

# MUSLIM LAW OF DIVORCE

K. N. AHMAD

KITAB BHAVAN

NEW DELHI - 110002

# THE Muslim Law of Divorce

BY  
K. N. AHMED

WITH A FOREWORD BY  
Mr. Justice, S. Anwar-ul-Haq

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THE  
MUSLIM LAW OF DIVORCE

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## FOREWORD

The institution of marriage is the foundation of all civilized communities and it is, therefore, only but natural that considerable attention has been paid by all religions and systems of law to the principles and rules regulating the contract of marriage and its dissolution. Although a Muslim marriage is essentially a matter of contract, creating rights and obligations for the parties, yet it is considered to be a virtuous act being commended by religion. Thus a Muslim marriage partakes of the nature of both a sacrament and a civil contract. There is considerable divergence of opinion, in several matters touching marriage and its dissolution, between the Shia and the Sunni doctrines and between the various schools of the Sunni sect itself. Mr. K. N. Ahmed has taken great pains in bringing out the rules applicable to each of these schools of thought. He has drawn extensively upon basic authorities and texts of Muhammadan Law, thus enriching this treatise and enhancing its value and interest to all those concerned with the subject.

This book is perhaps the first comprehensive compilation of Muslim Law on the dissolution of marriage to be published in Pakistan. Mr. Ahmed's style is simple and clear. His approach is analytical, and the comparative study of the different systems of law has been undertaken without bias and any preconceived notions. There is no attempt to show one system as being superior to the others. Such objectivity in presentation of this difficult subject is indeed commendable.

Mr. Ahmed's treatment of the effect of conversion of the husband or wife on a Muslim marriage, and his discussion of the conflict of laws in this behalf, will be found to be of particular interest by students of law, lawyers and judges alike. The subject is, of course, stimulating and offers a vast field of study, having international ramifications. Mr. Ahmed has dealt exhaustively with the subject in the light of original

Muslim texts as well as leading judgments of the Superior Courts of a number of countries. The changes introduced by the Dissolution of Muslim Marriages Act, 1939, have also been appropriately noticed.

The development of Muslim Law has considerably suffered in the past owing to a rigid adoption of the doctrine of Taqlid. There is no doubt that the views of the earlier Imams and Jurists are entitled to the utmost respect, and no Court or Commentator will differ from them, except for very compelling or sound reasons, nor can the difference of interpretation mean a departure from a clear injunction of law as contained in the Qur'an or Sunnah, or even Ijma, on any grounds of equity, good conscience or public policy. But the right to understand and interpret the law in the context of the present-day conditions must be recognised and conceded, if the dynamic and universal character of the religion and laws of Islam is to be preserved. I am confident that Mr. Ahmed's book will be found extremely useful for the purpose of promoting an intelligent understanding of Muslim law relating to dissolution of marriage. It is bound to prove indispensable for the legal profession.

S. ANWARUL HAQ

*Chief Justice, High Court of Lahore*

Lahore,

November 13, 1971

## PREFACE

There are several valuable and authentic books on Muslim Law available to us and books by authorities like Ameer Ali and Sir Abdur Rahim command the same respect now as they did nearly a century ago. Many other useful books on Muslim Law have been written by such eminent writers as Tyebji, Nawab Abdur Rahman, Sircar, Wilson, Macnaghten, Saksena and others. These books had been written when India was governed by the English and we were subject to English Law. No doubt, the Muslims were governed by the Muslim Law but even then encroachment was made in the personal laws like those of marriage, divorce etc. Moreover, the English Law used to be applied where so enacted, or where there was a conflict between it and the Muslim Law, while the Anglo-Indian Courts were greatly influenced by the English Law. The result is that the Anglo-Muslim Law differs in several important respects from the Muslim Law, as has been pointed out in the book at relevant places. Another drawback was that those books covered the entire field of Muslim personal law in one or two volumes with the result that no single aspect of Muslim Law could be given exhaustive treatment. Still another difficulty was sometimes felt by the fact that these books dealt with only the Hanafi Law and to some small extent with the Shiah Law. The laws of the other schools of the Sunnis were practically ignored because these books were mainly meant for India, the vast majority of the population of which consists of the Hanafis. The Hanafi Law allows the adoption of the law of another Sunni sect whenever the rigid adoption of Hanafi rule involves hardship to its followers. Unfortunately, this very important principle was either not noticed or was ignored by the Anglo-Indian Courts. Great need has, therefore, been felt for a book overcoming these difficulties.

In this book I have discussed at length in the chapter on Conversion, the conflict between the Muslim, the Hindu and the English laws and the law in force in the U.S.A. It was not possible for me to give the entire Maliki, Shafi'i, Hanbali and Shiah Laws in the book. It would have involved unnecessary repetitions and would have made the book unwieldy and difficult to refer to. I have, therefore, confined myself to discussing the Hanafi Law at length and to giving the laws of the other sects where they differed with the Hanafi law.

I have given and discussed the case-law on various aspects of the law of divorce, but I have not hesitated to differ with the views taken therein where some important provisions of the Muslim Law have been overlooked. All subjects have been discussed exhaustively, and I have relied in my discussion on authoritative books on Muslim Law. I have also endeavoured to give and discuss the basic ideas underlying the rules laid down by the Imams and other Muslim Jurists. The book will not be found to be lacking in authority on these aspects.

The Muslim writers have followed the same order of treatment in their books throughout the ages as was adopted in the second year of the Hijrah. It is rather arbitrary and not very convenient to readers. In this book I have adopted my own order of treatment and it is hoped that it will be found to be more methodical and convenient.

In the end I must confess that the many handicaps under which I worked and wrote this book and which are usually experienced in most developing countries have not allowed me to write the book as I really wanted to. I only hope that the indulgent reader will tolerate any defects that may be found in the work and that future writers will find it helpful as a stepping-stone.

It may be added that different law journals and books have given different spelling of names. In case of difficulty it will be useful to have recourse to the Index of Cases.

Before concluding the Preface, I must fulfil the pleasant task of expressing my gratitude to some persons who rendered



me great help in writing the book. I am thankful to Mufti Amjad Ali Sahib for his selfless and kind assistance. I would have experienced great difficulty in writing the book in the absence of the same. I am especially grateful to Mr. Khalid M. Ishaque, former Advocate-General of West Pakistan, for his ready and unstinted help and encouragement. He read through many chapters of the manuscript and offered valuable advice on several points. He also put his entire library including a collection of rare books on Oriental and foreign laws, at my disposal, and helped me similarly in a number of other ways. In short, Mr. Khalid M. Ishaque's kindness and generosity have been unlimited and I owe a heavy debt of gratitude to him. I must also thank Dr. Fazlur Rahman, former Director, Islamic Research Institute, for his great encouragement to me and the keen interest he took in the book. Dr. Ahmad Hasan also deserves my thanks for his valuable help in proof-reading, checking references etc. and for completing the index of Arabic, Persian and Urdu books. My thanks are also due to Hakim Mohammed Said, S.I. for his kind cooperation in connection with the chapter on Defects in Spouses. I must express my thanks to Aqa Mohammad Shaikh Shariat for his guidance on various Shi'i problems. Lastly, I must express my gratitude to my wife, Masuda Khatun, and my daughters, Miss Rehana Ahmed and Miss Fauzia Ahmed, for their painstaking help and encouragement. They read the greater portion of the book and made many useful suggestions.

My thanks are due to the following for their assistance : Dr. Miss Mahmooda Said, Dr. Mrs. Sadika Naeem A. Jafery, Maulana Abu Talib Jauhary ; Mr. A. A. Zuberi, Secretary, Islamic Research Institute ; and Khwaja Salamuddin of Ripon Press, Lahore.

Karachi  
January, 1972

K. N. AHMED

## NOTE ON transliteration

The system of transliteration of Arabic words adopted in this series is the same as has been employed by the editors of the Encyclopaedia of Islam, new edition, with the following exceptions : q has been used for k and j for dj, as these are more convenient to follow for English-knowing readers than the international signs. The use of ch, dh, gh, kh, sh, th, and zh with a subscript dash, although it may appear pedantic, has been considered necessary for the sake of accuracy and clearer pronunciation of letters peculiar to Arabic and Persian. As against the Encyclopaedia, *tā marbūṭah* has throughout been retained and shown by the ending h or t, as the case may be. This was also found necessary in order to avoid any confusion. In words of Persian origin the retention of the final h is essential as it stands for *hā-yi mukhtaṭafī*, which should not be dispensed with.

References in the text to Qur'ānic verses are from the English translation of the Qur'ān by Maulana Muhammad Ali Lahore.

## ACKNOWLEDGEMENTS

I desire to express my thanks to the following publishers of books and law journals for their kind permission to quote from their works :—

### BOOKS

- |   |   |
|---|---|
| 1. The Ahmadiyya Anjuman, Isha'at-i-Islam, Lahore | English translation of Quran by Maulana Mohammad Ali.                     |
| 2. The Bobbs Merrill, Indianapolis.               | 1. Keezer on Marriage and Divorce.<br>2. Harper, Problems of the Family.  |
| 3. Champman and Hall Ltd., London,                | Morals in Evolution by L. T. Hobhouse.                                    |
| 4. The Calarendon Press, Oxford.                  | Private International Law; G. C. Cheshire.                                |
| 5. Ernest Benn Ltd. London                        | The Mischief of Marriage, J. T. W. Baden Worsley.                         |
| 6. Methuen & Co. Ltd., London.                    | Divorce & Its Problems. E. S. P. Haynes and D. Walker Smith.              |
| 7. Woking Muslim Mission, London.                 | Mishkat-al-Masabih, English Translation by Al-Haj Maulana Fazal al-Karim. |
| 8. William Heineman, London                       | Ideal Marriage, Van. de Velde   |

### LAW JOURNALS

- |   |                              |
|---|------------------------------|
| 1. All England Law Reports, London.                               | The All-England Law Reports. |
| Pakistan Law Decision, Lahore.                                    | The Pakistan Law Decisions.  |
| 2. The Canadian Bar Association, Ottawa, Canada.                  | The Canadian Bar Review.     |
| 3. The Incorporated Council of Law Reporting for England, London. | Law Reports                  |
| 4. Stevens Sons Ltd., London.                                     | The Law Quarterly Review.    |
- (1) W. E. Beckett : The Recognition of Polygamous Marriages under English Law.
- (2) E. J. Cohn, The Nullity of Marriage.
- (3) G. C. Cheshire, Nullity jurisdiction and Remarriage during voidable Marriage.
- (4) Prof. J. D. Huges, Judicious method and the problem in Ogden vs. Ogden.
- (5) H. C. Morris, Nullity of Marriage.
- (6) M. Schmithoff, Validity of Marriage and the Conflict of Laws.
- (7) Nullity Jurisdiction and Marriage (Notes).
5. W. Green and Sons Ltd.                      Scots Law Times.  
Edinburgh, Scotland.
6. Many other Law Journals have also been consulted in the preparation of this book and this is gratefully acknowledged.

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- The Muslim Family Laws Ordinance, 1961, Ordinance VIII of 1961.....11, 13, 17, 30, 31, 32, 33, 37, 39, 76, 78, 82, 83, 87, 135, 138, 143, 146, 280, 293, 684, 914
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## ABBREVIATIONS

A.C. preceded by date e.g., (1900) A.C. Add.	Law Reports, Appeal Cases, House of Lords. since 1890 (Eng.). Adams Ecclesiastical Reports, 3 vols. 1822-1826 (Eng.). Agra High Court Reports (India).
Agra H.C.R.	All India Reporter.
A.I.R. Preceded by the number of year, name of H.C. and followed by the number of page. Thus A.I.R. 1950 Lah. 236.	
The High Courts referred are :	
Allahabad (All.) ; Bombay (Bom.) ; Calcutta (Cal.), Lahore (Lah.) ; Madras (Mad.) ; Nag- pur (Nag.) ; Oudh ; Patna (Pat.) ; Peshawar (Pesh.) ; Rangoon (Rang.) ; Sind.	
Ala.	Alabama Reports (U.S.A.).
Alaska.	Alaska Reports (U.S.A.).
A.L.J.	Allahabad Law Journal (India).
All.	Indian Law Reports, Allahabad.
A.L.R.	Annotated Law Reports series (Eng.).
All. E.R.	All England Law Reports, Since 1936 (Eng.).
Am. Dec.	American Decisions (U.S.A.).
Am. Rep.	American Reports (U.S.A.).
Am. St.	American State Reports (U.S.A.).
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875-1890 (Eng.).
App. Div.	South-Africa Reports, Appellate Division.
Ariz.	Arizona (U.S.A.).
Arks.	Arkansas Reports (U.S.A.).
Atl.	Atlantic Reporter (U.S.A.).
A.W.R.	Allahabad Weekly Reporter.
B. Mon.	B. Monroc's Reports (Kentucky).
Beng. L.R.	Bengal Law Reports (India).
Bom. H.C.R.	Bombay High Court Reports, 12 vols. 1861-1875 (India).
Bom. L.R.	Bombay Law Reports (India).

Bom. L.J.	Bombay Law Journal (India).
Bur. L.J.	Burma Law Journal (Burma).
Bur. L.T.	Burma Law Times (Burma).
Cal.	California Reports (U.S.A.).
Cal. App.	California Appellate Reports (U.S.A.).
Can B.R.	Canadian Bar Review (Canada).
Car.	Carolina Reports (U.S.A.).
Ch. preceded by date.	Law Reports, Chancery Division, since 1890.
Ch. App.	Law Reports, Chancery Appeals 10 vols., 1865-1875 (England).
Ch.D.	Law Reports, Chancery Division 45 vols., 1875-1890 (England).
Cl. & Fin.	Clark & Finnelly's Reports, House of Lords, 12 vols., 1831-1846 (England).
C.L.J.	Calcutta Law Journal (Indian).
C.L.R.	Calcutta Law Reporter (Indian).
Colo.	Colorado Reports (U.S.A.).
Conn.	Connecticut Reports (U.S.A.).
Cr. L.J.	Criminal Law Journal.
Curt.	Curtei's Ecclesiastical Reports, 3 vols. 1834-1844 (England).
C.W.N.	Calcutta Weekly Notes (India).
D.L.R.	Dacca Law Reports (Pakistan).
Dec. (Deccan) L.R.	Deccan Law Reports, Hyderabad Deccan.
Drew.	Drewry's Reports, Chancery, 4 vols. 1852-1859 (Eng.).
E.A.L. Reports	East Africa Law Reports.
Ecc. & Ad.	Spink's Ecclesiastical and Admiralty Reports, 2 vols. 1853-1855.
Ga.	Georgia Reports (U.S.A.).
Hag. Con.	Haggards Consistorial Reports, 2 vols., 1789-1821 (England).
Hag. Ecc.	Haggards Ecclesiastical Reports, 4 vols. 1827-1833 (England).
H.L.Cas.	Clark's Reports, House of Lords, 11 vols., 1847-1866. (England).
I.A.	Law Reports, Indian Appeals Privy Council, 1873.
I.C.	Indian Cases.
Ill.	Illinois Reports (U.S.A.).
Ill. App.	Illinois Appellate Reports (U.S.A.).
I.L.R.	Indian Law Reports.
Ind.	Indiana Reports.

Ind. App.	Indiana Appeals Reports.
Iowa.	Iowa Reports (U.S.A.).
J.P.	Justice of the Peace, since 1837 (Eng.).
Jur.	Jurist Reports, 18 vols. 1837-1854 (Eng.).
Kans.	Kansas Reports (U.S.A.).
K. B : preceded by date and number of vol. followed by page, e.g. 1905 2 KB 3.	Law Reports, King's Bench Division, 1900- 1952-53 vols.
Kyi	Kentucky Reports (U.S.A.).
Ky.L.	Kentucky Law Reports, U.S.A.
L. (Lah).	Law Reports, Lahore Series (Pakistan).
L.B.R.	Lower Burma Rulings.
L.J. (Ch)	Law Journal, Chancery 1831-1946 (Eng.).
L.J. (o.s.)	Law Journal, Old Series, 10 vols. 1823-1831 (Eng.).
L.J.P.	Law Journal, Probate, Divorce and Admiralty, 1875-1946. (Eng.).
L.J. (P.C.).	Law Journal, Privy Council, 1865-1946 (Eng.).
L.J. (P. & M).	Law Journal, Probate and Matrimonial Cases, 1858-1859; 1866-1875 (Eng.).
L.J. (P. M. & A.)	Law Journal Probate, Matrimonial and Admiralty, 1860-1865 (Eng.).
L.J. Q.B. or K.B.	Law Journal, Queens' Bench, or Kings Bench 1822-1946 (Eng.).
L.L.J. preceded by date	Lahore Law Journal (Pakistan).
L.J.R preceded by date.	Law Journal Reports, 1947-1949 (Eng.).
L.Q.R.	Law Quarterly Review (Eng.).
L.R.A	Lawyer's Reports, Annotated. (Eng.).
L.R.A.C.	Law Reports. Appeal Cases (Eng.).
L.R. Ch.D.	Law Reporter, Chancery Division (Eng.).
L.R.H.L.	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols. 1866-1875 (Eng.).
L.R.(K.B.) .	Law Reports, Kings Bench, 10 vols., 1865-1875 (Eng.).
L.R.P.C.	Law Reports, Privy Council, 6 vols., 1865-1875 (Eng.).
L.R.P. & D.	Law Reports, Probate and Divorce, 3 vols., 1865- 1875 (Eng.).
L.R. (Q.B.).	Law Reports, Queens' Bench, 10 vols., 1865- 1875 (Eng.).



L.R. (Sc. & Div.).	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols. 1866-1875 (Eng.).
L.T.	Law Times Reports, 1859-1947 (Eng.).
Lucknow.	Indian Law Reports, Lucknow series.
M. (Mad).	Indian Law Reports, Madras Series. All India Reporter, Madras Series.
Mass.	Massachusetts Reports (U.S.A.).
Md.	Maryland Reports (U.S.A.).
M.H.C.R.	Madras High Court Reports.
M.I.A.	Moore's Indian Appeal Cases, Privy Council, 15 vols. 1836-1863.
Mich.	Michigan Reports (U.S.A.).
Minn.	Minesotta Reports (U.S.A.).
Misc.	Miscellaneous Reports (U.S.A.) (N. Y.)
M.L.J.	Madras Law Journal (India).
M.L.T.	Madras Law Times (India).
M.L.W.	Madras Law Weekly (India).
M.O.App.	Missourie Appeal Reports U.S.A.
Mont.	Montana Reports U.S.A.
M.W.N.	Madras Weekly Notes.
Nag.	India Law Report, Nagpur.
Nag.L.J.	Nagpur Law Journal (India).
Nag.L.R.	Nagpur Law Reporter (India).
N.Car.	North Carolina Reports (U.S.A.).
N.Dak.	North Dakota Reports (U.S.A.).
N.E.	North Eastern Reports (U.S.A.).
N.H.	New Hampshire Reports (U.S.A.).
N. L. J.	Nagpur Law Journal.
N.Mex.	New Mexico Reports (U.S.A.).
N.W.	North Western Reports (U.S.A.)
N.Y.	New York Reports (U.S.A.).
N.Y.S.	New York Supplement (U.S.A.).
O. C.	Oudh Cases (India).
Okla.	Okla Reports.
O.L.J.	Oudh Law Journal (India).
Ore.	Oregone Reports (U.S.A.)
Oudh.	All India Reporter, Oudh Series.
O.W.N.	Oudh Weekly Notes (India).
Preceded by date.	Law Reports, Propbate, Divorce and Admiralty Division, since, 1890 (Eng.).
Pa.	Pensylvania Reports (U.S.A.).
Pa.Sup.Ct.	Pennsylvania Supreme Court Reports (U.S.A.).
Paige.	Paige Chancery (N.Y.) (U.S.A.).