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ARTICLES

Women's rights in the Nikahnama in Bangladesh : A critical study

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The International Criminal Court: A Remarkable Achievement Striving Against Global Political Setbacks

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যৌতুক : একটি সামাজিক ব্যাধি

সড়ক দুর্ঘটনা ও ট্রাফিক আইন : প্রেক্ষিত বাংলাদেশ

আদালত অবমাননা, সাংবাদিকতা-প্রকাশনা ও তথ্যের অধিকার : পরিপ্রেক্ষিত বাংলাদেশ

বাংলাদেশের রাজনীতিতে পঞ্চম জাতীয় সংসদের কার্যকারিতা : একটি পর্যালোচনা

Abstract on the Project Changing Pattern of Trade Union in Bangladesh

Abstract on the Project Protection of Human Rights in Criminal Justice: Bangladesh Perspective

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The Impact of Section 7 of the Muslim Family Laws Ordinance on the Validity of *Talaq*: A Legal Analysis

Muhammad Ekramul Haque*

Introduction

Unlike many other religious legal systems Islamic law considers marriage as a contract though there are some differences with the concept of civil contract strictly speaking. It also accommodates a scope to terminate a contract in a number of ways. Thus, Islamic *sharia* law prescribes certain specific procedures to terminate a marriage. It may be terminated by acts of the parties, by death or by operation of law. Apart from unilateral termination to be made by the husband or by the wife being empowered by delegated power of divorce there is also a scope to dissolve a marriage through mutual consent. In whatever method a marriage is dissolved the sharia law nowhere requires any notification to be made to any formal authority expressly in this regard. But, many countries by legislation added some statutory formalities to be observed to terminate a marriage even under Islamic law. The status of those statutes sometimes seems to be obscure for want of clear provision regarding its observance and consequence of its non-observance. Muslim Family Laws Ordinance, 1961 is one such legislation that is now applicable in Bangladesh that lays down certain procedural formalities to be observed to pronounce a *talaq* in whatever mode. *inter alia*, section 7(1) of this Ordinance prescribes a *talaq* to be notified to the Chairman, a local government authority who in turn will take certain steps to conciliate the dispute and after the expiry of 90 days on and from the day of receipt of notification¹ by the Chairman *talaq* will become effective². It is also mentioned in section 7 that non-observance of such

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¹ University of Dhaka.

The High Court Division in *Safiqul Islam and others V. State*, 46 DLR 1994 HCD 700, says that 'A careful scrutiny of section 7 of the Family Laws Ordinance shows the 90 days reconciliation period is to start from the date of the receipt of the notice by the Chairman and not from the date when it was written'.

² It precludes a divorce or *Talaq* from being effective for a period of ninety days from the date of the receipt of the notice by the chairman-' *ibid*.

notification will be punishable but nothing is expressly mentioned regarding its impact on the validity of *talaq*. That is why this statutory provision gives rise to confusion whether still *talaq* is unilateral act or interference of another public body is required by notification under section 7. It has been settled through judicial interpretation that once notice of *talaq* is served to the Chairman, *talaq* will be effective after the expiry of 90 days whether the Chairman takes any further step or not.³ But this is not clear that if someone even does not serve at all any such notice under section 7(1) what will be the fate and legal consequence of the *talaq* pronounced unilaterally? Even if a husband pronounces *talaq* according to *ahsan* method or in exercise of delegated power the wife pronounces a *talaq* but none of them serves any notice to the Chairman, prior to 1961 the *talaq* was treated as an effective *talaq*, but what will happen now after 1961 Ordinance comes into operation? If the statute becomes ambiguous then usually that ambiguity is removed through judicial interpretation. But here two opposing trends of the judicial decisions are found. There are some cases where notice under section 7 has been considered as essential for the validity of a *talaq* while others declared *talaq* as effective even without such notice under section 7. Muslim Family

³ The High Court Division in *Abdus Sobhan Sarker V. Md. Abdul Ghani*, 25 DLR 1973 HCD227, p. 229, says: "It will also appear that although sub-section (4) of section 7 provides that within thirty days of the Talaq of the chairman is required to constitute an Arbitration Council which is to take all steps necessary for reconciliation; nothing has been said in the section or anywhere else in the Act providing as to what will happen if upon receipt of such a written notice of the *talaq* the chairman does not constitute an Arbitration Council or if the Arbitration Council so constituted does not take any steps to bring about reconciliation between the parties. Failure of the chairman to constitute an Arbitration Council or that of a duly constituted Arbitration Council to take necessary steps to bring about reconciliation is thus inconsequential.... Section 7 requires the Arbitration Council neither to decide nor to determine anything upon such notice ... Thus, so far as *Talaqs* are concerned the Arbitration Council has no function except to take steps to bring about reconciliation between the parties. Beyond this the Arbitration Council has nothing to do in this matter. ... Once written notice of the pronouncement of *Talaq* in terms of sub-section (1) is delivered to the Chairman, the *Talaq*, is otherwise valid, will be effective on the expiry of ninety days of the delivery of such notice or if the wife be pregnant at the time of the pronouncement of a *Talaq* till the pregnancy

Laws Ordinance 1961 or even only section 7 gives rise to many important legal issues. The objective of this article is neither to analyze the sharia law, nor the detailed provisions of the MFLO, rather it is to assess only the impact of notification under section 7 on the validity of a *talaq*. In doing so, this study will be totally confined only in analyzing the relevant issues, principles and cases in quest to have the present law in Bangladesh regarding notification under section 7 of the Muslim Family Laws Ordinance, 1961.

2. Analysis of relevant cases

Let us at first examine some Pakistani cases on the point of requirement of notification under section 7 of the Muslim Family Laws Ordinance 1961. Karachi High Court in *The State Vs. Mst. Tauqir Fatima and another*⁴ in 1964 held that non-service of notice under section 7 makes a *talaq* ineffective.⁵ But *Mrs. Parveen Chaudhry vs. 6th Senior Civil Judge, 1st Class, Karachi*⁶ (1976) did not mention notification as essential for the validity of *talaq*.

The Lahore High Court in the same year in *Inamul Islam Vs. Mst. Hussain Bano and 4 others*⁷ considered notification under section 7(1) as mandatory to make a *talaq* effective. Interestingly, the Court also added that even mere notification to the Chairman is not sufficient rather that has to be served to the wife as well. If a *talaq* being pronounced according to sharia law is not notified both to the Chairman and the wife, *talaq* will not become effective.

ends, if it ends after that *iddat* period."

⁴ PLD 1964 (W.P.) Karachi 306.

⁵ A R Khan J says: "... the learned Additional City Magistrate should not straightway have accepted the application of Shamsul Hassan ... in which he had stated that he had divorced his wife on that day, by a valid and irrevocable divorce, because he had failed to give a notice to the Chairman of the Union Council concerned in accordance with the provisions of section 7 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961). ... As no such notice had been given by Shamsul Hassan in this case, the *talaq*, that he had pronounced according to his version, on the 6th December 1962, could not have become effective, *Ibid.* 307-8.

⁶ PLD 1976 Karachi 416.

⁷ PLD 1976 Lahore 1466. The High Court says: 'I do not agree with him that the service of copy of the notice under sub-section (I) of section 7 of the Ordinance is not essential', (at p. 1468).

The Court observed:

There are three important requirements under subsection (1) of section 7: (i) pronouncement of *talaq* in accordance with Muslim law; (ii) service of the notice on the Chairman; and (iii) service of copy of the notice on the wife. If any one of these conditions is not satisfied, the *talaq* would not become effective even after ninety days. The supply of copy to the wife is a necessary part of the requirement of service of notice on the Chairman. Similarly, the provision is clear that the notice to the Chairman shall have to follow a pronouncement of *talaq*.⁸

This decision was followed by the Lahore High Court subsequently in *Rashida vs. Ghulam Raza*⁹ in 1977. But, the same High Court in another subsequent case *M. Zikria Khan vs. Aftab Ali Khan*¹⁰ in 1985 denied the necessity of notification to the wife as an essential requirement for the validity of *talaq*. Thus, in this case it was held that a *talaq* will be effective after the expiry of 90 days on and from the day of receipt of notification of *talaq* by the Chairman though no copy of notice is served to the wife. "Caroll suggests that the interpretation of section 7(3) in the earlier case is preferable to that in the later case".¹¹ "The former gives an opportunity to the wife to try to save marriage within the *iddat* period (Caroll 1985b:278, See Mehdi 1994:166-172)".¹²

The Lahore High Court held in *Akhter Hussain Vs. Collector, Lahore*¹³ that once the notice is served to the Chairman, the Chairman will constitute an Arbitration Council but it will not have the authority to annul the divorce except reaching to concil. If the husband absents himself in the conciliation proceedings still the *talaq* will be effective after the expiry of 90 days from

⁸ *Ibid.*

⁹ PLD 1977 Lahore 363.

¹⁰ PLD 1985 Lahore 319.

¹¹ Haque, Naima; Unpublished thesis submitted in partial fulfillment of the requirements of the University of East London, School of Law for the degree of Doctor of Philosophy, June 1995; p. 88.

¹² *Ibid.*

¹³ PLD 1977 Lahore 1173.

the date of receipt of notification by the Chairman.¹⁴

In Princes *Ayesha Yasmien abbasi Vs. Maqbool Hussain Qureshi and 2 others*¹⁵ both the parties signed the agreement to dissolve the marriage in presence of two witnesses and they also sent it to the Chairman and requested the authority concerned that the marriage between them be dissolved and to complete the formalities with intimation to each one of the parties to the agreement satisfy the notification requirement under section 7(1).¹⁶ By virtue of sections 7 and 8 notification is required even in cases of dissolutions other than by *talaq*.¹⁷

In-1982, it was held in *Muhammad Rafique Vs. Ahmad Yar*¹⁸ that non-observance of notification procedure under section 7 is a punishable act as the violation of the MFLO but it cannot invalidate the *talaq*. Thus the Lahore High Court in this case decided that a *talaq* does not become ineffective on the ground of non-service of notice under section 7 of the MFLO 1961.

¹⁴ The Lahore Court says: "The proceedings before the Chairman were under section 7 of the Ordinance. The requirements of the law furnished therein so far as this section is concerned, are that a 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 supply a copy thereof to his wife. A *talaq* so communicated unless revoked earlier or the operation of it extended in certain circumstances is not to be effective until the expiry of 90 days from the date when such notice is delivered to the Chairman. The Chairman under the law has a duty on receipt of such notice to constitute an Arbitration Council whose duty is to attempt reconciliation between the spouses within the time permitted under the law. The order passed by the Chairman annulling the divorce is clearly without lawful authority and of no legal effect" *Ibid.* (at p. 1173-4).

¹⁵ PLD 1979 Lahore 241, p. 243.

¹⁶ *Ibid.* The Court in this case says: "In the light of the above discussion the Chairman had no authority except to state that proceedings conducted under section 7 had succeeded and that he had nothing more to do in the case. His observations that no recourse had been taken to the provisions of section 7 of the Muslim Family Laws Ordinance, 1961, and that 'the agreement reached between the two matrimonial parties on 28-6-1977 cannot be treated as a notice of *Talaq*' are without lawful authority and without any legal effect." (at p. 246).

¹⁷ *Ibid.*

¹⁸ PLD 1982 Lahore 825.

Though there was a previous decision of the Pakistan Supreme Court (1981) where a *talaq* was not treated as effective for want of notice, Lahore High Court in the above case (*Muhammad Rafique's case*) interpreted Supreme Court decision differently. The Supreme Court there said that the *talaq* stood revoked for want of notice. It was the presumption of the Court that non-service of notice will amount to revocation of *talaq*. Thus, non-service of notice was not considered as a ground for making *talaq* ineffective rather that acted as a revocation of *talaq* that made *talaq* ineffective. *Shameem Hussain Kadri, Actg. CJ* says:

'However, I have given my own reasons on account of the legal intricacies involved in the case and the dictum of the Supreme Court in Mst Ghulam Fatima's case. This was a case where the wife was stated to have been released from the wedlock by her husband by pronouncing Talak and executing Talaknama.... It was held that the Talak did not become effective but stood revoked for reason of no notice having been given by the husband under section 7(1) of the Ordinance. The learned Judge clearly created a distinction between revocation and the taking effect of Talak. It is thus clear that the absence of notice would obviously be a violation of section 7 of the Ordinance only, the crime punishable under the Ordinance. By no stretch of imagination Talak, if pronounced, can be claimed to be ineffective.¹⁹

To reach to such a conclusion the Court also emphasized on the object of section 7 saying that this provision was enacted to protect the women from oppression of their husbands in the name of *talaq*. If the husbands are now given the opportunity to abuse this provision at their interest to hang the women at the middle way claiming that though *talaq* has been pronounced under *sharia* law notice has not been served yet under the statute. Husbands thus try to take the benefits of either of the claims according to their sweet will and the object of law will be simply frustrated.²⁰

¹⁹ *Ibid.*, 831.

²⁰ The Court says: "Suffice it to say that the objective of this Ordinance was to provide protection to the weaker sex from the tyranny, high-handedness and upper hand of the man, surely it did not extend to keep a woman hanging in matrimony." *Ibid.*

*Chuhar vs. Mst. Ghulam Fatima and another*²¹ is another subsequent case (1984) where Lahore High Court gave its decision in line with *Muhammad Rafiffues* case and likewise also has given a similar interpretation of the earlier Supreme Court decision saying "It may be noted that the Honourable learned Judge has not declared *talaq* ineffective for want of notice but in his wisdom has stated that *Talaq* had not become effective but stood revoked. The words 'stood revoked' are of great significance."²² In this case a *talaq* was considered as effective even without service of notice under section 7 of the MFLO. Two points were emphasized to reach to such conclusion, that section 7 cannot be permitted to be used by the husband as a tool of oppression as it appears in this case that he denies the validity of a *talaq* after 15 years of pronouncing it on the ground of non-service of notice whereas by this time the divorced wife has married another person *bona fide* considering that *talaq* as effective. Another point is that there is no evidence of direct or indirect revocation of *talaq* and moreover it was a case of mutual annulment where no such question arises. Ghazanfar Ali Gondal, J in Chuhar case says:

The case in hand is, however, a case of determined *talaq*/separation by mutual consent where the question of revocation does not arise. Although the *Talaq* was pronounced 15 to 18 years back, yet the first husband never revoked it expressly or otherwise, in these circumstances, I am convinced that the main object of section 7 of the Ordinance to prevent hasty dissolution of marriage by *talaq* pronounced by the husband unilaterally, has not been defeated by non-giving of the notice. Section 7 of the Ordinance is obviously for the benefit of female and if section 7(1) of the Ordinance is interpreted in a manner as desired by the learned counsel, it may create many mischiefs (*sic*) ... To my mind, in the case in hand, the non-giving of notice under section 7(1) of the Ordinance does not render *talaq* ineffective. The decisions relied on by the learned counsel are quite distinguishable, inasmuch as, in those cases either *talaq* was revoked expressly/ impliedly/ otherwise or the factum of *talaq* was denied/disputed whereas the situation herein altogether different inasmuch as, the *talaq* was given with full determination and mutual consent and the same was never revoked

²¹ PLD 1984 Lahore 234.

²² *Ibid.* 239.

expressly/ impliedly or otherwise by first husband.²³

Apart from these Lahore and Karachi High Courts decisions there are some decisions of the Supreme Court of Pakistan to be looked into. The Supreme Court of Pakistan in *Syed Ali Nawaz Gardezi vs. Lt. Col. Muhammad Yusuf*²⁴ considered service of notice under section 7 as mandatory to make a *talaq* effective. Referring section 7 of the MFLO 1961 it was argued by the learned counsel of the respondent Mr. Mahmud Ali in this case that "the word 'effective', occurring in sub-section (3) of this section/ means 'effective against the husband only', and that if the husband failed to give required notice to the Chairman the *talaq* would be effective at once"²⁵. But the Court rejected this contention considering it as 'nugatory' to section 7. The Court says:

This interpretation would make the section itself wholly nugatory. All that the husband has to do then is that he should refrain from giving the requisite notice and the *talaq* would automatically take effect. This is exactly the mischief which the section seems designed to remedy.²⁶

The Court then decides that if the husband does not serve such notice under section 7, such abstinence will be treated as revocation of that *talaq*. The Court says:

... it is obvious that 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 dunks 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.²⁷

The decision of *Ali Nawaz* case was followed subsequently in 1981 in *Mst. Ghulam Fatima vs. Abdul Qayyum and others*²⁸ where it was held that "the

²³ *Ibid.*

²⁴ PLD 1963 Supreme Court 51.

²⁵ *Ibid.*, 75.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ PLD 1981 Supreme Court 460.

talaq had not become effective but stood revoked as no notice under subsection (1) of section 7 was given²⁹. In 1982 the Federal Sharia Court in *Shera and another Vs. the State*³⁰ has again followed it where a *talaq* without notice under section 7 was considered as ineffective. But, this decision adversely affected the interest of the woman. In this case, husband pronounced divorce but did not serve any notice under section 7. After two years of such pronouncement is made the wife considering the divorce as final married another person. An allegation of *zina* under the *Hudood Ordinance* was brought against the present couple. The Court convicted them on the ground that the marriage with the first husband was not terminated in the absence of notification under section 7 of the MFLO 1961. Dismissing the appeal made by the second husband the Federal Shariat Court says:

Assuming that some type of divorce had been pronounced by Amir whether oral or in writing, it is not the case of the appellants that the complainant sent any notice of that divorce to the Chairman, Union Council or Union Committee as the case may be as required by section 7 of the Family Laws Ordinance. Non-compliance with section 7 makes a divorce ineffective. It has been held in a number of cases that the relationship of the husband and wife in spite of divorce does not cease to exist in case of non-compliance with the provisions of section 7. In fact in the case of *Ali Nawaz Gardezi v. Muhammad Yusuf*, it was held by the Supreme Court of Pakistan that if divorce is pronounced, the absence of notice to the Chairman, Union Council or Union Committee would amount to retraction of that divorce. The alleged divorce is ineffective and does not put an end to the relationship between Amir and Mst. Jowye. They are even now husband and wife. There can be no doubt that by living apparently as husband and wife and by having sexual intercourse with one another in that capacity the appellants are committing *Zina* with one another and both of them have been rightly convicted.³¹

In *Noor Khan vs. Haq Nawaz and 2 others*³² the Federal Shariat Court did not

²⁹ *Ibid.*, 464

³⁰ PLD 1982 Federal Shariat Court 229.

³¹ *Ibid.*, 232.

³² PLD 1982 FSC 265.

follow the earlier decision where a *talaq* was considered as effective even without any notice under section 7. Because, otherwise there comes unnecessary allegation of *zina*. Thus it avoided the adverse impact of making notification mandatory for the validity of *talaq*. The Court says:

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 Patch 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 Laws 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 in action 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 ... the prosecution was initiated which shows that it was motivated out of revenge and feelings of loss of face.³³

In *Mst. Bashiran and another Vs. Muhammad Hussain and another*³⁴ also the Shariat Appellate Bench considered a *talaq* even without notice under section 7 as valid. If the Court in the said case would not accept that divorce as effective the wife would be convicted of *zina* as she remarried another person *bona fide* relying on the fact of divorce with her earlier husband as valid though notice was not served under section 7 of the MFLO 1961. It is worth mentioning that a written divorce deed was executed in presence of witnesses that was attested by the Notary Public and the Court finally considered it as sufficient to constitute an effective *talaq*.³⁵

The Supreme Court of Pakistan in *Mst. Kaneez Fatima vs. Wali Muhammad*³⁶ differed with Ali Nawaz Gardezi case saying that non-service of notice does not amount to revocation of *talaq*. The Court observed:

³³ *Ibid.*, 275-6 at para 19.

³⁴ PLD 1988 SC 186. [Shariat Appellate Bench].

³⁵ *Ibid.*, 188-9.

³⁶ PLD 1993 SC 901.

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 be revoked. This controversy should be considered from practical and purposive point of view taking into consideration the facts and circumstances of each case.³⁷

The Court finally concluded saying that sending notice to the Chairman under section 7 is a mere formality. The Court says:

In these facts it is to be considered whether strict construction should be given to section 7 of the Ordinance. The provisions of section 7 of the Ordinance have remained controversial from the very beginning and there are conflicting views to general *about* it. Hower, keeping in view the facts of each case the applicability and interpretation of section 7 has to be construed in that light. In a 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 particularly in cases where penal provisions of section 7(2) is to be enforced because in such cases the parties do not willfully commit breach and bona fide believe that they have been divorced with the consent of each other and sending of notice to the Chairman, Union Council, is merely a formality. The notice can be sent at any time thereafter to comply with the provisions of section 7.³⁸

In *Allah Rakha* case (2000), some of the provisions of section 7 were declared as unconstitutional, Dr. Wemer F. Menski nicely summarized the Pakistani position regarding notification under section 7(1) in the following words:

The case law of the 1960s still held that a *talaq* without notice to the wife and the local authority would be invalid. However, already by the 1970s, cases of abandoned Muslim wives who had married another man began to come to the notice of courts. Soon after the introduction of the Zina Ordinance in 1979, prosecution cases for zina began to appear in which ex-husbands who had simply discarded their wife earlier suddenly 'remembered' that they were still married according to the official law. Looking at the facts of such cases, courts in Pakistan decided swiftly that, in

³⁷ *Ibid.*, 915-916.

³⁸ *Ibid.*, 917.

certain circumstances, written notice of the Muslim divorce would not be an essential prerequisite for legal validity. Then, by the mid-1980s, Pakistan's Islamisation had the effect that a husband's *talaq* was now held to be instantly valid because this was so under sharia. By the 1990s, section 7 of the 1961 Ordinance is still on the statute book but its provisions are more or less totally superseded by the re-assertion of sharia law in Pakistan. This development has not yet been properly analysed and therefore has not yet been vigorously criticised.

3. Analysis of Bangladeshi cases

The way the interpretation of section 7 has been developed in Pakistan Bangladesh has not experienced the same. The main reason probably is the absence of any Hudood Ordinance and the Islamization process in Bangladesh. Let us now concentrate on Bangladeshi legal decisions.

It was decided in *Abdul Aziz Vs. Rezia Khatoon*³⁹ that non-service of notice under section 7(1) renders a *talaq* ineffective and even if a *talaq* is pronounced by the husband without notification, the *talaq* will not be effective in law. Later on the High Court Division in *Safiqul Islam and others V. State*⁴⁰ also held that notification under section 7 is essential for making *talaq* effective and unless a *talaq* is confirmed as such by notification such *talaq* will not be effective and the parties will remain as husband and wife in the eye of law. *Mst. Fatema Begum vs. Md. Golam Hossain* (Family Suit No. 61 of 1991) and *Anjuman Ara vs. Md. Abdur Rashid* (Family Suit No. 97 of 1999) are the two unreported family suits where it was held that without serving notice properly under section 7(1) of the MFLO 1961 *talaq* will not be effective.⁴¹

³⁹ DLR 733.

⁴⁰ 46 DLR 1994 HCD 700. Here the Court says: 'A divorce under the Ordinance is not a unilateral act of a person rather it involves a public authority in the matter. ... the marital status of the parties will not in any way change during that period. The parties in law will continue to remain husband and wife till the divorce is confirmed.'

⁴¹ Monsoor, T.; *Judiciary and Gender in Trial: Reported and Unreported Decisions of the Family Courts*, 2005, Nymphaea, Dhaka; p. 28.

But The High Court Division in *Sirajul Islam V. Helena Begum and others*⁴² held that a *talaq* may be effective even if notice is not served under section 7(1) of the MFLO 1961. *Sirajul Islam's* case though says that mere non-service of notice does not make the *talaq* ineffective, but in fact it will appear by a scrutiny of the judgment that such a decision was given in a specific context and not in absolute terms. Discussing the facts of the case it was concluded in the said judgment that the husband 'purposely avoided to give notice to the Chairman of Union Council under section 7 of the Ordinance 1961 and with an intention not to revoke it again, otherwise he would have tried for reconciliation but he did not. Keeping only this fact in the background the Court decided it as such that *'Be that as it may, we are, however, of opinion that mere non-service of notice upon the chairman of the Union Council under section 7 of the Muslim Family Laws Ordinance cannot render the divorce ineffective if the conduct of the husband appears to be so.'* Thus, both the background of the decision and adding the words *'if the conduct of the husband appears to be so'* give the impression that *talaq* will be effective even without notice under section 7 if the husband tries to use section 7 as a device to defraud and does not give notice in order to take the undue benefit by such omission. It is believed generally that the object of the MFLO was to protect the women from the abuse of power of the husband regarding *talaq* by preventing hasty dissolution of marriage and as such to utilize the statute generally for the benefit of the wives. Such an objective also becomes apparent from the following observation made in the case:⁴³

The Muslim Family Laws Ordinance, 1961 is a beneficial legislation. The object of the provision of this Ordinance is certainly for the benefit of the vast majority of a particular class of people. From *the* reading of section 7 of the said Ordinance the object of the said section is to give a benefit to the female preventing a hasty dissolution of marriage by *talaq* being pronounced by the husband unilaterally without giving any scope for reconsideration but such benevolent intention is likely to be converted into an instrument of abuse and tyranny by the husband. Instead of preventing the said abuse it

⁴² 48 DLR 1996 HCD 48.

⁴³ *Ibid.*

may aggravate the sufferings without end. On plain reading of section 7 of the Ordinance 1961 it can be said that it was never the intention of the legislature that a husband exercising his independent act pronouncing, *Talaif* cannot be given effect to until and unless such notice is given to the Chairman, and it means if a husband divorces his wife but does not give notice purposely to the Chairman then the divorce will not be effective till eternity. The intention of (he legislature while enacting the said Ordinance 1961 was to prevent hasty dissolution of marriage and a duty is cast upon the husband to give notice under section 7 of the said Ordinance. If he failed to do so intentionally the very object of the said section becomes redundant.

In formulating the view regarding the impact of non-service of notice under section 7 the court in *Sirajul Islam's* case has relied basically on two Pakistani cases. *Ganhar Vs. Mrs. Ghulam Fatima and another*⁴⁴ is the first one where it was held that 'non-giving of notice under section 7(1) of the Ordinance does not render *talaq* ineffective'. The Court in *Sirajul Islam's* case mentioned that in spite of difference in the facts of these two cases it has relied on Pakistani judgment to settle the issue of the effect of non-service of notice of *talaq* to the Chairmen under section 7 vis-a-vis the validity of divorce. The second Pakistani case that was relied in *Sirajul Islam's* case is *Mrs. Parveen Chaudhry vs. 6th Senior Civil Judge, 1st Class, Karachi*⁴⁵ where it was held that validity of *talaq* is not dependant on serving of notice under section 7 of the MFLO. The Karachi High Court in *Parveen Chaudhry* case has in fact observed that section 7 merely postpones the effect of *talaq* for 90 days.⁴⁶ Mentioning these two cases the Court in *Sirajul Islam's* case finally concluded

⁴⁴ PLD 1984 Lahore 124.

⁴⁵ PLD 1976, 416.

⁴⁶ The Court says: 'In regard to the validity of the divorce we have no hesitation in expressing our confirmed opinion that under the Muslim Personal Law as well as the Ordinance no mode is prescribed for pronouncement of divorce. It is established law that a Muslim can pronounce a divorce orally or make the divorce in writing. In fact, under the Muslim Personal Law a divorce in writing became irrevocable as soon as the same was written but the Ordinance has made inroads into the Muslim Personal Law by providing a machinery and procedure for confirmation of the divorce and postponement of its effect for 90 days.' (*Ibid.*, 419).

that 'in view of the aforesaid decisions of High Courts of Pakistan we hold that the divorce of the plaintiff opposite party is valid and effective ...' Thus, it appears that at the beginning of formulating the opinion the Court in *Sirajul Islam's* case though put the principle on a specific context (using it as a device to defraud), but at the end it has generalized the principle clearly referring two to other Pakistani cases and thus it seems to formulate the general principle that non-service of notice under section 7 does not invalidate the *talaq* if that otherwise becomes effective. [There is another interesting dimension of this case that though it says that mere non-service of notice under section 7 of the MFLO, does not render a *talaq* ineffective does it say that the husband can repudiate a marriage unilaterally without complying with anything? The answer is negative.] In *Sirajul Islam's case* though the court relied on two Pakistani cases, at the same time the court also emphasized on the point that the husband swore an affidavit before the magistrate and sent a copy thereof to the Nikah Registrar under section 6 of the Muslim Marriage and Divorce (Registration) Act 1974. Though the Court has not clearly set such observance of other statutory provision as an alternative to the notification procedure under section 7 of the MFLO, it is obvious that to validate the *talaq* in spite of non-service of notice under section 7 the Court also relied on the fact of making an affidavit before the Magistrate and observance of another statutory formality under section 6 of the said Act of 1974.⁴⁷ A curious analyst may throw a question how would the court decide the case if the husband would not have made such compliance with section 6 under the Act of 1974? Would the court declare a mere unilateral repudiation made by the husband as valid? Clues are there to answer the question both in affirmative and negative. Reliance of the fact and act of the husband in the said case gives rise to the conclusion that the court would not favor a mere repudiation without any statutory formalities

⁴⁷ Dr. Taslima Monsoor (op. dft 41, p. 25) commented that 'At present this area of the law is quite confused as the High Court Division of the Supreme Court of Bangladesh in *Sirajul Islam vs. Helena Begum* has decided that there are other ways to give *Talaq* than giving a notice to the Chairman, as an affidavit before the Magistrate is also equally acceptable. The new trends in the higher judiciary are taking away the best possible protection offered to women for reconciliation.'

whatsoever as it has been observed by the Court that 'Non-service of notice to the Chairman of the Union Parishad under the provision of this section cannot render ineffective divorce disclosed in an affidavit'⁴⁸. But reliance on the two Pakistani cases in unequivocal terms and the policy of the Court not to give chance to the husband to misuse section 7 means that in the guise of notification procedure if the husband tries to take the undue benefit over the wife, the conclusion is that the Court also could favor a unilateral repudiation as valid even without observance of any statutory requirement in the appropriate cases. As it has been also observed in the same case that "When divorce is clearly established by the conduct of the husband, mere non-service of notice upon the Chairman as enjoined by section 7 of the Ordinance does not render the divorce ineffective"⁴⁹.

In 1999, 3 years later after *Sirajul Islam's* case, *Sherin Akhter and other Vs. Md. Ismas*⁵⁰ gives rise to curious impression that the decision in this case implies that validity of a *talaq* is dependant on notification under section 7 of the MFLO 1961. In this case, to declare the *talaq* as effective the High Court Division proved the performance of section 7(1) by the wife where it has been also held that the wife is also required to observe the notification procedure for the validity of *talak-i-tafweed* or delegated divorce. It is worth mentioning here that both the original and appellate lower courts in this case at earlier denied the *talaq* as they were not satisfied about the performance of notification procedure under section 7 properly. But the High Court Division reversed the lower court decision saying "The requirement of sub-section (1) of section 7 of the Muslim Family Laws Ordinance 1961 in my opinion has been duly complied with and the *talaq-e-tafwiz* became effective'. Thus, ultimately it appears that at every stage of this case both lower and higher Courts considered the requirement of notification procedure under section 7 as a factor for declaring the *talaq* as effective.

In 2003 the High Court Division in *Dilruba Aktar vs. AHM Mohsin*⁵¹ settled

⁴⁸ Supra note 42.

⁴⁹ 1996 BLD 477.

⁵⁰ 51 DLR 1999.

⁵¹ 51 DLR 568.

that *talaq* in any form shall not be effective unless section 7(1) is complied with. No such *talaq* where section 7(1) has not been complied with will be treated as an effective *talaq* in the eye of law.⁵² Thus, this High Court decision is made in conformity with the earlier *Abdul Azxz vs. Rezia Khatoon*⁵³ case. Dr. Naima Haque commented in her Ph.D. thesis that 'According to the orthodox law the divorce is effective after the expiry of the *iddat* period, that is after 90 days, but the Ordinance makes it dear that its provisions override other laws, custom and usage's (Section 3 of the Muslim Family Laws Ordinance, 1961)'.⁵⁴ Surprisingly, the Nikah Registrars also register *talaq* in Bangladesh even if it is not pronounced in compliance with section 7 of the MFLO. Such an anomalous situation has been pointed out by Dr. Naima Haque, with her comment that *talaq* thus made or registered without complying with section 7 of the MFLO does not have any effect in the eye of law, in the following words:

Neither the Muslim Family Laws Ordinance of 1961, nor the Muslim Marriages and Divorces (Registration) Act of 1974, provides for maintaining a liaison between the two statutes and they do not state the effectiveness or consequences of divorces if no notice is sent to the *Union Parishad* but nevertheless the divorce is registered at the Marriages and Divorces registration office have no effect in the eye of the law, but in practice such divorces are considered effective by the Kazis.⁵⁵

4. Conclusion

It may be concluded that the family law in Bangladesh does not have any clear statutory provision regarding the validity of a *talaq* pronounced in violation of section 7 of the Muslim Family Laws Ordinance 1961. In the absence of such provision in the statute the courts interpreted the relevant laws differently. The judgments are found on both sides. So far, the latest

⁵² The Court in *Dilruba* case (*ibid.*, 576 at para 50) says: "A close reading of sections 6 and 7 of the Ordinance 1961 manifestly demonstrates that a *Talaq* in any form shall not stand effective and *Talaq* shall be not *Talaq* in the eye of law unless provision contained in section 7(1) is sternly complied with...."

⁵³ 21 DLR 733.

⁵⁴ *Supra* note 11, p. 89.

⁵⁵ *Ibid.*

position of the High Court Division is found in Dilruba case⁵⁶ that decides the requirement of notification under section 7 of the MFLO as mandatory to constitute a valid *talaq* in the eye of law. However, to confirm the legal position in this regard we require a new legislation bringing statutory change or a final pronouncement in this regard from the superior court to remove all ambiguities and confusions.

⁵⁶ Supra note 51.