakistan announced the formation of a seven-member Commission on Marriage and Family Laws, consisting of Dr Khalifa Shuja-ud-Din (President), Dr Khalifa Abdul Hakim (Member-Secretary), Maulana Ehtesham-ul-Haq Thanvi, Mr Enayet-ur-Rahman, Begum Shahnawaz, Begum Anwar G. Ahmad, and Begum Shamsunnahar Mahmood.¹⁹ After the demise of the incumbent president, Mian Abdur Rasheed, a former Chief Justice of Pakistan, was appointed as its new president on October 27, 1955. The commission was mandated to report on "the proper registration of marriages and divorces, the right to divorce exercisable by either partner through a court or by other judicial means, maintenance and the establishment of special courts to deal expeditiously with cases affecting women's rights."²⁰ The commission published its report on June 20, 1956, while the dissenting note of Maulana Thanvi was published separately on August 30, 1956. The commission's report invited severe criticism from the 'ulama.²¹ A detailed discussion of the commission's report is beyond the scope of this work.²²

¹⁴See, section 88(C) of Law No. 19 of 2009 regarding *Qanun Ahkam al-Ushrah*, <<http://www.gcc-legal.org/MojPortalPublic/DisplayLegislations.aspx?country=6&LawTreeSectionID=9968>> (last accessed Sept. 7, 2010).

¹⁵See Article 49 of Law No. 84-II of 9 June 1984, Comprising the Family Law of Algeria.

¹⁶See Marriage and Divorce (Muslim) Act, 1951 as amended till 2006 [Cap. 134] section 27 and Rules 1 & 2 Second Schedule. However, the law does not mention whether *talaq* pronounced by a husband without following this procedure is valid or not. Serajuddin wrongly mentions that three notices should be given by a husband to the wife under section 27 of the above law. See Alamgir Muhammad Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia* 222 (2d ed., Karachi: Oxford University Press 2001).

¹⁷See sections 43 and 45(1-4) of Ordinan 43 Tahun 2001, Ordinan Undang-Undang Keluarga Islam, 2001, Negeri, Sarawak. There is a similar procedure for *talaq* in the Federal Territory of Kuala Lumpur (Malaysia); See also, Zaleha Kamruddin, *Divorce Laws in Malaysia (Civil & Shariah)* 167-168 (Kuala Lumpur: International Islamic University, 1998).

¹⁸See Freeland Abbott, *Pakistan's New Marriage Law: A Reflection of Qur'anic Interpretation* 1 Asian Survey 26, 26 (Jan. 1962); See also Pakistan Times, Lahore (Apr. 14, 1955).

¹⁹*Report of the Commission on Marriages and Family Laws*, The Gazette of Pakistan, Karachi 1197, (June 20, 1956) [hereafter Report].

²⁰*Id.* at 1197-8.

²¹For example, see generally Syed Abul A'la Maududi, *The Family Law of Islam, in Studies in the Family Law of Islam* 21 (Khurshid Ahmad ed., 2d ed., Karachi 1961); Amin Ahsan Islahi, *A Critique of the Modernist Approach to the Family Law of Islam*, in *Id.* at 194.

²²For a detailed analysis of the Report, see Serajuddin, *supra* n. 16, at 35-75.

The commission recommended the enactment of laws providing that three divorces in one session would amount to one pronouncement, and for a divorce to be effective, two further pronouncements in two successive *tuhrs* would be necessary.²³ Moreover, they added that the legislation should provide that no person would be able to pronounce a divorce without obtaining an order to that effect from a matrimonial and family court.²⁴

Moulana Thanavi rejected outright the commission's recommendations, by stating that, "[t]o put a restriction on the exercise of this right by making it ineffective if *talaq* is not registered or not authorized by the Matrimonial and Family Laws Court, not only amounts to tampering with the injunctions of the faith but also putting obstacles in the way of dissolution even when it becomes necessary and desirable."²⁵

Because of the intense hostility of the *'ulama* to the commission's recommendations relating to divorce, the framers of the MFLO ignored the idea of court intervention in divorce. The provisions of section 7 of the MFLO relating to *talaq* are reproduced herein below:

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 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 both.
3. Save as provided in sub-section (5), a *talaq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (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 the 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 be later, ends.
6. Nothing shall debar a wife whose marriage has been terminated by *talaq* effective under this section from marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time, so effective.

The most manifest implications of section 7 are: First, it refers the issue of divorce to an administrative body for bringing about a reconciliation; second, *talaq* is not effective for ninety days, during which reconciliation shall be attempted between the parties. Unfortunately, the reconciliation effort does not precede the pronouncement of *talaq*, but follows it. Third, although subsection (1) mentions any form of *talaq* ("*talaq* in any form whatsoever") which in turn, obviously includes *ihsan*,²⁶ *hasan*,²⁷ as well as *talaq al-bid'at* (triple *talaq*). But under Islamic law, as discussed above, the procedure for reconciliation is only possible if only either one or two—and not the third one—pronouncements have been made.²⁸ Fourthly, section 7 can be construed to imply abolishment of *talaq al-bid'at* because it allows remarriage between the two parties after the divorce without an intervening marriage or *halala*, which, under section 7, becomes imperative following the third such pronouncement.

²³Report, *supra* n. 19, at 1213.

²⁴*Id.* at 1214.

²⁵*Id.* at 1586–7.

²⁶In the *ihsan* form, the husband pronounces only one *talaq* while his wife is in a state of purity during which time he has not had sexual intercourse with her and does not revoke it until the end of the third purity.

²⁷In the *hasan* form, the husband pronounces one *talaq* in a *tuhr*, he must not pronounce *talaq* for a second time until the next *tuhr*. He can do so still later at anytime during the subsistence of the marriage, say after three years, and whenever he does so, the *talaq* will be counted as the second *talaq*. When the husband has pronounced *talaq* for the second time in a *tuhr*, he must not pronounce *talaq* for a third time before the next *tuhr*, but he can do so still later at anytime during the subsistence of the marriage and whenever he does so, the pronouncement will be counted as the third *talaq*. For details, see Triple *Talaq* in One Session, *supra* n. 1.

²⁸This is according to the *jamhur*. Reconciliation is possible according to Ibn Taimiyah, Ibn al-Qayyim, the *ahl al-hadith*, and the Shi'a Imamiya, because they treat three repudiations in one session to be one.

The MFLO is indeed a very vague piece of legislation as far as its provisions of *talaq* and share of the grandchild²⁹ are concerned. The *‘ulama* launched a scathing attack on these provisions in particular.³⁰ The main criticism of section 7 is as follows: First, under Islamic law, a third divorce becomes effective as soon as it is pronounced but under section 7, a third divorce will be effective only after ninety days have elapsed from the date of the receipt of its notice by the chairman, and not from the date of pronouncement of the *talaq*. Secondly, under Islamic law, *‘iddat* (waiting period) is counted from the time of the pronouncement but, under section 7 it is counted from the time the notice is received by the chairman. Furthermore, problems arise when no notice is sent to the chairman. Thirdly, under Islamic law, divorce of a couple who have not yet consummated their marriage becomes effective immediately and no *‘iddat* is required for the woman. But, under the MFLO, every divorce, whether or not the marriage is consummated, will be effective only after the expiry of ninety days following the receipt of its notice, by the chairman.³¹ Fourthly, according to section 7, the *‘iddat* of a woman who is not pregnant is over ninety days but under Islamic law, her *‘iddat* is three monthly courses. Fifthly, under section 7, the *‘iddat* of a pregnant woman is the end of pregnancy or ninety days, whichever is later. According to the *Qur’an*, it ends with the end of pregnancy, a period which may be less than ninety days. Finally, under section 7, effectiveness of *talaq* is dependent on the notice of *talaq* to the chairman and reconciliatory efforts by him. This has no basis in Islamic law.

In *Allah Rakha v. The Federation of Pakistan*,³² the Federal Shariat Court in Pakistan had declared subsections (3) and (5) of section 7, as repugnant to the injunctions of Islam.³³ The federal government had appealed against that decision to the Shariat Appellate Bench of the Supreme Court where the case is pending at the writing of this work.

Section 7 of the MFLO has been the subject of fierce debates in the academic circles as well as amongst the superior judiciary in Pakistan. It is pointed out by some authors that because of the procedure laid down in section 7, Pakistani law abolishes triple *talaq* or *talaq al-bid‘at*,³⁴ in one session, which seems to be the correct view.

ANALYSIS OF JUDICIAL INTERPRETATIONS OF SECTION 7 OF THE MFLO

The first question awaiting interpretation by the judiciary in Pakistan concerned the consequences of failure to give notice of *talaq* to the chairman (i.e., what might be the effect(s) of a husband’s failure to give any notice of *talaq* to the chairman?). In *Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf*,³⁵ the Supreme Court of Pakistan held that where the husband did not give notice of *talaq* to the chairman, he

²⁹Section 4 of the MFLO states that “In the event of the death of any son or daughter of the propositus before opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.” This section has been severely criticized by ‘ulama, many modernists, and some foreign authors. Those who defended this section include Fazlur Rahman, Moulvi Muhammad Usmani, Kemal Farooqi, and N. J. Coulson. Those who opposed representation for an orphaned grandchild include Tanzil-ur-Rahman, F.M. Kullay, Herbert J. Liebesny, and J.N.D. Anderson, to name a few. For a comprehensive discussion of the views, arguments, and analysis of the supporters and opponents of section 4, see Serajuddin, *supra* n. 16, at 81–118, and Hamid Khan, *Islamic Law of Inheritance* 168–184 (2d ed., Karachi: Pakistan Law House); The Federal Shariat Court in *Allah Rakha v. Federation of Pakistan*, PLD 2000 FSC 1 has declared section 4 of the MFLO to be repugnant to the injunctions of Islam and the case has been appealed to the Shariat Appellate Bench of the Supreme Court, where it is pending.

³⁰*Muslim Family Laws Ordinance as Commented Upon by Ulama in the Light of [the] Quran [sic] and [the] Sunnah* (Hyderabad: Maktaba-e-Ilmi). The original pamphlet was in Urdu and was signed by fourteen ‘ulama, mostly from Lahore; *Marriage Commission Report X-Rayed* (Khurshid Ahmad, ed., Karachi: Chirag-i-Rah Pub. 1959) (second ed. titled *Studies in the Family Law of Islam*).

³¹In practice, the Arbitration Council locally known as “*Musalihati Council*” (in some areas it is known as the “*Musalihati Court*”), upon the receipt of the notice, looks at the type of *talaq* pronounced by the husband. The council does not act when three pronouncements are made by a husband, and tells the parties to wait for ninety days for obtaining their divorce certificates. Thus, in practice, the chairmen of the council considers three *talaqs* in one session, as three.

³²PLD 2000 FSC 1.

³³*Id.* at 62. Under Article 203D(1) of the 1973 Constitution of Pakistan, the Injunctions of Islam mean whether a provision of law is according to the *Qur’an* and the *Sunnah* of the Prophet (PBUH), or not. Thus, the Federal Shariat Court has the constitutional duty to “examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and the *Sunnah* of the Holy Prophet.” In other words, the court has no duty to look to other sources of Islamic law, beyond the *Qur’an* and the *Sunnah*, to decide the Islamicity of a legal provision.

³⁴See Serajuddin, *supra* n. 16, at 215; Lucy Carroll, *Talaq-e-Tafwid in the Classical Texts*, in Carroll & Kapoor, *Talaq-e-Tafwid*, 45.

³⁵PLD 1963 SC 51.

would be deemed to have revoked the *talaq*.³⁶ The facts of this case are very interesting. In 1951 Ali Nawaz Gardezi, a Shi'a Muslim from Pakistan, married a German woman, Christa Renate Sonntag in Hull, England, and subsequently, the couple moved to Lahore and settled there. In August 1961, Renate met Lieutenant Colonel Yusuf at Quetta and they developed a liking for each other. On December 31, 1961, Renate and Yusuf left Lahore for Quetta and on January 2, 1962, they were married there according to Islamic rites. Renate was declared to have converted to Islam and took the new name Ruqayya. Gardezi filed a complaint under sections 497 and 498 of the Pakistan Penal Code against Yusuf for enticing his wife and committing adultery with her. Yusuf was found guilty on both charges by a single bench of the West Pakistan High Court and fined 12,500 rupees and 7,500 rupees, respectively, on each charge, or in default, to suffer imprisonment for one year on the first charge and up to six months on the second charge. On his intra-court appeal, the full bench of the High Court acquitted him of both the charges and accepted his appeal. However, Gardezi appealed to the Supreme Court because the case involved many questions of law.

Yusuf's main defense was that Gardezi had properly divorced Renate and produced before the court an alleged divorce deed signed by Gardezi on December 29, 1961. Gardezi challenged the divorce deed. The trial judge held that the deed was forged but the appellate bench had considered it genuine. The Supreme Court left the issue of the genuineness of the deed unresolved. The alleged divorce deed was open to a number of objections. First, the court held that Renate's assertion that she had become a Muslim was not supported by any evidence as there were neither witnesses nor a *maulvi* (religious scholar) present on the occasion of her declaration of adoption of Islam as her new religion. The court further said that, "There is then no escape from the conclusion that, on her own showing, Christa Renate had not been properly divorced by the complainant, as she was not a Muslim on the relevant date."³⁷

Secondly, the divorce alleged to have been pronounced by Gardezi could at best be described as *talaq-i-bid'at* (triple divorce) but since he was a Shi'a Muslim such a *talaq* was not recognized as valid under Shi'a law. Under the Shi'a law, a husband cannot make his *talaq* to his wife irrevocable. Moreover, the Shi'a law requires the presence of two witnesses and the exchange of specific words (*sega*) for *talaq*. As discussed above, under the Shi'a law, which incidentally is also concurred by Ibn Taimiyah, even three pronouncements of *talaq* in one session amount to a single pronouncement only.

Thirdly, Gardezi's counsel argued that the MFLO would be applicable only where both parties to a marriage were Muslim citizens of Pakistan. The court maintained that the ordinance was applicable to those situations as well where only the husband was a Muslim citizen. The court then ventured to discuss the purposes and objectives of section 7 of the ordinance and the implications of non-compliance with it. The court said

The section clearly contemplates a machinery of conciliation whereby a husband wishing to divorce his wife unilaterally, may be enabled to think better of it, if the mediation of others can resolve the differences between the spouses. The *talaq* pronounced is to be ineffective for 90 days from the date on which notice under subsection (1) of this section is delivered to the Chairman and this period is to be utilized for the attempt at reconciliation . . . the object of section 7 is to prevent hasty dissolution of marriages by *talaq*, pronounced by the husband, unilaterally, without an attempt being made to prevent disruption of the matrimonial status. If the husband himself thinks better of the pronouncement of *talaq* and abstains from giving a notice to the Chairman, he should perhaps be deemed, in view of section 7, to have revoked the pronouncement and that would be to the advantage of the wife. Subsection (3) of this section precludes the *talaq* from being effective as such, for a certain period and within that period, consequently, it could not be said that the marital status of the parties had in any way changed. They would still in law continue to be husband and wife.³⁸

These remarks by Justice S.A. Rahman do not make any reference to Islamic law. His clear ruling above shows that he considered section 7 of the MFLO to have abolished triple *talaq* in one session and that any *talaq* under this section is not irrevocable. Moreover, according to his interpretation, the marital status of the parties does not change within the 90-day period provided for in subsection (3). The most controversial interpretation of Justice Rahman, however, is that failure to give notice of *talaq* to the chairman under subsection (3) amounts to revocation of *talaq*. Although this interpretation has

³⁶*Id.* at 74–75 (per Justice S.A. Rahman).

³⁷*Id.* at 72.

³⁸*Id.* at 74–75.

benefited women who ask the courts for maintenance when their husbands pronounce *talaq* orally without giving any notice of it to the chairman, however, this has caused trouble for some women upon remarrying, as ex-husbands can very well accuse them of adultery.

The court ruled that the marriage between Renate and Gardezi subsisted because even if she was divorced, no notice of it had been given to the chairman. Thus Yusuf had committed adultery with Renate but the court acquitted him under section 497 of the Pakistan Penal Code on the ground that Gardezi had manipulated the details. Gardezi knew that adultery was being committed but took no steps to prevent it. Yusuf was, however, found guilty of enticing and taking away Renate from Lahore, for which the court fined him the reduced amount of 2000 rupees.

The overall effect of the Gardezi case was that notice to the chairman of the concerned Union Council was mandatory upon pronouncement of *talaq* by a husband and failure to give notice of *talaq* under section 7 amounted to its revocation. This remark by S.A. Rahman, J. could only be considered as *dictum* because failure to give notice of *talaq* was not an issue in that case. This indeed was a very controversial interpretation of section 7. However, the Supreme Court as well as the High Court raised it to the status of a celebrated *ratio* in subsequent cases, such as the *State v. Mst. Tauqir Fatima*,³⁹ *Abdul Aziz v. Rezia Khatoon*,⁴⁰ *Abdul Mannan v. Safrun Nessa*,⁴¹ *Mst. Ghulam Fatima v. Abdul Qayyum and Others*,⁴² *Muhammad Salahuddin Khan v. Muhammad Nazir Siddiqui*,⁴³ and *Junaid Ali v. Abdul Qadir*.⁴⁴ The Gardezi case had thus become “the Gardezi rule”—failure to give notice of *talaq* amounts to its revocation.

There have been only two exceptions to “the Gardezi rule” reported in two later cases, but these were due to the peculiar circumstances of those two cases. These were *Noor Khan v. Haq Nawaz*,⁴⁵ and *Chuhar v. Ghulam Fatima*.⁴⁶ In the *Noor Khan* case, in November 1979, Noor Khan filed a First Information Report (FIR) in a police station alleging that about ten years prior to that, a certain Haq Nawaz had forcibly taken his uncle’s wife Naziran Bibi away, and ever since had been committing *zina* (adultery) with her and she had also given birth to three children. Fateh Khan, the ex-husband, claimed that he had not divorced Naziran Bibi whereas Haq Nawaz and Naziran Bibi asserted that they were legally married after Fateh Khan had divorced her. The case was tried under the offences of the Zina Ordinance, 1979 and subsequently it reached the Federal Shariat Court. The court held the following:

In the particular circumstances of the case before us, we are of the view that the version of the defence in respect of the divorce having been pronounced by Fateh Khan, P. W. appears to be more plausible in view of the long acquiescence of 10/12 years by the complainant party in allowing the two accused to continue to live as husband and wife without any challenge or prosecution whatsoever. In these circumstances it would be making the technicality of the provisions of notice under section 7 of the Muslim Family Law Ordinance too cumbersome on the parties who have been living together as husband and wife without any challenge for 10/12 years. They were all the time thinking that they had been validly married after divorce by P.W. Fateh Khan and inaction of Fateh Khan had reinforced their belief. Such a state of affairs could not be held to be covered by the provisions of definition of Zina as provided in section 4 of Ordinance VII of 1979.⁴⁷

The court came to the conclusion that the complainant was motivated by revenge and feelings of loss of face.

In *Chuhar v. Ghulam Fatima*,⁴⁸ Boota had divorced Ghulam Fatima but had not sent the notice of *talaq* to the chairman of the Union Council, as required. Ghulam Fatima married Muhammad Ramzan, and a son, Fakir Hussain, was born of this wedlock. After Ramzan’s death, his cousin, Chuhar, filed a suit in January 1976 claiming the deceased Ramzan’s estate as his sole heir. He alleged that his cousin, Ramzan, was not legally married to Ghulam Fatima since her divorce from the first husband was ineffective under section 7 of the MFLO because he had not sent any notice of *talaq* to the Council’s chairman, although the first husband asserted before the court that he had not revoked the *talaq*. The

³⁹PLD 1964 (W.P.) Kar. 306.

⁴⁰21 DLR 1969, 733.

⁴¹1970 SCMR 845.

⁴²PLD 1981 SC 460.

⁴³1984 SCMR 583.

⁴⁴1987 SCMR 518.

⁴⁵PLD 1982 FSC 265.

⁴⁶PLD 1984 Lah. 234.

⁴⁷*Noor Khan v. Haq Nawaz*, PLD 1982 FSC 265 at 275–6.

⁴⁸PLD 1984 Lah. 234.

court held that failure to give notice of *talaq* might give rise to an irresistible presumption that the *talaq* has been revoked impliedly but the presumption is rebuttable and that each case should be decided on its own facts. In the present case, the *talaq* was pronounced some fifteen to eighteen years earlier, and the first husband never revoked it expressly or impliedly. The court ruled that section 7 of the ordinance was meant for the benefit of women and it should not be interpreted in a manner which might ruin their lives. On the facts of the case, the court held that not giving a notice did not render the *talaq* ineffective. *Chuhar v. Ghulam Fatima* was relied upon by a division bench of the high court division of the Bangladesh Supreme Court in *Sirajul Islam v. Helana Begum*.⁴⁹ *Noor Khan* and *Chuhar* are the two main exceptions to the infamous ‘Gardezi rule’, otherwise the repeated pronouncements by the judiciary has raised that case to the status of a ‘well-settled principle of law’.

Till the passing of the Protection of Women (Criminal Laws Amendment) Act, 2006 (hereinafter the Protection of Women Act), husbands who would not comply with subsection (3) of section 7 to give notice of *talaq* would, in order to harass their ex-wives, accuse them of *zina* with their new husbands. The Protection of Women Act has put an end to this practice.⁵⁰

In *Mst. Kaneez Fatima v. Wali Muhammad*,⁵¹ the Supreme Court of Pakistan, while discussing the Gardezi rule, held that “failure to send notice of *talaq* to the Chairman of the Union Council does not by itself lead to the conclusion that *talaq* has been revoked. *It may only be ineffective but not revoked*”⁵² [italics supplied]. This was the first time that the infamous Gardezi rule was overruled by the Supreme Court itself. In the *Kaneez Fatima* case, both the husband and wife had mutually agreed to dissolve their marriage with effect from 1st November 1977, and the wife received 10,000 rupees and five *tolas* (one *tola* equals twelve grams) of gold in lieu of the prompt dower of 30,000 rupees and 20 *tolas* of gold and a monthly maintenance of 200 rupees as part of the settlement. Both parties had agreed that they would have no further claim in the future against each other. However, on 6th April 1978, the appellant Kaneez Fatima filed a suit for recovery of what she claimed was the remaining amount of the dower (i.e., 20,000 rupees) and maintenance, in the family court, pleading that the compromise was arrived at due to coercion and no notice of dissolution of marriage had ever been given to the chairman as provided for in section 7 of the MFLO, 1961. It was held that “In case where with the consent of both the parties divorce is effected and confirmed in writing under their undisputed signatures section 7 should not be strictly construed.” The court opined that “the notice can be sent at any time thereafter to comply with the provisions of section 7.”⁵³ In stating so, the court refused maintenance to the appellant. Commenting on the Gardezi rule, the court held, “So far the observations made in Syed Ali Nawaz Gardezi’s case, it may be observed that failure to send notice of *talaq* to the Chairman of the Union Council does not by itself lead to the conclusion that *talaq* has been revoked. It may only be ineffective but not revoked.”⁵⁴

Unfortunately, in *Mst. Farah Naz v. Judge Family Court*,⁵⁵ the Supreme Court took another U-turn and upheld the controversial Gardezi rule (without referring to the Gardezi case itself).⁵⁶ In the *Farah Naz* case, the appellant filed a suit for recovery of maintenance from the husband on February 16, 2002, but the husband, who claimed to have pronounced divorce from her on December 13, 1997, stated that she was not entitled to the relief of maintenance. Her claim for past maintenance was rejected by the trial court, but accepted by the first appellate court from December 28, 1996 to April 14, 1998. Both courts

⁴⁹In this case the husband had divorced his wife but did not give any notice of *talaq* to the chairman of the concerned Union Council or to his wife. Regarding the payment of the wife’s deferred dower, the husband’s counsel argued that since the husband had not given any notice of *talaq* to the chairman under section 7, the *talaq* pronounced by him was not effective and the wife was thereby not entitled to the deferred dower. The wife’s counsel rebutted this argument and contended that swearing the affidavit and registration of the *talaq* showed that the husband definitely intended to sever the marriage tie with his wife and not to revoke it again. The court held that non-service of notice to the chairman of the Union Council under section 7 of the MFLO cannot render the divorce ineffective if the conduct of the husband appears to be so. 48 DLR (1996). The court held that the divorce was valid and effective and the wife was entitled to decree for the entire amount of her deferred dower. *Id.* at 51.

⁵⁰For details, see this author’s *Is Zina bil jabr a hadd, ta’zir, or Syasa offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan*, 14 Y.B. Islamic & Middle E. L. 95–115 (2008–2009).

⁵¹PLD 1993 SC 901.

⁵²*Id.* at 916. (Per Saleem Akhtar, J for the five members bench. Other members of the bench were Shafiur Rahman, Abdul Qadeer Chaudhry, Saeeduzzaman Siddiqui and Wali Muhammad Khan, JJ).

⁵³See PLD 1993 SC 901 at 917.

⁵⁴See PLD 1993 SC 901 at 915–6.

⁵⁵PLD 2006, SC 457.

⁵⁶See *id.* at 463 (per Rana Bhagwandas, J for the divisional bench).

(i.e. trial court and the first appellate court) accepted the oral *talaq* pronounced by the husband although the husband had not given any notice of that *talaq* to the chairman as required under section 7. The High Court upheld the decision of the trial court regarding maintenance. However, the Supreme Court disagreed and held that “oral allegation of *talaq* would neither be effective nor valid and binding on the appellant.” The *Farah Naz* case was decided by a divisional bench of the Supreme Court comprising of Rana Bhagwandas and Muhammad Nawaz Abbasi, J.J., whereas *Kaneez Fatima* was decided by a larger bench of five judges. Although facts in both the cases were somewhat similar, in the *Farah Naz* case the court awarded the wife past maintenance as claimed by her.

In *Farah Naz*, the Supreme Court made no reference to either *Ali Nawaz Gardezi* or to *Kaneez Fatima*. This author’s conclusion is that in *Kaneez Fatima* the parties opted out of the procedure of section 7 whereas there was no mutual compromise to put an end to the marital tie and the husband allegedly pronounced an oral *talaq* but had failed to prove it. Another point is that in *Farah Naz* the respondent (husband) was trying to benefit from his own failure to give notice of *talaq* to the chairman. Unfortunately, the Supreme Court did not raise this point in its discussion. The *Farah Naz* decision has apparently re-activated the “Gardezi rule” (i.e., failure to give notice of *talaq* to the chairman amounts to revocation). In addition, *Farah Naz* (a divisional bench’s decision) cannot overrule *Kaneez Fatima* (a unanimous decision by a five-member bench) because a larger bench of the Supreme Court binds a smaller bench.⁵⁷

The preceding discussion is thus clearly depictive of the Supreme Court’s inconsistency with regard to section 7 of the MFLO. Moreover, as we have seen above, from the perspective of Islamic law, there exist many objections against section 7. In addition, the penalty clause of section 7 (i.e., subsection 7(2)) is useless, as there has not been any case reported in Pakistan under this subsection. This means that there is no punishment when a husband violates section 7 in divorcing his wife. The problem is that a divorcee may have no interest to go to court against an ex-husband if they are not divorced under section 7, as most women would consider themselves divorced under Islamic Law. One solution may be that in cases where the Chairman of the Union Council (also known as the *Thalthi* Council or the *Musalihati* Council) is aware that a husband has violated section 7, he should report such cases to the police for action. Otherwise, subsection 2 will have no effect and thus remain a toothless law.

INTERPRETATION OF SECTION 7 OF THE MFLO IN BANGLADESH

Bangladesh, the former East Pakistan, inherited the MFLO, 1961 before gaining its independence in 1971. The view that the sending of notice under section 7(1) is not essential seems to have emerged in Bangladesh in *Abdul Aziz v. Razia Khatoon*,⁵⁸ which was relied upon later by the then erstwhile Lahore High Court in *Maqbool Jan v. Arshad Hassan*,⁵⁹ in which the court observed the following:

I am also in respectful agreement with the specific observation in the Dacca [High Court] case of Abdul Aziz that if *talaq* is otherwise valid (i.e., under the personal law of the parties the *talaq* is valid) it would become effective under that law; but the only clog therein is that its effectiveness would be postponed for ninety days under subsection (3) of section 7 of the Ordinance.⁶⁰

In other words, the court indicated that failure to give notice of *talaq* is just a formality and that *talaq* will be effective after ninety days.⁶¹ However, the decision is ambiguous and should be read with caution.⁶²

Under section 7(4), it is obligatory on the chairman to constitute an arbitration council for bringing about a reconciliation between the parties. However, the effects of the failure of the chairman to constitute the council, the council’s failure to attempt reconciliation, or the failure of either of the affected parties to participate in the proceedings of the council are unclear since 7(4) is silent on these issues. In *Abdul Aziz v. Rezia Khatoon*,⁶³ it was argued on behalf of the wife that unless an arbitration council was duly constituted and the council failed to bring about reconciliation between the parties, a

⁵⁷For details of this rule, see, this author’s forthcoming *Precedent in Pakistani Law* (Karachi: Oxford U. Press, 2013).

⁵⁸[1969] DLC 586.

⁵⁹PLD 1975 Lah. 147.

⁶⁰*Id.* at 151–2 (*per* Afzal Zullah J.). The quote of this case given in Anisur Rahman, *Development of Muslim Family Law in Bangladesh: Empowerment or Streamlining of Women?* 51 J. Asiatic Soc’y (2008) is wrong. http://www.asiaticsociety.org.bd/journals/Dec_2008/contents/AnisurRahman.htm (last accessed Oct. 6, 2012).

⁶¹The decision is not very clear because on the one hand it seems to validate *talaq* if valid under the personal law of the parties, and on the other hand, it mentions that *talaq* will be effective subject to subsection (3) of section 7. Section 7(3) talks about the delivery of notice to the Chairman of the Union Council.

⁶²See David Pearl & Werner Menski, *Muslim Personal Law* 379 (London: Sweet & Maxwell 1998). David & Menski’s work is now fourteen-years-old and its new and updated edition is long overdue.

⁶³21 DLR (1969) 733.

divorce could not be legally effective under section 7 of the ordinance. The court held that if the chairman fails to constitute an arbitration council or, even after its constitution, the council fails to take necessary steps for bringing about a reconciliation, the *talaq*, if valid otherwise, will be effective on the expiry of ninety days from the date of receipt of the notice of *talaq* by the Chairman of the Union Council.⁶⁴

In *Abdus Sobhan v. Md. Abdul Ghani*,⁶⁵ the respondent accused Sakhitannessa, his wife, of bigamy. He alleged that she was legally married to him and that Abdus Sobhan Sarkar married her during the subsistence of this marriage. Abdus Sobhan's counsel argued that his client had married Sakhitannessa after she exercised her delegated right to divorce⁶⁶ and that the arbitration council had approved the divorce. The court held that nothing is mentioned in section 7 as to what will happen if the chairman does not constitute an arbitration council or if the council fails to take the necessary steps. The court, therefore, observed the following:

Once written notice of the pronouncement of a *talaq* in terms of sub-section (1) is delivered to the Chairman, the *talaq*, if otherwise valid, will be effective on the expiry of ninety days of the delivery of such notice Thus, so far as *talaqs* concerned the Arbitration Council has no function except to take steps to bring about reconciliation between the parties. Between this the Arbitration Council has nothing to do in this matter.⁶⁷

Unfortunately, the same year in which the *Abdus Sobhan* case was decided, 1973, the high court division in *Md. Kutubuddin Jaigirdar v. Nurjahan Begum*,⁶⁸ ruled that sending a notice to the chairman and the opposite party is [a] pre-requisite to the legal validity of a divorce. This position seems to have been settled since *Sirajul Islam v. Helana Begum*.⁶⁹ In that case, no notice of *talaq* was given by the husband to either the chairman of the concerned Union Council or the wife. In connection with payment of the wife's deferred dower, a question arose whether the *talaq* was effective. The husband's counsel argued that since no notice was served by the husband, the *talaq* pronounced by him had not become effective and the wife was not entitled to the deferred dower. However, the husband had sworn in an affidavit before the magistrate pronouncing *talaq* and had served a copy of the affidavit upon the Nikah Registrar under section 6 of the Muslim Marriage and Divorce (Registration) Act, 1974. The court held that "mere non-service of notice upon the Chairman of the Union Council under section 7 of the Muslim Family Law Ordinance cannot render the divorce ineffective if the conduct of the husband appears to be so."⁷⁰ The court relied on Pakistani cases *Chuhar v. Ghulam Fatima* (discussed above), and *Mrs. Parveen Chaudhry v. 6th Senior Civil Judge, Karachi*,⁷¹ and held that the divorce was valid and effective and the wife was entitled to the entire amount of dower. Since the above were all high court decisions in Bangladesh, they have clarified the position that in Bangladesh, a failure to give notice of *talaq* to the Chairman of the Union Council does not invalidate *talaq* if the conduct of the husband indicated that he had indeed divorced his wife. The Bangladeshi case law is also very good in answering the question about the failure of the chairman to constitute an arbitration council as well as the failure of the council to take the necessary steps.

TRIPLE TALAQ AND THE INDIAN CASE LAW

In light of the verdicts given by some Indian High Courts, *talaq al-bid'at* (as it is spelled in India) is both invalid and ineffective if pronounced by the husband. In *Marium v. Md. Shamsi Alam*,⁷² the husband had pronounced triple *talaq* on his wife and when he repented his action, she filed a suit for a declaration that she had been divorced by Alam. The Allahabad High Court held that "[a] divorce pronounced thrice in one breath by a Muslim husband would have no effect in law, if it was given without deliberation and without any intention of affecting an irrevocable divorce; such divorce is a

⁶⁴*Id.* at 736.

⁶⁵25 DLR (1973) 227.

⁶⁶For details of delegated right of divorce also known as "talaq-i-tafwid", see this author's *Stipulations in a Muslim Marriage Contract with Special Reference to Talaq al-Tafwid Provisions in Pakistani Law* 12 Y.B. Islamic & Middle E. L. 235–262 (2005–2006).

⁶⁷*Id.*, at 229.

⁶⁸25 DLR (1973) 21.

⁶⁹48 DLR (1996) 48.

⁷⁰*Id.* at 51.

⁷¹PLD 1976 Kar. 416.

⁷²AIR 1979 All. 257.

form of *talaq-e-ahsan*, and thus is revocable by the husband before the *iddat* expires.” The court ruled that *talaq* pronounced by Alam was revoked by him within the *iddat* period. Therefore, the marriage between the couple was subsisting and the wife was denied the relief she had asked for. The Allahabad High Court, thus, had based its decision on the opinion of Ibn Taimiyah, which in the subcontinent, is endorsed by the *Ahl al-hadith*.

In *Rahmat Ullah v. State of U.P.*,⁷³ the Lucknow Bench of the Allahabad High Court declared the triple *talaq* invalid. In this case, a notice was issued to Rahmat Ullah, a landowner, under the U.P. Imposition of Ceiling on Land Holding (Amendment) Act, 1972. He pleaded that since he had divorced his wife Khatoon Nisa, the land belonging to her was mistakenly added to his assets. Both Khatoon Nisa and Rahmat Ullah produced a document to prove the divorce. Under the Act, a married woman cannot hold separate property; but a judicially separated wife or a divorcee can. The High Court had to decide whether the plea of divorce was genuine or resorted to for defrauding the state, and whether a woman who is divorced according to the rules of her personal law is entitled to the same benefits as a woman who is separated or divorced through a court decree. The court ruled that the mode of triple divorce, giving unbridled power to the husband to divorce his wife at will, cannot be deemed operative as it has the effect of perpetuating discrimination on the grounds of gender, i.e., male authoritarianism. The court further opined that since the practice of triple *talaq* denigrates women, it is in violation of the Indian Constitution.

This decision is very strange because it declared a marriage dissolved twenty-five years earlier to be subsisting even against the wishes of the parties. Moreover, the issue of triple *talaq* was not an issue before the court and the opinion of the court on this point could be treated only as *obiter dicta*.⁷⁴ Also, it is against Article 26 of the Constitution, which protects the personal law of each religious community in India; and, the court’s interpretation of Islamic law is seriously flawed because it did not discuss the opinions of Muslim jurists on the issue. Finally, being a matter of personal law, the court should have avoided the imposition of Ibn Taimiyah’s opinion, if the parties concerned wanted to be governed by the opinions of the *Hanafi fuqha*. The court had, in fact, attempted to force a reunion between the ex-husband and his divorced wife without the free consent of either.

In *Masroor Ahmed v. State*,⁷⁵ the husband claimed restitution of conjugal rights against the wife who in turn filed proceedings for dowry harassment. While these cases were pending in the court, the couple decided to be reunited. However, since the estranged husband had, reportedly, triply divorced his wife, the local ‘*ulama* (religious scholars) opined that the reunion was illegal and sexual relations resumed by the two amounted to *zina*. To circumvent this, the husband entered into a new contract of marriage with the wife. But, the ‘*ulama* insisted that renewal of marriage, without an intervening marriage (*halala*) with a third person, was of no avail and their *zina* verdict remained in force. Meanwhile, relations between the husband and the wife worsened and the wife filed a First Information Report against the husband accusing him of marital rape. They subsequently reconciled and the husband applied to the court for quashment of the FIR. Badar Durrez Ahmad, J., of Delhi High Court observed that harsh abruptness of triple *talaq* has brought about extreme misery to divorced women and even men who are left with no choice to undo the wrong or any scope to bring about reconciliation. He ruled that a triple *talaq* should be regarded as one revocable *talaq*.

Another novel Indian concept regarding triple *talaq* is that *talaq* must be “for a reasonable cause.” This was first held in *Jiauddin Ahmed v. Anwara Begum*⁷⁶ by the Gauhati High Court. Two other grounds were also added by the court. These were that *talaq* must be preceded by “attempts at reconciliation” by the nominees of the spouses, and it “may be affected” if the said attempts fail.⁷⁷ In this case, the wife was thrown out of her matrimonial home by her husband and she applied for maintenance. The husband argued that he had divorced her. The first question that the court had to answer was whether there had been a valid *talaq* by the husband. The court held that the *talaq* allegedly given by the husband was invalid under Islamic law and the wife was entitled to maintenance. *Jiauddin* was a single

⁷³Writ Petition No. 45 of 1993.

⁷⁴Also see Flavia Agnes, *Law and Gender Inequality: The Politics of Women’s Rights in India* Women & L. in India 112–16 (2004); Furqan Ahmad, *Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspects* 105–08 (New Delhi 1994).

⁷⁵See details of the case in Tahir Mahmud, *A Revolutionary Judgment on Divorce: Comments on a Recent Delhi High Court Decision*, 12 Amity L. Watch: H. J. of Amity Inst. of Adv. Leg. Stud., 9–10 (Nov. 2007).

⁷⁶(1981) 1 GLR 358.

⁷⁷Attempt at reconciliation before *talaq* is undoubtedly Islamic but is not a pre-condition for *talaq* to be effective.

bench decision but was subsequently endorsed by many Indian High Courts,⁷⁸ as well as the Supreme Court.⁷⁹ The prevailing case law in India, therefore, is that *talaq* given without a valid cause, which is not preceded by an attempt at reconciliation between the nominees of the spouses, is invalid. However, such reforms should be brought by legislators and not through judicial law-making or judicial activism. The Indian courts have attempted a rewriting of Islamic law unknown to the overwhelming majority of Muslim jurists.

CONCLUSION

The MFLO, 1961, has abolished triple *talaq* as the procedure laid down in section 7 is largely applicable to one or two pronouncements. Furthermore, some subsections of section 7 are in clear contravention of Islamic law. The Supreme Court of Pakistan has also not been consistent in its interpretation of section 7, especially in the matter concerning failure to give notice of *talaq* to the Chairman of the Union Council. Courts in Bangladesh have also been inconsistent about the issue of non-service of the notice of *talaq*. Likewise, some Indian High Courts have ruled that *talaq-e bid'i* or *talaq-e-bid'at* is not valid if exercised by a husband. Moreover, Indian courts have held that *talaq* without a “just cause,” which is not preceded by an “attempt at reconciliation” between the spouses, is invalid. Such rulings are very controversial when viewed from the standpoint of Islamic law. However, some Muslim states such as Egypt, Syria, Jordan, Iraq, Sudan, Morocco, Kuwait, Yemen, Afghanistan, Libya, Kuwait, Qatar, Bahrain, and the United Arab Emirates, have specifically adopted Ibn Taimiyah’s opinion regarding the issue of a triple *talaq*. Section 7 of the MFLO seems to have abolished triple *talaq* and thereby Ibn Taimiyah’s position seems to have been, by implication, adopted both in Pakistan and Bangladesh. It is important to remember that once such a law (i.e., three pronouncements of *talaq* in one sitting amount to, in fact, one or two only) is passed by the relevant legislature of a Muslim state, then it becomes binding even for those scholars who had disagreed with it before the promulgation of such a law. The reason being that under the Islamic theory of legislation only the state has monopoly over new legislation through “fresh *ijtihad*” and not individual scholars who must follow such legislation.

⁷⁸High Court’s decisions that endorsed and elaborated *Jiauddin* include: *Mst. Rukia Khatun v. Abdul Khaliq Lasker*, (1981) 1 GLR 375 which was divisional bench’s decision of the same High Court; *Zeenat Fatema Rashid v. Md. Iqbal Anwar*, 1995 AIHC 416 (Gau.); *Saira Bano v. Mohd. Aslam*, 1999 (3) Mh. L.J. 718; *Dagdu Chotu Pathan v. Rahimbi Dagdu Pathan*, 2002 (3) Mh. L.J. 602. This is a full bench decision of the Bombay High Court in which it was held that *talaq* must be for a reasonable cause and must be preceded by attempts at reconciliation between the husband and the wife, by the arbitrators, but the *talaq* may be affected if the attempt fails. Other cases are *Najmunbee v. Sk. Sikandar*, 2003 (2) Mh. L.J. 958; *Saheda Khatoon v. Gholam Sarwar*, 2002 Cri. L.J. 4150 (Cal.).

⁷⁹The Supreme Court endorsed the law laid down by the High Courts, especially in the *Jiauddin* case in *Shamim Ara v. State of U.P.* (2002) 7 SCC 518. Five years later, the Supreme Court reaffirmed the *Shamim Ara* decision in *Iqbal Bano v. State of U.P.*, AIR 2007 SC 2215.