



INTERPRETING THE LAW ON ABSOLUTE DELEGATED DIVORCE: AN EXERCISE IN COMPARATIVE JURISPRUDENCE

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Abstract:

The article analyzes a fictitious case for extracting the rules of Islamic law about delegated divorce and how these rules may have changed their meaning and scope in the particular context of the legal system of Pakistan after the promulgation of the Muslim Family Laws Ordinance, 1961 (MFLO). It addresses questions such as: what is the effect of delegation of divorce in absolute terms? Does it signify multiple repudiations or only one? Does it remain effective after the end of the session of delegation? Can the delegated right of divorce be withdrawn? How MFLO changed these rules? How the entry in Column 18 of the Nikahnama should be interpreted? The article emphasizes that the muftis and judges need to appreciate the significance of the drastic changes that MFLO has brought in the nature of absolute delegation

Keywords:

Delegated Divorce,
Absolute Delegation,
Session of Delegation

Receiving Date:

22 November 2021

Acceptance Date:

18 December 2021

Publication Date:

30 December 2021

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Facts of the Case

Brief facts of the case are as under: the marriage contract of Zahid and Ayman was concluded on 3rd February, 2007. The marriage was registered under the Muslim Family Laws Ordinance, 1961. In Column 18 of the *Nikahnama*, which asks “Whether the husband has delegated the power of divorce to his wife? If so, under what conditions?”, “yes” was written to signify that Zahid had delegated the right of divorce to Ayman without any condition.

However, Zahid contends that he intended to give Ayman the right of one repudiation only. After some time, differences arose between the couple and all efforts at reconciliation made by their relatives failed. On 1st November, 2018, Zahid informed Ayman through a letter sent to her via registered post that he has withdrawn the right of divorce which he had earlier delegated to her. On receiving the letter, Ayman pronounced divorce two times on 3rd November, 2018.

Zahid contends that after he withdrew the delegated authority, the pronouncement of divorce had no legal effect. As opposed to this, Ayman contends that the right of divorce once delegated cannot be withdrawn and as such the two divorces were effective and enforced.; hence this petition.

Issues Framed

For the purpose of determining the legal consequences of this act, the following issues have been formed:

- a. Whether the act of writing “yes” in column 18 of the *Nikahnama* makes Ayman the owner of the right to divorce or the agent of Zahid in pronouncing the divorce?
- b. Whether the intention of Zahid plays any role in defining the nature and scope of this delegated authority?
- c. Whether Zahid had the right to revoke this authority before Ayman exercised it?
- d. Whether Ayman had the authority to pronounce divorce after the end of the session in which the authority was delegated to her?
- e. Whether Ayman had the authority to pronounce two divorces collectively?

These are the major issues raised in this case. The legal consequences in the Pakistani law and Islamic law will be analyzed separately for the sake of analytical consistency.

Legal Consequences in Pakistani Law

Pakistan inherited laws from British colonial masters. Section 18 of the Indian Independence Act, 1947, provided for the continuity of the pre-independence laws. Thus, it held, *inter alia*:

Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new

Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.³

It is well known that British generally adopted the policy of non-interference in religious affairs as well as in matters which they deemed included in 'personal law.' Hence, there very few pieces of legislation on issues of marriage, divorce, inheritance and the like. One of them was the Dissolution of Muslim Marriages Act, 1939 (Act No. VIII of 1939), which was prompted by problems faced by Muslim women in getting their marriages dissolved and it is well known that the *fatwa* of Mawlana Ashraf Ali Thanawi (d. 1943), titled *al-Hilah al-Najizah li 'l-Halilah al-'Ajizah* (Effective Legal Device for the Oppressed Wife). As the Hanafi law interpreted the grounds for dissolution of marriage very narrowly, it was very difficult for oppressed women to get rid of unhappy marital relationship. Mawlana Thanawi consulted other scholars and, then, after detailed correspondence with Maliki jurists in the Arab world, prepared this *fatwa* in which he accepted some of the rulings of the Maliki School on the basis of compelling necessity. Interestingly, this *fatwa* had detailed discussions on the concept of delegated divorce and it preferred it as one of the effective tools for women who wanted to get out of unhappy marriage relationship, although the *fatwa* recommended delegation of this right to women in a restricted form. This *fatwa* became the basis for the draft bill on the law about dissolution of marriages. However, it is very surprising to see that delegated divorce could not find its place in the said Act.

Thus, issues related delegated divorce continued to be governed by the un-codified provisions of Islamic law (which meant Hanafi law for sunnis), as per the provisions of the Muslim Personal Law (Shariat) Application Act, 1937. In Pakistan, this latter law was replaced by the Act of 1948 which was in turn replaced by the Act of 1962. This law remains applicable in Pakistan. Thus, Section 2 of the Muslim Personal Law (Shariat) Application Act, 1962 (Act No. V of 1962), says:

Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim personal Law (Shariat) in cases where the parties are Muslims.⁴

Had there been no legislation in Pakistan on the issue of delegated divorce, the courts would be bound, as per the provisions of this law, to apply the rules of Islamic law to issues of delegated divorce. However, after the Muslim Family Laws Ordinance, 1961 (Ordinance No. VIII of 1961) was

³ Section 18 (3), Indian Independence Act, 1947.

⁴ This Section has been used by the Supreme Court in a leading case about paternity/legitimacy of children born after the conclusion of the marriage contract. The Court, while interpreting the provisions of Article 128, Qanoon-e-Shahadat, 1984, declared that no person other than the husband could deny the paternity of a child and even the husband's right was very narrow and restricted. See: *Ghazala Tehsin Zohra v Mehr Ghulam Dastagir Khan*, PLD 2015 SC 327.

promulgated, the legal position changed because the said Ordinance has several provisions on the issue. Significant provisions of this Ordinance are examined here.

Governing Law in Pakistan

Section 5 of the Muslim Family Laws Ordinance (MFLO), 1961 makes it compulsory to record the marriage contract in a specified document called the *Nikahnama*. The West Pakistan Rules Made under the MFLO give the specimen of *Nikahnama* in Form II. Column 18 of this Form contains questions about the delegation of the right of divorce stating: “Whether the husband has delegated the power of divorce to the wife? If so, under what conditions?”

The concept of *talaq al-tafwid* was recognized and applied by the courts in pre-partition India.⁵ However, the judges held only those forms of delegation valid which were deemed ‘reasonable’ and not opposed to ‘public policy’.⁶ Sometimes conditional delegation was held repugnant to public policy and as such void.⁷ Absolute delegation was generally considered void on the same grounds. Obviously, this approach was based not on the principles of Islamic law but those of the English law of contract.

In an interesting case,⁸ the validity of absolute delegation of the right of divorce was discussed. Although the case is important in the sense that it upheld the validity of absolute delegation of the right of divorce, it is of no relevance in the present case for two reasons: one, it does not examine the effects of the provisions of MFLO on the issue; and two, the methodology adopted by the Court for determining the rules and principles of Islamic law is defective. Thus, it primarily relied on Charles Hamilton’s translation of *Hidayah*, Baillie’s *A Digest of Muhammadan Law* and D. F. Mulla’s *Muhammadan Law*—none of which is an authentic and reliable source of Islamic law. The case law on the issue was also irrelevant not only because those cases were mostly decided by British judges who had no access to the proper manuals of Islamic law but also because they relied on secondary (and sometimes tertiary) sources and interpreted them in accordance with the principles of interpretation of common law. This is generally true for the whole tradition of the so-called *Anglo-Muhammadan Law*.

In Pakistan, after the promulgation of the Muslim Family Laws Ordinance, 1961, the area is governed by the said Ordinance. Despite this, the courts tend to apply a mixture of the pre-MFLO case law and Islamic law (derived primarily from *Hamilton, Baillie* and *Mulla*) to issues of delegated divorce. Thus, when the Lahore High Court was asked if the *Sunni* wife had the right of delegated divorce when the husband was a *Shi’ah*, it neither examined the issue from the perspective of the provisions of MFLO nor did it settle the issue by a reference to the proper manuals of Islamic law.⁹ Instead, it relied on the provisions of Islamic law as expounded in a pre-partition case.¹⁰ This was a serious error of law as

⁵ Mulla’s *Muhammadan Law*, Section 305.

⁶ See for instance: *Hamidoola v Faizunnisa*, ILR 8 Calcutta (1881) 327.

⁷ *Bai Fatima v Alimahomed*, (1913) ILR Bombay 280.

⁸ *Aklima Khatun v Muhibur Rahman*, PLD 1963 Dac 602.

⁹ *Dr. Qambar Raza Bokhari v Zainab Bashir*, PLD 1985 Lah 187.

¹⁰ *Deedar Hossein v Zahoor-oon-Nisa*, (1841) 2 MLA 441.

Section 1 (2) MFLO is explicit in asserting that MFLO applies to *all Muslim citizens of Pakistan* and the Supreme Court applied the provisions of MFLO even in cases where one of the spouses was neither Muslim nor a Pakistani citizen at the time of the conclusion of the marriage contract.¹¹ Moreover, Section 3 of MFLO gives it an overriding status over all other laws:

The provisions of this Ordinance shall have effect notwithstanding any law, custom or usage, and the registration of Muslim marriages shall take place only in accordance with these provisions.

Hence, the governing law in the case at bar is MFLO.

Form II and the West Pakistan Rules have been made under MFLO, as such the meaning and scope of the word “divorce” are controlled by MFLO. Therefore, writing only “yes” in Column 18 of Form II means that the husband has delegated the right of divorce “in accordance with the provisions of MFLO” to his wife. This position is further substantiated by Section 8 MFLO, which says:

Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by talaq, the provisions of section 7 shall, *mutatis mutandis* and so far as applicable, apply.

This Section changes the whole nature and structure of delegated divorce in Pakistan as explained below.

Determining Scope of the Relevant Legal Provisions on Divorce

If it is MFLO, and not Islamic law or the pre-MFLO case law, which now controls the meaning and scope of divorce in Column 18 of Form II, the legal consequences of absolute delegation can only be checked in the light of the provisions of MFLO. As Section 8 MFLO declares that the provisions of Section 7 are applicable, *mutatis mutandis*, to a delegated divorce, it is pertinent to have a brief sketch of the pre-requisites of effective divorce as laid down in Section 7.

This Section requires that after the husband pronounces divorce “*in any form whatsoever*” he is under an obligation to send “*as soon as may be*” a notice of his having done so to the Chairman of the Union Council and a copy thereof to the wife.¹² Divorce may be revoked “*expressly or otherwise*”.¹³ The Chairman is required to constitute an arbitration council within 30 days of the receipt of the notice for bringing about conciliation between the parties.¹⁴ In any case, divorce remains “*ineffective*” till the expiration of 90 days after the delivery of the notice to the Chairman¹⁵ or the end of pregnancy, if the

¹¹ *Syed Ali Nawaz Gardezi v Muhammad Yusuf*, PLD 1963 SC 51.

¹² Section 7 (1).

¹³ Section 7 (3).

¹⁴ Section 7 (4).

¹⁵ Section 7 (3).

wife is pregnant, whichever is later.¹⁶ The wife can remarry the same husband without an intervening marriage, except where divorce becomes effective for a third time according to this procedure.¹⁷

In *Ali Nawaz Gardezi*, the Supreme Court of Pakistan held that failure to comply with this obligation amounted to implied revocation of the divorce pronounced. The same was reaffirmed by the Supreme Court in many other cases.¹⁸ However, in *Kaneez Fatima*,¹⁹ the Supreme Court held that failure to send notice to the Chairman of the Union Council would not be deemed revocation but it would render the divorce ineffective. In that particular case, the husband was asked that if he wanted to make the divorce effective, he must give notice to the Chairman of the Union Council even if 16 years had passed after the pronouncement of the divorce and despite the fact that divorce was pronounced after a compromise settlement between the spouses. Thus, the Court held that the effect of *talaq* was frozen till the Section 7 formalities were fulfilled. In *Ghulam Nabi*,²⁰ the Supreme Court held that failure to send a copy of the notice to the wife would also render the divorce *ineffective*.

The law, thus, prefers that the wedlock should remain intact and allows the spouse who pronounced divorce to revoke it unilaterally as it makes room for recourse through devising the post-divorce conciliation mechanism. This purpose of the law was recognized by the Supreme Court in *Ali Nawaz Gardezi* where it declared that if the procedure prescribed in Section 7 is not followed, the divorce would be deemed to have been revoked. The argument of the Court was two-fold:

- a. That the intention of the legislature behind the procedure laid down in Section 7 is to put an end to hasty dissolution of marriages and to give the parties time for reconsideration and reconciliation; and
- b. That for this purpose the Section explicitly declares that the pronounced divorce will become effective after the expiry of ninety days.

The Court, then, moved on to declare:

If the husband himself thinks it better of the pronouncement of *talaq* and abstains from giving 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... 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.²¹

¹⁶ Section 7 (5).

¹⁷ Section 7 (6)

¹⁸ See, for instance, *Abdul Mannan v Safurannisa*, 1970 SCMR 845 and *Muhammad Salahuddin Khan v Muhammad Nazir Siddique*, 1984 SCMR 583.

¹⁹ *Kaneez Fatima v Wali Muhammad*, PLD 1993 SC 901.

²⁰ *Ghulam Nabi v Farrukh Latif*, PLD 1986 SCMR 1350.

²¹ *Syed Ali Nawaz Gardezi v Muhammad Yusuf*, PLD 1963 SC 51, at 74-75.

This view has been followed in many subsequent cases and it caused serious problems later on after the promulgation of the Hudood Ordinances. Many a times it happened that a person divorced his wife without following the procedure of Section 7; later, when the woman would marry another person, the former husband would file a case against them under the *Zina* Ordinance claiming that as he did not follow the procedure of Section 7, the *talaq* was deemed to have been revoked and that the woman continued to be his wife; hence, he would claim that the couple committed *zina*.²² The issue was finally resolved by the Shariat Appellate Bench of the Supreme Court in *Bashiran v Muhammad Hussain*.²³ In this case, the Court declared that for the purpose of the operation of the Offence of Zina Ordinance, validity of marriage or divorce would be determined by the personal law (Islamic law) of the couple.

Another worth noting fact is that MFLO does not recognize irrevocable divorce. All the divorces under MFLO, including the third of the three, are revocable. Similarly, only one divorce will become effective after fulfilling the Section 7 procedure even if two or three divorces were given at one time. Section 7 (6) is explicit on this point:

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

This provision puts a period to all discussions on this question.

It is also worth noting that the Federal Shariat Court in *Allah Rakha v The Federation of Pakistan* declared that the provisions of Section 7, MFLO, were repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. However, appeals were filed against the said judgment in the Shariat Appellate Bench of the Supreme Court and the case is still pending decision there. Hence, Section 7, MFLO, with all this baggage remains in filed.²⁴

Applying the Law to Absolute Delegation of the Right of Divorce

As per Section 8, MFLO, in the event of delegated divorce, the wife steps into the shoes of the husband and assumes his rights and obligations. The Pakistani law does not distinguish the legal consequences of the divorce pronounced by the wife from those of the one pronounced by the husband. As Section 8 has it, the provisions of Section 7 shall, *mutatis mutandis*, apply to delegated divorce.

From the foregoing, the following conclusions are drawn for ascertaining the legal effects of delegated divorce:

- a) When the wife pronounces divorce, she comes under an obligation to send a notice of her having done so to the Chairman of the Union Council and a copy thereof to the husband. Failure to comply with this requirement would render the divorce ineffective.

²² See, for instance, *Shera v The State*, PLD 1982 FSC 229.

²³ *Allah Rakha v The Federation of Pakistan*, PLD 2000, FSC 1.

²⁴ *Syed Ali Nawaz Gardezi v Muhammad Yusuf*, PLD 1963 SC 51, at 74-75.

- b) After the Section 7 procedure is followed, only one of the divorces will become effective.
- c) This divorce will be revocable.

As for the question of authority of the husband to revoke the delegated authority before the wife exercises it, the MFLO does not deal with this issue explicitly and there is no reported case law on the issue. However, even a cursory look at the provisions of the MFLO and the rules made there under makes it crystal clear that the law does not allow the husband to revoke this delegation, unless the same is mentioned in Column 18 of the *Nikahnama* in answer to the second question: “If so, under what conditions?” *Therefore, delegation is irrevocable. If the parties want to make a room for revocation, or putting other restrictions on the authority of the wife in using the delegated right, they may mention them explicitly in Column 18.* In the absence of any such restriction, the absolute delegation is irrevocable and it puts the wife on an equal footing with the husband.

On the same grounds, *the delegation of the right of divorce is for life, unless an explicit restriction is put on the time period.* Similarly, *the delegation results in transferring the right of three divorces to the wife, unless it is explicitly restricted to one or two divorces.* However, for making each of the divorces effective she will have to follow the Section 7 procedure.

If the husband pronounces the divorce, he is to follow the Section 7 procedure and he can unilaterally revoke the divorce. If the husband is not willing to revoke it, the wife may try to convince him for revocation during the conciliation process. The same holds true in the case when the wife pronounces a divorce. In such a case, she has to fulfill Section 7 formalities and she may unilaterally revoke the divorce. But if she is not willing to revoke it, the husband cannot unilaterally revoke it. He may, however, try to convince her for revocation during the conciliation proceedings.

Verdict According to Pakistani Law

It is, therefore, safely concluded that under Pakistani law the net result of writing merely “yes” in Column 18 of Form II is that:

- (a) Ayman acquired the right of three divorces for life;
- (b) Zahid had no authority to revoke the delegation and his letter dated November 1, 2018 had no legal effect;
- (c) Only one of the two pronounced divorces will become effective after Ayman fulfills the formalities imposed by Section 7 MFLO. For making the second divorce effective, Ayman will have to go through these legal formalities again.
- (d) In the meanwhile, Ayman may unilaterally revoke the divorce; Zahid cannot revoke it without obtaining the consent of Ayman for which purpose the law has prescribed the conciliation procedure in Section 7, MFLO.

Legal Consequences in Islamic Law

Now, we will look at the rules of Islamic law relevant to the case at bar. After this, the position in Pakistani law will be compared with that in Islamic law. Finally, all the issues will be settled in accordance with the provisions of Islamic law because we believe that *all man-made laws, which are not compatible with Islamic law, are void ab initio*.

It may be noted here that the present analysis is based on the presumption that every school of Islamic law is an internally coherent legal system. It, therefore, focuses primarily on the expositions of the Hanafi School only.²⁵

Relevant Rules of Islamic Law on Delegation of Divorce

Islamic law allows a person to delegate the power of divorcing his wife to another person. This delegation, however, may take place in two different forms: *tawkil* and *tafwid*.²⁶ The former is the ordinary case of making an agency (*wakalah*). The authority of the agent (*wakil*) is limited and can be withdrawn by the principal (*asil*) at will because the contract of agency is non-binding (*ghayr lazim*).²⁷ *Tafwid*, on the other hand, transfers the right fully to the delegatee and thus results in *tamlik*, i.e., making the delegatee the owner of the right.²⁸ *Tafwid* is binding (*lazim*) for the husband so that he cannot revoke it.²⁹ For the delegatee, it is non-binding and he/she may or may choose not to use the option.³⁰

Whenever a person delegates the right of divorce to his wife, it results in *tafwid*.³¹ This may take many forms, such as:

- (a) “Your affair is in your hands” (امرک بیدک);
- (b) “Choose (yourself)” (اختاری);
- (c) “You are divorced, if you wish” (انت طالق ان شئت); and
- (d) “Divorce yourself, if your wish” (طَلَّقِي نَفْسَكَ ان شئت).

As is obvious, (a) and (b) are not explicit in conveying the meaning of divorce and as such they attract the rules about divorce pronounced in ambiguous (*kinayah*) terms.³² As opposed to this, (c) and

²⁵ See for details on this issue: Imran Ahsan Khan Nyazee, *The Secrets of Usul al-Fiqh: Rules for Issuing Fatwas* (Islamabad: Advanced Legal Studies Institute, 2013), 58-64.

²⁶ Malik al-'Ulama' 'Ala' al-Din Abu Bakr b. Mas'ud al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, eds. 'Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud (Beirut: Dar al-Kutub al-'Ilmiyyah, 1424/2003), 4: 247.

²⁷ *Ibid.*, 266-67.

²⁸ *Ibid.*

²⁹ *Ibid.*, 4: 248.

³⁰ *Ibid.*

³¹ *Ibid.*, 266-67.

³² *Ibid.*, 257-58.

(d) are explicit in conveying the meaning of divorce and as such they attract the rules about divorce in explicit (*sarih*) terms.³³ Thus, the resultant divorce is revocable in (a) and (b) and irrevocable in (c) and (d).³⁴

As far as the number of divorces are concerned, all the four forms of delegation mentioned in para 9 give the wife the right of one divorce (revocable in (a) and (b) and irrevocable in (c) and (d)),³⁵ unless the right of three divorces is inferred from other circumstances.³⁶

The intention of the husband plays its role in (a) and (b) only because they are *kinayah*.³⁷ As (c) and (d) are *sarih*, the intention is ineffective in the sense that if he said: “Divorce yourself once, if you wish” and intended three divorces it will result in one divorce only.³⁸ Similarly, if he said: “Divorce yourself thrice, if you wish” and later says that he intended only one divorce, this would be unacceptable.³⁹ However, his intention becomes relevant where the words are absolute, such as: “Divorce yourself, if you wish”. In such a case, the result will be one revocable divorce, unless he intended to give her the right of three divorces.⁴⁰

The delegation may be with or without the mention of time. If no time is mentioned, as in “Divorce yourself, if you wish (ان شئت)”, the delegation remains valid till the end of the session only.⁴¹

If the wording implies an unlimited period of time, such as: “Divorce yourself when you wish (اذا شئت)”, the wife will have this right for life.⁴² If time has been specified, the delegation will remain valid till the expiry of that time.⁴³

Determining the Meaning and Scope of Delegation

Now, when we apply these rules to a situation where the husband merely says “yes” in answer to the question: “Whether you have delegated the right of divorce to the wife,” we draw the following conclusions:

- a) Because the husband delegated the right of divorce to his wife, not to a third person, this delegation results in *tamlík*, not *tawkil*. As such, this delegation cannot be revoked.

³³ Ibid., 263-66.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid., 249-55.

³⁷ Burhan al-Din ‘Ali b. Abi Bakr al-Marghinani, *al-Hidayah fi Sharh Bidayah al-Mubtadi* (Beirut: Dar Ihya’ al-Turath al-‘Arabi, n.d.), 2: 236-40.

³⁸ Ibid., 225.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid., 240.

⁴² Ibid., 242-43.

⁴³ Ibid.

- b) As the word “divorce” has been used in the question, it is the case of explicit divorce which is revocable by the husband;
- c) This is the case of delegation in absolute terms which gives the wife the right of one divorce, unless the husband intended to give her the right of three divorces.

Compatibility of Pakistani Law with Islamic Law

This analysis clearly shows that the concept *tafwid al-talaq* in Islamic law is inherently different from the concept of delegated divorce in Pakistani law. Some important points of differences may be noted here:

- a) In Islamic law, even where the wife pronounces divorce after she has been delegated this right by the husband, she divorces “herself”; thus, if the divorce is revocable, the husband retains the right of revoking it. As opposed to this, in Pakistani law the wife steps into the shoes of the husband and divorces “him” thereby acquiring the rights and obligations of the husband, such as the duty to fulfill the formalities of Section 7 MFLO and the right to revoke the divorce.
- b) Divorce in Islamic law becomes effective from the moment it is pronounced. The procedure prescribed by Section 7 MFLO, which is also applicable to delegated divorce in Pakistani law, is in direct conflict with Islamic law.
- c) In Islamic law, absolute delegation results in transferring the right of one divorce till the end of the session, while delegation in Pakistani law – though it is absolute – transfers the right of three divorces to the wife for life. Thus, Islamic law requires additional evidence for extending the time period for the exercise of the right beyond the session and for transferring the right of three divorces. In Pakistani law, on the other hand, the presumption is that the wife has been given the right of three divorces for life and additional evidence is required for restricting that right.
- d) Islamic law divides divorce into two kinds, revocable and irrevocable, and holds that even one explicit divorce becomes irrevocable after the end of the waiting period (*'iddah*). Moreover, sometimes even one divorce can be irrevocable from the very beginning. Divorce in equivocal terms (*kinayah*) is an example. Irrevocability here means that reunion of the couple is not possible without a fresh contract of marriage (technically it is called *baynunah sughra* or temporary separation),⁴⁴ which also necessitates consent from both sides and agreeing to a new dower. As opposed to this, Pakistani law does not recognize irrevocable divorce at all and holds that even the third divorce is revocable.

⁴⁴ This temporary separation also occurs when the waiting period ends after the first divorce, or when the second divorce is pronounced. In both these cases, fresh contract of marriage with fresh dower is necessary for reunion of the couple. When the third of three divorces is pronounced, permanent separation (*baynunah kubra*) occurs after which reunion is not possible without an intervening marriage.

Applying Islamic Law in the Context of the Pakistani Law

If Zahid was asked in the context of Islamic law if he had delegated the right of divorce to Ayman and he replied “yes”, the result would have been the transfer of one revocable divorce till the end of the session. However, the context of the Pakistani law modifies the situation. Zahid wrote “yes” while filling Column 18 of Form II made under MFLO. This, as noted above, amounted to acknowledging the transfer of the right of three divorces to Ayman for the whole of her life. In other words, the act of writing “yes” in Column 18 of Form II will be deemed “additional evidence” for establishing the intention of transferring the right of three divorces beyond the session. Hence, the context and circumstances in which the right was delegated make it equivalent to Zahid’s saying to Ayman: “Your affair regarding divorce is in your hands”, or “Divorce yourself *when you wish*”.

As far as the husband’s right of revoking a revocable divorce is concerned, *this is a right given to him by the Divine law and no human authority can snatch it from him. Similarly, no human authority can suspend the effect of divorce when the Divine law has made it effective from the moment of its pronouncement.*

The Ruling

By writing “yes” in Column 18 of the *Nikahnama*, Zahid delegated the right of three divorces to Ayman for an unlimited period of time. After this delegation, he had no authority to revoke it. Hence, his letter dated 1st November, 2018, informing her of the revocation of this delegation, was without any legal effect.

Resultantly, the two divorces pronounced by Ayman on 3rd November, 2018, are effective and enforced. The first of these divorces was revocable, but the second was irrevocable. Hence, recourse (*ruju* ‘) is not possible without a fresh marriage contract.

Conclusions

Islamic law envisages that delegation of divorce in absolute and explicit terms gives the wife the right of one revocable divorce till the end of the session of the delegation. The husband after delegating this right to wife cannot revoke it. However, after the wife pronounces divorce, the husband can revoke the divorce without the consent of the wife till the end of the waiting period. As opposed to this, the provisions of the Muslim Family Laws Ordinance, 1961, and the Rules made thereunder about delegation of divorce gives the wife the same authority which the husband possesses and, thus, they change the very nature of delegation of divorce. As per this scheme of the things, divorce delegated in absolute and explicit terms signifies the right of three repudiations for the whole of life. Moreover, such a divorce cannot be unilaterally revoked by the husband. Thus, muftis have to appreciate that in this context when the husband rights “yes” in Column 18 of the *Nikahnama* without further elaborating it, this will signify that he delegated the right of three repudiations to his wife for the whole of her life. However, if the wife pronounces only one divorce, the husband will still have the right of unilateral

revocation, as this is a God-given right which cannot be snatched from him. The law in Pakistan is repugnant to Islamic Injunctions on this last issue. Allah knows best!