

'Bai'ah' according to Islamic jurisprudence

The current debate over oath-taking and its combination with divorce and pledge of political allegiance (bai'ah) has caused concern among Muslims to know Islam's own viewpoint on the issue.

The facts remain unclear but continued media coverage of the "oath of loyalty" linked to Pas representatives to divorce their wives (talak tiga) if they jump or quit the party has invoked public disapproval of this manner of oath-taking and its negative impact on the sanctity of marriage.

This is also a reliable indicator of Islam's outlook on this matter and may well provide the basis for a juridical consensus of our learned scholars to proscribe and denounce the oath-taking at issue.

Taking an oath proper (yamin) is permitted, according to the directive of a hadith, but in the name only of God and His revealed speech, the Quran.

Muslims are also cautioned not to debase God's illustrious name in frivolous oath-taking (Q.2:224). An oath may thus be taken for a valid reason, to show earnestness to observe or avoid a certain conduct in the future, or ascertain the truth of a past event, such as of witnesses before a court.

Oath-taking to divorce one's wife is basically ultra vires, but the jurists admitted it as a form of oath due to its continued practice among Muslims of a pre-Islamic usage that survived the advent of Islam. Muslim jurists consider this, not as yamin proper, but something of compromised validity they named as half.

Yet it became moot whether taking an oath on a contingent divorce was an oath proper, or a suspended divorce (talaq ta'liq). Since the oath in question is not in God's name, it is oath in a figurative sense (majazi) only. Muslim jurists have, however, disagreed over the juridical consequences of such an oath.

The four Sunni schools of Islamic jurisprudence have held that a suspended divorce takes place when its condition materialises, regardless as to whether it was taken by way of an oath, or a suspended divorce for its own sake. This conclusion is based on a hadith simply declaring that "Muslims are bound by their stipulations". A suspended divorce consequently occurs as pronounced in the first place.

The Zahiri and Shia schools have held that a suspended divorce, be it in the form of an oath or otherwise, does not occur ab initio, due mainly to the existence of doubt over its underlying intent: did he actually mean to divorce his wife or merely to show earnestness in respect of another purpose?

Ibn Taymiyyah (d.1328 CE) and his disciple, Ibn Qayyim al-Jawziyyah, have held that

if the suspended divorce was taken by way of an oath only, even when its contingent event materialises, divorce does not occur, but the oath-taker is liable to an expiation (kaffarah) that consists of giving charity or fasting. Ibn Qayyim agrees but holds that no expiation is required.

However, if the suspended divorce is pronounced for its own sake, not combining with an oath, then it does take place whenever its contingent event materialises.

The hadith which declares that "divorce is the worst of all permissible things in the eyes of God" implies that all divorce is reprehensible (makruh).

A suspended divorce, when intended, is worse in the sense that it puts the marriage, which the Quran characterises as a solemn covenant (mithaqan ghaliz) in a state of insecurity and suspense (Q.4:21).

Although essentially a civilian contract concluded between two willing parties, marriage in Islam has a devotional (ta'abbudi) aspect that sets it apart from other contracts.

There is disagreement between the Hanafi and Syafii schools over the interpretation of a Quranic verse authorising women who attain intellectual maturity (rushd) to manage their own property transactions (Q:4:6).

The Hanafis drew the conclusion that if an adult woman is authorised to conclude financial contracts, she can, by analogy, also contract herself into marriage without the intervention of a guardian (wali).

The Syafii's retort that marriage is not like other financial contracts as it involves family relations, hence the analogy at issue is discrepant (qiyas ma'al-fariq), which is void, and the presence of wali is a requirement of marriage even of adult women.

These interpretations remain unresolved to this day. A message one can draw from this may be that marriage and divorce should not be mixed up with other transactions, including party-political matters.

A bai'ah fortified by a suspended divorce is also unprecedented in that it consists of an unconditional pledge of loyalty, which the early Muslims took to support the Prophet in the propagation of Islam and counted as an act of merit (Q.48:10).

The Prophet also took bai'ah from women, as the Quran recounts that "they avoid shirk (associating other deities with God), committing theft, adultery, infanticide, slander..." (Q:60:12).

Following the spread of Islam in Arabia and beyond, bai'ah lost its theological

application and took a predominantly political character.

In the constitutional theory of caliphate that Muslim jurists subsequently formulated, bai'ah became a requirement of valid election to the caliphal office.

This was not conditional, however, nor has there been any bai'ah in our history to combine with a suspended divorce. A bai'ah in our times is the rough equivalent of a vote. Just as a vote is unconditional, so is the bai'ah.

A vote in a parliamentary or presidential election cannot take a condition to say, for instance, that "I vote for you provided that you do such and such". A condition of this kind would render the election inconclusive. This can also be said of bai'ah.

The alleged bai'ah-cum-suspended divorce that the media has reported of Pas representatives is unprecedented and amounts to a bid'ah (pernicious innovation), which calls for renunciation and avoidance.

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