

Triple Talaq: An Insult to Muslim Womenhood

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ABSTRACT

The most atrocious form of dictatorship to which Muslim women have been going through since time immemorial is the despicable custom of instant divorce which is against law and equity. Triple Talaq is unilateral, arbitrary, and abrupt, and leaves no scope for a couple's reconciliation or for a woman's say in the matter. This illogical practice of triple divorce neither found a place in a holy Quran nor in Sunnah of Prophet Mohammed which provide for a proper and egalitarian treatment of women. All Muslims are also not unanimous on this form of divorce. All 'ulama agree that pronouncing triple talaq in one sitting is bid'ah (innovation) and that bid'ah is sin and yet this sinful practice is enforced in the name of divine law. Custom like triple talaq vitiates three of the most prime fundamental rights enshrined in the constitution of India viz. Article 14 which speaks of equality, Article 15 which speaks against discrimination and Article proclaiming the Right of life and liberty. So discriminatory practices like triple talaq should go not only because they go against the Quran or many Islamic countries have done away with them but they must go because they violate democratic rights guaranteed by the constitution. Every possible attempt should be made to eradicate this sinful practice from our society. Quranic spirit for equality must be inculcated in making the frameworks of legislation for enforcing divorce amongst the Muslim community. Though held to be un-Islamic by many Muslim scholars and activists in India, Triple Talaq is still very commonly practiced by Muslims and, sarcastically validated by many Muslim religious leaders in India

Keywords: - Triple Talaq, Islamic, Sunnah, Quran, Reconciliation

INTRODUCTION

In today's world of advanced science and technology, where man and women, irrespective of their sex, works for a better tomorrow, custom like Triple Talaq clearly shows that in Muslim community it is the husband who wears the trouser. Theoretically the body and soul of Islam provides a very sound principles for dissolution of marriage in which both male and female have equal rights all and

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sundry and there is no discrimination between them but the real situation does not seem to be this. Gap is clearly visible between formulation of Shariah and teaching of holy Quran.

Talaq is an ancient institution and it is the biggest achievement of Islamic Jurisprudence that it contains the right for both the partners to dissolve the marriage. A matrimonial alliance is entered into for love, kindness and peace among spouses. If any marriage becomes devoid of the characteristics of peace and harmony for which it is a rearing ground and instead converts into one relentless nightmare, it is obviously a torture for both the partners. So in such circumstances Islam protects them from such kind of permanent torture. Thus by recognizing right to divorce, Islam protects husband and wife from such a living hell, which could be injurious to society.

Islamic law recognizes matrimonial alliance as civil contract and not as sacrament which is eternal unlike Hinduism. Regardless of its contractual nature the institution of marriage is better known as Sunna i.e. practices of the Prophet. But in spite of, marriage is Sunnah of prophet; Islam permits dissolution of matrimonial contract in unavoidable circumstances. Islam encourages reconciliation between spouses rather than severance of their relations. But where a better relation between husband and wife becomes distinctively unworkable Islam does not keep them coupled in a disgusting fetter to a hurting and unbearable position. In such situation divorce is recognized.

Justice Krishna Iyer has rightly observed that there is a very misleading notion under Muslim law that husband has a supreme authority to repudiate the marriage. But the Quranic verses explicitly forbid a Muslim husband to divorce his wife if she remains loyal and true to him and respects the matrimonial bond. He further opined that the study of Muslim law reveals a realistic, rational, amazingly contemporary law of divorce.³

VARIOUS MODES OF DIVORCE UNDER MUSLIM LAW

The word Talaq as used during the Jahiliya period means untying a knot or being released from covenant. It is a derivative of itlaq, which means sending away or untying the knot of marriage. Thus Talaq essentially means coming out of the marital knot and becoming free.

Marriage under Islam can be repudiated in four ways namely one from husband's side that is known as Talaq, the other from the wife's side which is known as Khula. The third form of dissolution of marriage is that the parties can be separated through mutual consent known as Mubaraat. Islam firmly believes that in the interest of family and society matrimonial dispute must be resolved by the parties and their arbitrators and must not be made public and disclosed before the court because

³ A. Yousuf Rawther v. Sowramma AIR 1971 Ker. 261

husband and wife are declared to be a libas(cloth) of each other in the holy Quran. So as a last resort the qazi/court is permitted to get the marriage dissolved if it is broken down; this is known as Faskh (Judicial Divorce). Under Dissolution of Muslim Marriage Act, 1939 the court can dissolve the marriage on eight grounds at the initiative of wife and the ninth ground talks about “any other ground prescribed or permitted under Muslim law”.

‘Talaq’, namely, repudiation of marriage by husband, can be classifying into two categories i.e. Talaq-e-sunnat and Talaq-e-biddat. Muslim husband which is of sound mind and attain puberty has right to repudiate the marriage at any time even in the absence of wife and without providing any reason. This practice has attained a relevant place in present time also, even though prophet strongly hates it.⁴

Here we only discuss dissolution from husband’s side that is Talaq. There are three modes in which the husband can exercise his power of divorcing his wife.

a) Talaq in Ahsan form: - The most approved form of Divorce

Most approved and recognized practice of repudiation of marriage under Islamic Jurisprudence is giving Talaq in Ahsan form. An Arabic word Ahsan means ‘best’. This form of divorce is recognized by all schools of Muslim law. In this form of divorce Muslim husband makes a single pronouncement of the word talaq during tuhr (i.e. period between two menstruation) followed by abstinence from sexual intercourse for the period of Iddat. The duration of iddat is 90 days or three menstrual cycles (in case, where the wife is menstruating). Alternatively, the period of ‘iddat’ is of three lunar months (in case, the wife is not menstruating). Ahsan is known as best form of divorce because it can be revoked either expressly or impliedly during the iddat period. If the couple resumes cohabitation or intimacy within the period of iddat the pronouncement of divorce is treated as having been revoked. Conversely, if there is no resumption of cohabitation or intimacy, during the period of ‘iddat’, then the divorce becomes final and irrevocable, after the expiry of the ‘iddat’ period. It is considered irrevocable because, the couple is forbidden to resume marital relationship thereafter, unless they contract a fresh ‘nikah’ (marriage), with a fresh ‘mahr’.

By resorting to this form of divorce hasty, thoughtless divorce can be prevented. Another advantage of this form of talaq is that couples need not to follow the cruel practice of halala.

b) Talaq in hasan form : - Approved method of divorce

Talaq-e-hasan is another permitted method of divorce under Muslim law that consist of three pronouncement made during three successive tuhr namely three consecutive periods of purity of the

⁴ Sri G.Anwar Basha, “Triple Talaq-Arbitrary act of husband is not approved by Quran” 4SCJ3-9(2017)

wife. The word talaq must be pronounced during the period of purity of the wife. Talaq become irreversible on last pronouncement. The consequence of such pronouncement is that marriage is dissolved, sexual intercourse becomes unlawful; iddat becomes obligatory; re-marriage between parties also becomes impossible unless she go through Halala.

This form of divorce is commonly misunderstood. The correct legal position is found in the views of a great Indian Muslim jurist, Moulana Ashraf Ali Thanavi who has clearly explained as under:⁵

“A person pronounces a revocable (raji) talaq. He then reconciles and resumes cohabitation. Two or four years later, under provocation he once again pronounces a revocable talaq. On recovering from provocation, he again resumes cohabitation. Now two talaqs are over. Hereafter, whenever he pronounces a talaq, it will be counted as the third talaq, which will dissolve the marriage forthwith, and should a remarriage be desired by the parties necessitate halala (inter-mediatory)”.

The distinction between ‘talaq-e-ashan’ and ‘talaq-e-hasan’ is, that in the former there is a single pronouncement of the word ‘talaq’ followed by abstinence during the period of ‘iddat’, whereas, in the latter there are three pronouncements of the word ‘talaq’, interspersed with abstinence. As against ‘talaq-e-ahsan’, which is regarded as ‘the most proper’ form of divorce, Muslims regard ‘talaq-e-hasan’ only as ‘the proper form of divorce’.

Both the approved form of Talaq do not show any unjustified power to the Muslim man, it only gives a right to a Muslim man to dissolve his Marriage. Also for the dissolution of Marriage, he is provided with the reconciliation period.

c) Talaq-e-Biddat: The Disapproved form of Divorce

Talaq-e-biddat popularly known as triple talaq, is regarded as a innovative and irregular form of Islamic divorce which has been practice by Muslims in India, especially adherent to Hanafi Sunni Islamic school of jurisprudence. In this form of divorce a man can divorce his wife by simply uttering the word talaq thrice. A peculiar feature of this Talaq is that though it is regarded as sinful and innovative but as soon as the words are pronounced divorce will take place and there is no opportunity of reconciliation between the parties. This latitude in the marriage and in the matter of divorce destroys that sense of security which is so fundamental for a full, free and happy life for a woman. In instant divorce, after pronouncement of the word talaq the wife will become haram for him and he cannot remarry her without following the barbaric practice of Halala. As per the practice of Halala he can go for nikah with her only after she marries another person and that person divorces her after consummation of marriage or she becomes a widow.

⁵Ashraf Ali Thanavi, Bahishti Zewar IV Rule 33 (1987)

As far as historical background of triple talaq is concern it was introduced by the Omayyad monarchs in the second century of the Mohammedan era. It was the second calipha Hazart Umar who had enforced Triple pronouncement as Triple Talaq in order to prevent the misuse of divorce laws by the Arabs. It is within the power of calipha of that time to implement certain ordinance in view of the prevailing condition or to meet some emergency situation and everybody must follow it. The Islamic Shariah which was formulated more than hundred years after the death of the Prophet and had evolved under complex influences of various civilizations took away what was given to women by the Prophet and the Quran. This issue of Triple Divorce in one sitting illustrates this very well. The husband holds the key, to assign no reason, to go to no court, take no consent of the wife, give no regard to her condition, follow no procedure or formality, and just pronounce Talaq.

THE INTERPRETATION OF TRIPLE DIVORCE IN TRUE ISLAMIC SENSE

“The lawful thing which Allah hates most is divorce.” ~Prophet Mohammad [PBUH]

The concept of “triple talaq in one sitting” or “Instant Talaq” is alien to holy Quran. This cruel practice finds its root in Islamic jurisprudence because a vast majority of Indian Muslim are adherents of the hanafi school of thought, which is one of the schools, of Sunni sect, that consider this practice of divorce as valid.

Fyzee was of the view that the divorce laws, no matter what it's value during the past, was so construe at least in the Hanafi School that it had become a one-sided engine of tyranny in the hands of the husband.

In the bench mark case of *Shamim Ara v. State of U.P.*⁶, the apex court observed that the law relating to dissolution of marriage provide under verses of holy book (Quran), (i) reasonable cause must exist for pronouncement of talaq (ii) the procedure of reconciliation must follow which provides for appointment of mediator from both side and they together would attempt reconciliation, failing which the decision for divorce will be recommend to Qazi.

India should learn a lesson from other countries in the world; far reaching reforms relating to unilateral divorce have been introduced during the recent years, in many Muslim countries⁷. In Egypt, Iraq, Pakistan, Bangladesh, Jordon and Bangladesh unilateral divorce is allowed, but it must be duly registered and defaulting husband is liable to punishment.

⁶ AIR 2002 SC

⁷Tahir Mahmood, Family law reform in the Muslim World, Indian Law Institute 1972.

JUDICIAL APPROACH AND GENDER DISCRIMINATION WITH MUSLIM WOMEN

Religion is not responsible for the denial of justice to Muslim women but it is as a result of lack of legal formality resulted in exemption from law. Judicial attitude towards Triple talaq is also seems to be tolerable except in few cases, judiciary always recognize it as valid form of divorce. In British India as well as in the independent India all the courts are declaring triple declaration of divorce as valid and lawful. The court justifies their action by using a common phrase, “Triple Talaq or Instance divorce is bad in theology, but good in law”.

Recently in the case of Shayara bano vs. Union of India⁸, Justice Joseph who formed majority judgment came up with memorable statement, “what is held to be bad in the holy Quran cannot be good in Shariat”.

Position before Independence

Instant divorce is recognized by Indian Courts. In an early case Sara Bai v. Rabi Bai⁹, where the parties belonging to the Hanafi Sunni sect, husband in the presence of two witnesses pronounced divorce to his wife before the qazi, and had a Talaq-Nama written out by the qazi, which was signed by the husband and attested by two witnesses, but in the absence of wife. The contention of wife was that it was not complete and final as it was not communicated to her. It was held that ‘bain talaq’ being absolute it was effective as soon as the words were written even without the wife receiving the writing.

In Amiruddin v. Khatoon Bibi¹⁰, Mohammad Rafiq and Piggott.J.J in their judgment held that the most widespread and rampant method of repudiation of marriage in the country was talaq-e-biddat . They observed: “ It is true that the Sunna and tradition, sanctioned only two modes of divorce, i.e. Ahsan and Hasan, but ever since the second century of the Mohammad era the biddai or sinful or irregular form introduced by jurists which is admittedly inconsistent with the tradition has been also recognized as valid mode of repudiation”.

Ahamad kasim Molla v.Khatoon Bibi¹¹ is a landmark judgment in the sense that, although the judge upheld the divorce given by the husband but, justice Costello ‘regretted’ his action and observed, “I regret that I have to come to the conclusion that as the law stands at present, any Muslim may divorce his wife at his mere whim and caprice”.

⁸22 August, 2017

⁹(1905) ILR 30 Bom. 537

¹⁰(1917) ILR 36 All.371

¹¹ AIR1933Cal.27

Position after Independence

The position even after independence not seems to be satisfactory, both the state and judiciary shrink its duty by remaining silent spectator on the atrocities faced by Muslim women in the name of religion.

In *Yosuf Rowther v. Sowaramma*¹² Justice Krishan Iyer made momentous observation on the subject of divorce. He observed, “it is popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. The holy Quran expressly forbids a man to seek pretext for divorcing his wife so long as she remains faithful and obedient.” he further opined that with reference to the circumstances prevailing in India, “Muslim law as applied in India has taken a course contrary to the spirit of what the Prophet (PBUH) or the Holy Quran laid down and the same misconception vitiates the law dealing with the wife’s right to divorce”.

In *Ziauddin Ahmad vs. Anwar Begam*¹³ Gauhati High Court delivered a very revolutionary judgment, in which Chief Justice Baharul Islam, after thread bare consideration of several previous Privy Council and High Court decision on Triple divorce laid down a correct law by extensively quoting the injunction of the Holy Quran and relevant Hadith. He held that *Rashid Ahmad*¹⁴, *Ahmad Kasim Molla*¹⁵, *Sara Bai*¹⁶, *Aisha Bibi*¹⁷ decisions are not correct nor in consonance with Islamic Sharia.

Recently in *Shayara Bano v. Union of India and Ors*¹⁸ historic judgment is pronounced by Hon’ble Supreme Court by declaring the practice of triple talaq as unconstitutional. In this case the multi-religion constitutional bench of Supreme Court comprises of J S Khehar and Justices Kurian Joseph, RF Nariman, UU Lalit and Abdul Nazeer heard seven petitions filed by Muslim women challenging the 1,400-year-old cruel practice of triple talaq, including one who was divorced on Whatsapp¹⁹. In view of the different opinions recorded, by a majority of 3:2 the practice of ‘talaq-e-biddat’ is set aside. The multi-religion constitution bench comprises of Chief Justice Kurian Joseph, Justice

¹² AIR 1971 Ker.261

¹³ Criminal revision no.199 of 1977 (unreported). Full text of the judgment was received by Prof.Tahir Mahmood editor of Islamic and Comparative law quarterly (as he then was) was later reproduced in ICLQ, in March 1982.

¹⁴ *Saiyid Rashid Ahmad v. Anisa Khatoon*, AIR 1932,P.C.25

¹⁵ *Ahmad Kasim Molla v. Khatun Bibi*, AIR, 1933,Cal. 27

¹⁶ *Sara Bai v. Rabia Bai*, ILR(1905) Bom.537

¹⁷ *Aisha Bibi v. Kadir Ibrahim Rowther* (1909) ilr 33 Mad.22

¹⁸ 22 August, 2017

¹⁹ <https://thewire.in/gender/supreme-court-instant-triple-talaq-judgment>

Rohinton Nariman and UU Lalit, said "what is sinful under religion cannot be valid under law. Triple talaq may be a permissible practice but it retrograde and unworthy. Since triple talaq is instant it is irrevocable and the marital tie gets broken, it violates the right to equality."

Justice Kurian Josep delivers majority judgment said that, "what is bad in theology was once good in law but after Shariat has been declared as the personal law, whether what is Quranically wrong can be legally right is the issue to be considered in this case. Therefore, the simple question that needs to be answered in this case is only whether triple talaq has any legal sanctity. That is no more res integra. This Court in Shamim Ara v. State of UP and Another²⁰ has held, though not in so many words, that triple talaq lacks legal sanctity. Therefore, in terms of Article 141, Shamim Ara is the law that is applicable in India".

Chief Justice JS Khehar and Justice Abdul Nazeer forms a minority judgment and held that though this practice is regarded as sinful but court has no authority to interfere in personal laws and it is the duty of the parliament to enact a legislation to end this practice. So it is clear from the above judgment that although for now triple talaq is declares to be unconstitutional but now the ball is in parliament court to bring legislation on this issue.

CONCLUSION

The most atrocious form of dictatorship to which Muslim women have been going through since immemorial is the despicable practice of triple talaq which is against law and equity. This illogical practice of triple divorce neither found a place in a divine Quran nor in Sunnah, which provide for a proper and egalitarian treatment of women. The holy verses of Quran describe Nikah as Sunnah of Prophet Mohammed through which a healthy family bond between spouses is established and makes their relationship very strong to last for the remaining part of their lives. So this firmly union cannot be repudiating whimsically without any proper basis and appropriate method. Accurate procedure for repudiation of marriage is prescribed under Quran, Hadis and Sunnah of Prophet, but practice like Triple Talaq not only violated that procedure but also make mockery of divorce laws under Islam. This draconian practice not only override the holy verses of Quran and prescribed practice of prophet but at the same time it infringes fundamental rights of Muslim women as it irreversibly end marriage without any chance of reconciliation. The chief architect of Indian Constitution Dr. Ambedkar's heart read for women welfare, said "unity is meaningless without the accompaniment of women". According to him "Morality comes in only when man comes in

²⁰ J.T.2002

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relation to women with love and respect”, and for the progress of the society two things are essential, first man has to be moral and second, the need of veracious relations attached with great importance i.e., social morality. And it is very true in regard to custom like Triple Talaq. Not only this form of divorce is against all scruples of morality but inflicts severe blows to the spirit of womanhood. The most unfortunate aspect of the bane of triple talaq is that not only this unilateral mode of divorce among Muslim men bestowed in his hands the power to repudiate the marriage and arbitrarily deal with the woman at his whims and caprices, but it is still recognized by the law in the 21st century India.

Triple talaq infringes fundamental rights of Muslim women as it is irreversible end marriage without any chance of reconciliation and thus violates their right of fair hearing. Stereotypes of Muslim women, entrenched by the trinity of multiple marriage, triple talaq and Halala have held them hostage for so long that they have become difficult to dislodge. In fact, a married Muslim woman lives in a constant fear of being divorced at the whim of her husband.

Bearing in mind the facts that instant divorce is not only un-Islamic, but also not approved by highly regarded Islamic scholars, and that such a practice has been invalidated in many Muslim-majority nations again it also blatantly violates provisions of Constitution of India whatever, the fact may be, Muslim husband taking the benefit of unlimited freedom of power in terminating marriage through triple talaq bestowed to them by Muslim Personal Law bypassing any court, want to stick to the Un-Islamic discriminatory custom much to the frustrations and distress of their wives. The solution to this problem seems to be inclusion of the provision relating to prohibition on triple talaq in the Nikahnama and once this barbaric practice goes, the cruel practice of Halala too will automatically go away as in other form of divorce; parties can remarry without following the practice of Halala.

The condition of our society is such that the people are in stark darkness of ignorance because of this ignorance women all over the world deprived of their basic rights and Muslim women are not exception to this. The problem of triple talaq has reached this magnitude. The dilemma has reached this degree largely owing to willful and deliberate misinterpretations being spread by some gatekeepers of religion in our country.

However this darkness is removed to some extent by Hon’ble Supreme Court through its judgment by setting aside the validity of instant talaq, thus rendering its pronouncement ineffective in dissolving a marriage. Supreme Court gave a Judgment keeping in mind all the fundamental rights and without violating them. But it failed to clarify the relation of state and religion since India is a Secular state. Abolishing Triple Talaq is a step forward towards a better future which

will help in the welfare of the society as a single unit. This Judgment has also built a wall of separation between the religious practice of marriage and the legal system prevailing.

It is believed in the orthodox religious circles that entire Muslim personal law is God-given and hence immutable. It cannot be reformed or codified. This position seems to be meaningless. The Muslim personal law has not only been reformed or codified in other countries but it has undergone drastic positive changes and some of its aspects are stured by legislature of India and others are yet in pipeline. So continuing the practice of triple talaq which deprived Muslim women of her fundamental rights, one cannot imagine a better society for women and as India is signatory to International conventions and declarations for providing justice to women this practice should come to an end. Thus re-establishment of the law based on the principles of justice and fairness enshrined in the Quran is indeed a pressing need of the hour.