DISSOLUTION OF MARRIAGE UNDER ISLAM WITH REFERENCE TO TALAQ-UL-BIDDAT

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Abstract

"The Islam of Mohammed contains nothing which in itself bars progress or the intellectual development of humanity"

- *Syed Ameer Ali in his The spirit of Islam*

He further added, "The Prophet inculcated the use of reason: his followers have made its exercise a sin…He impressed on them to gain quest of knowledge to the land of the heathens. They do not take it even when it is offered to them in their own homes." An understanding of the above highlights that the religion never professes the wrong, nor does it even tangentially abrogate on the rights of persons. It is us, the people, whose incorrect interpretations and convenience based mind mechanisms which create obstacles in the smooth flow of religion, law, and politics. Through this paper the author has tried to focus on the forms of dissolution of marriage prevalent and accepted by Islam with focus on Talaaq-ul-biddat, commonly referred to as "Triple Talaq" and the change in scenario post the recent judgment by the Apex court of India.

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INTRODUCTION

If there is white there is black, if there is good there is evil, if there is marriage there is Divorce. Divorce is a practice been carried on since ages in most civilizations and is an essential part of most cultures and religions. It's a common practice amongst the Arabs, Hebrews, Israelis' etc. Under the Hindus however it got recognised and accepted as an essential ingredient only after the passing of the Hindu Marriage Act, 1955. However, it has been a common prolonged practice amongst the Arabs much before it got recognised by the Hindus.

Death of either of the spouses is an accepted form of dissolution of marriage in most personal laws and one that requires the least amount of formalities to be complied with. On the other hand, when the marriage is terminated by the act of parties either by mutual consent or at the discretion of one of the spouses it falls in the other category, i.e., Divorce.

According to Ameer Ali[1], the reforms of Prophet Mohammad marked a new departure in the history of eastern legislations. The prophet of Islam is reported to have said "with Allah", the most detestable of all things permitted is divorce", and towards the end of his life he practically forbade its exercise by men without intervention of an arbiter or a judge.

The Prophet declared that among other things which have been permitted by law, divorce is the worst.[2] However when it becomes impossible to maintain a congenial atmosphere and all that remains is hate and suffering, Divorce is the only preferred option that lies.

Prophet Mohammad stated that, "if a woman be prejudiced by a marriage, let it be broken off", basis which he has granted the right to women to obtain divorce on certain reasonable grounds.

MODES OF DISSOLUTION OF A MUSLIM MARRIAGE

In Islamic law, there are two prima facie instances when the holy union of marriage gets dissolved; a) By the death of the husband or wife, i.e. by act of God b) Divorce, i.e. by act of parties**.**

The first category as mentioned above is the simplest form of dissolution and demands no explanation, it is the inevitable consequence of death of the spouse. The second category forms a class which entails certain kinds as follows:

[1] Mohammedan Law, p.472
[2] Tyabji: Muslim Law, Ed. IV, p. 143

a) Judicial divorce (By wife under the Dissolution of Muslim Marriage act, 1939)

b) Extra judicial divorce

By Husband:

TALAQ

In ordinary parlance the term means to repudiate or reject however in the context stated herein it refers to ending the marriage ties. In *Moonshee Buzloor Rahim* v. *Laleefutoon nisa*[3] it was said that under Muslim law Talaq is the mere arbitrary act of a Muslim husband who may repudiate his wife at his own pleasure with or without cause. He can pronounce the Talaq at any time. It is not necessary for him to obtain the prior approval of his wife for the dissolution of his marriage.

Verse 4:35 of the Quran reads as:

"If ye fear a breach between them twain appoint two arbiters, one from his family,

One from hers, If they seek to set things right, Allah will cause their reconciliation."

The above verse tries to pitch that the most apt way for settling family disputes is by appointing arbiters who are aware of the idiosyncrasies of the parties to help reconcile the situation rather than jittering horrible comments at each other and throwing mud at each other's faces in the open. If there lays a scope for reconciliation, then it will definitely happen and Allah will be the facilitator for the same.

This clearly sketches out the vociferous, unfettered, uncontrolled, unconstrained nature of Talaq which unfortunately exemplifies the patriarchal nature of society giving arbitrary power to the husband and therefore creating an illusionary hierarchy between the sexes.

There exists a rigid observance of a set etiquette or formalities to be complied with by both the sects of Shia and Sunni. Such as for both the sects its necessary that the person is of a sane mind while pronouncing the Talaq. In case of Shia's the husband shall have attained the age of puberty and there shall be two competent witnesses present at the time of pronouncement. In case of Sunni's the person shall be an Adult which would apply that he shall have attained the age of 18 in accordance with the Indian Majority Act. The Talaq could be in writing (Talaqnama) or oral

[3] 8 MIA 397

but shall nevertheless be a clear manifestation of the intent. Astonishingly Sunni law does not give weight to a Talaq pronounced under compulsion or intoxication, unlike the shia's who consider it null and void.

There are namely two kinds of talaq's at the discretion of the husband;

TALAQ-UL-SUNNAT

As performed as per the traditions of the Prophet, it is of two kinds;

Ahsan: Considered as the best kind of Talaq or the very proper way. The husband must pronounce the formula of divorce in a single sentence. It is revocable in the Iddat period. It must be however pronounced in the state of purity (tuhr) i.e. when the wife is not undergoing her menstruation cycle. However, if the marriage has not been consummated or if the wife is beyond the age of mensuration or the couple has lived far away for a while, this restriction doesn't imply.

Hasan: In Arabic Hasan means "Good". It could be referred to the proper way. It however is of lesser worth as compared to Talaq pronounced under Ahsan. There must be three successive pronouncements of the formula of Divorce. Such form of Talaq is irrevocable after the third pronouncement.

TALAQ-UL-BIDDAT (TRIPLE TALAQ)

The most sinful mode of Talaq, introduced by the Omeyyads to ease the process of giving divorce by escaping the clutches of law. Not accepted by the Shia's and Malikis. Three pronouncements made during a period of *tuhr* either in one sentence or in separate sentences. It becomes irrevocable immediately when it is pronounced irrespective of Iddat. This Talaq is also known as Talaq-ul-bain. When in writing it becomes irrevocable immediately.

ILA

When the sole purpose of marriage which is procreation as justified by mostly all sects and societies, gets defeated, there lies a standing question mark to such a marriage. If a husband declares to his wife that he does not want to have any sexual relations with her and maintains his word for 4 months pending which he does not indulge in any sexual intercourse with her, it falls within this category and is referred to as Ila and the marriage gets dissolved after months. Unless

there is sexual intercourse in the span of those 4 months, basis which the marriage would be resumed.

ZIHAR

Although an outdated method of divorce but interestingly grants certain rights to the wife. In this form of divorce the husband compares the wife to a woman from his prohibited relationship such as mother or sister post which there is no cohabitation or sexual relation for 4 months. On the completion of these 4 months the marriage does not dissolve but Zihar gets completed. The wife has the right to approach the court for a judicial divorce or restitution of conjugal rights, in which case the husband goes through a penance (such as feeding 60 poor persons, fasting etc) for having done such a sin, of comparing the wife to a woman from his prohibited relation.

By Wife

TALAQ-E-TAFWEEZ

The husband possesses such an absolute right to divorce that he has the power to delegate it further to anyone whom he likes just as in the concept of agency, he appoints someone to exercise his right on his behalf. In this manner, he can delegate his right to his wife as well. Such a Talaq can be unconditional or subject to some condition. A pertinent factor about such form of Talaq however is that the wife essentially does not have a right to divorce, hence she divorces herself by exercising this right and does not divorce the husband.

LIAN

Just as one can sue for defamation, a Muslim wife holds the right to divorce her husband on false and vexatious charges of unchastity and infidelity. However, it is mandatory that the wife is not guilty and her behaviour has in no manner been unchaste resulting in adultery.

DIVORCE UNDER DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939

This act came as an effulgent move on behalf of our government to ensure that the right the Muslim women were being deprived of, the right to divorce, is granted to them. Section 2 of the acts enumerates the instances when a woman can divorce her husband.

By Mutual Consent

KHULA

The Quran, on Khula states- " ……and if you fear that they(husband and wife) may not be able to keep within the limits of Allah, in that case it is no sin for either of them if the woman releases herself by giving something (to the husband). [4] The literal meaning of Khula is "to take off the clothes". Herein it refers to the fact that the husband releases the wife (as he puts his clothes off), in exchange for some compensation.

MUBARAT

In this method, both the husband and wife are desirous of separation and thus no party is legally required to compensate the other by giving some consideration. Unlike in Khula where only the wife is interested in separating and thus takes the initiate first, here either of the parties could take the initiative.

EVOLUTION AND PAST OF TALAQ-UL BIDDAT

Talaq-ul-biddat or as referred to as in popular parlance "Triple Talaq" traces its existence to the caliphate under caliph Hazrat Umar. It was created as a weapon to fight the indecencies of the Arab husbands but unfortunately became a barbaric weapon with the passing of time.

Arab men after conquering Syria, Egypt wanted to marry the women in those countries irrespective of already being married. However, these women demanded that they first give a divorce to their existing wives at once by pronouncing talaq at one sitting, consequential to which they would get married to them. The Arab men however knew that the pronouncement has to be over a period of two tuhr's and such an impromptu pronouncement at one sitting would be void. This pledged a way for them to get the best of both worlds, they would still retain their first wives and yet be able to marry the Syrian and Egyptian women. The situation became vicious and religion was being misused by unscrupulous husbands. As a remedial measure Caliph Umar as an administrative order declared that Talaq pronounced thrice at one sitting would dissolve the marriage irrevocably.

Further, as lamentable as it may seem the Hanafi jurists approved this method as a valid way of granting Divorce and paved way for its religious sanction.

At present, until the current judgment by the Apex court, severe hardship was being faced by the

[4] Quran: Sura II, Ayat 229

women of the Muslim community. The view of the Prophet as mentioned in the Quran and the Opinions' in the Hadith on the same matter could be analysed as;

Holy Quran: The holy Quran, paramount source of Islamic jurisprudence has not ordained that the three divorces pronounced in a single breath would have the effect of three separate divorces.[5]

The relevant verse from the Quran corroborating the above statement is- "A divorce is only permissible twice; after that the parties should either hold together on equitable terms or separate with kindness."[6]

*Ahadith***:** The view that mere repetition of divorce without an intention to give a Mughallazah or final divorce or simply by way of emphasis or in momentary excitement does not amount to a Mughallaza or final divorce finds full support from traditions.[7]

"Mahmud-b, Labeed reported that the messenger of Allah was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said; Are you playing with the Book of Allah who is great and glorious while I am still amongst you? So much so that a man got up and said; shall I not kill him?" [8]

The practice of triple divorce, during caliph Hadrat Omar's time was being greatly misused and the purpose that Caliph Umar had introduced it for under his rein was no more the only purpose of indulgence in this facility in the modern times. Hadrat Omar used to punish people who would pronounce triple divorce. He used this as a method to discourage them from adapting this practice.

Analysing the juristic view, as per Abu Hanifa and various other Hanafi jurists, although Triple Divorce might be considered bad in religion but stands good in law and is a binding Mughallazah or final divorce.

JUDICIAL OVERVIEW

Being bad in Theology does not make it bad in law. Following this method of interpretation, the

[5] Aqil Ahmad, Mohammedan Law, 23rd Edn., p.175
[6] I-II : 229 Trans. By. A. Yusuf Ali
[7] *Supra* note 5
[8] *Mishkat-ul-Masabih :* An English Translation & commentary by AL Maulana Fazlul Karim p.693, Islamic book service, New Delhi

Indian courts have been declaring Triple pronouncements as lawful and effective.

The Bombay High Court in Sara Bai v. Rabia Bai,[9] recognised Triple divorce on irrevocable footing.

Further in *Ahmad Giri* v. *Mst. Megh*[10] observed, "The Talaq-ul-biddat is the most prevalent form of obtaining divorce in India. Any change in this respect cannot be brought about by judicial interpretation. If there is a general desire among Muslims to revert to pristine purity of Islam, how such changes in the present state of Muslim Law can be brought out, in the words of late Syed Amir Ali, "whether by general synod of Muslim doctors or by the direct action of the legislatures, it is impossible to say."

Further in, *Jiauddin Ahmed* v. *Anwara Begum*[11], the High Court stated that, - "A perusal of the Quranic verses and the commentaries thereon by well-recognized Scholars of great eminence like Mahammad Ali and Yusuf Ali and the pronouncements of great jurists like Ameer Ali and Fyzee completely rule out the observation of Macnaghten that "there is no occasion for any particular cause for divorce, and mere whim is sufficient", and the observation of Batchelor, J. (ILR 30 Bom. 537) that the whimsical and capricious divorce by the husband is good in law, though bad in theology. These observations have been based on the concept that women were chattel belonging to men, which the Holy Quran does not brook.

The Supreme court in a landmark judgment in *Shamim Ara* v. *State of U.P.*[12]clarified the Islamic law of divorce as applied in India. The court observed that the correct law of divorce as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the Husband and the wife by two arbiters, one from the wife's family and the other from the husband; if the attempt fails talaq may be affected.

In *Iqbal Bano* v. *State of U.P.* [13] the apex court held that the conclusion that in view of the statement in the written statement about an alleged divorce 30 years back by utterance of the words "talaq" "talaq" "talaq" three times is sufficient in law, is not sustainable.

The position of Triple Talaq however changed by leaps and bounds after the judgment of 2017

[9] ILR (1905) 30 Bombay 537
[10] AIR 1955 J & K 1
[11] (1981) 1 Gau. LR 358
[12] JY 2002 (7) SC 520
[13] (2007) 6 SCC 785

which questioned the constitutionality of the same and brushing aside the sentiments of the concerned community, the Apex Court took a stand for the women of the Muslim Community and gave a powerful verdict as analysed further.

PERUSAL OF THE 2017 JUDGMENT

Justice Joseph Kurien stated that what cannot be true in theology cannot be accepted in law either. Union Women and Child Welfare minister Maneka Gandhi declared- "*Yeh ek accha nirnay hai, ling nyaya and ling samanta ki or ek aur kadam* (This is good decision, another step towards gender equality and gender justice).

Whether a political Stint or a step forward towards progress, this decision has impacted many victims of an unscrupulous and whimsical custom named Triple Talaq. Although a 2002 judgment[14] which also held Triple Talaq invalid was being followed by several High courts, however the 2017 judgment by the Apex court completely changed the scenario and bought relief too many hegemonized women.

In *Re: Muslim Women's Quest For Equality* v. *Jamiat Ulma-I-Hind & Ors*[15] Supreme Court by a 3:2 majority declared Triple Talaq invalid and ended the misery of many Muslim women. Critically examining the same, it is pertinent to establish the background of the case *Shayara Bano* v. *Union of India & Others*[16] in which the following was ascertained;

Muslim Personal Law (Shariat) versus Customs/ Usages

For a long time in the Pre-independence British Periods the Muslim women battled with the oppressive nature of customs and usages and protested against the same. They were governed by the Muslim personal law- Shariat as well as the customs and usages which were harsh towards them displaying a patriarchal monopoly. Basis this, in 1937 the Muslim Personal Law (Shariat) Application Act was passed to amend the situation.

Section 2 of the act read as; "*Application of personal law to Muslims.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land)*

[14] *Shamim Ara* v. *State of U.P.* (2002) 7 SCC 518

[15] Suo Motu Writ (Civil) No. 2 of 2015 With, Writ Petition (Civil) No. 118 of 2016, Writ Petition (Civil) No. 288 of 2016, Writ Petition (Civil) No. 327 of 2016 Writ Petition (Civil) No. 665 of 2016, Writ Petition (Civil) No. 43 of 2017

[16] Writ Petition (C) No. 118 of 2016, with, Suo Motu Writ (C) No. 2 of 2015, Writ Petition(C) No. 288 of 2016, Writ Petition(C) No. 327 of 2016, Writ Petition(C) No. 665 of 2016, Writ Petition(C) No. 43 of 2017

regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

Therefore, leaving no room whatsoever for the customs or usages to prevail if they acted contrary to the act, which would include matters of Divorce.

Also, It is relevant to highlight herein, that under Section 5 of the Shariat Act provided, that a Muslim woman could seek dissolution of her marriage, on the grounds recognized under the Muslim 'personal law'. It would also be relevant to highlight, that Section 5 of the Shariat Act was deleted, and replaced by the Dissolution of Muslim Marriages Act, 1939.[17]

As there was no right for Hanafi women to seek a decree of divorce from their husbands, The Hanafi jurists had laid that in cases where the Hanafi law acts as an obstacle or causes any form of destitution, the Maliki, Shafii or Hanbali law could be applied on. Therefore, the Dissolution of Marriage by a Muslim woman act, 2019 applies to them as well.

Sinful in theology, yet sanctioned by Law?

The plea put forth by the petitioners in the inherent case was that if something is considered sinful in theology it shall not be accepted in law. Placing reliance on Hindu customs such as Devdasi system, Sati, Polygamy which have also been abolished now, the petitioners sought an invalidity of the Triple Talaq system as well. However, examining these three practices the court stated that they were abolished by legislative enactments and not judicial orders and thus cannot be used for comparison. The court also stated that this practice had been in force since the last 1400 years from the time of Caliph Umar. Commenting on this issue, finally they declared that this ground of the petitioner did not hold strong that just because it was bad in theology it shall be declared bad in law as well. It was also asserted that Talaq-ul- Biddat forms an integral part of the Muslim Personal law and is a matter of faith for the Sunni Muslims belonging to the Hanafi school.

[17] Writ Petition (C) No. 118 of 2016, with, Suo Motu Writ (C) No. 2 of 2015, Writ Petition(C) No. 288 of 2016, Writ Petition(C) No. 327 of 2016, Writ Petition(C) No. 665 of 2016, Writ Petition(C) No. 43 of 2017

Constitutional morality and violation of Article 25 of the Constitution of India

One of the main points which were used for determining the validity of Triple Talaq was if it was if it violated the provisions of part III of the constitution containing the fundamental rights.

With regards to article 14, it was rightly put by the petitioner that Muslim women were being discriminated in comparison to other women of different religions, be it Hindus, Sikhs etc as there was an arbitrary and uncontrollable right to end the matrimonial alliance granted to their husbands who lead to severe hardship for them. It was also contended by the petitioners that the women had a right to human dignity as granted under article 21 of the constitution and as a fundamental duty enshrine under article 51A(e) it was the duty to ensure that women were not subjected to any derogatory practices. Nevertheless, this contention that it is violative of constitutional morality relying on various precedents was also set aside.

Based on the above on the matter of being violative of article 25 and relying on judgment rendered by the Bombay High Court in the Narasu Appa Mali case[18] and several others was also rejected.

However, in In *Re: Muslim Women's Quest For Equality* v. *Jamiat Ulma-I-Hind & Ors*[19] it was held that "*Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in Fyzee's book (supra), the Hanafi school of Shariat law, which itself recognizes this form of Talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God. Indeed, in Shamim Ara v. State of U.P.*[20]*, this Court after referring to a number of authorities including certain recent High Court judgments held as under:*

"13…The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation. In Rukia Khatun[21] *the Division Bench stated that the correct law of talaq, as ordained by the*

Holy Quran, is: (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one

[18] AIR 1952 Bom 84
[19] *Supra* note 15
[20] *Supra* note 14
[21] (1981) 1 Gau LR 375

chosen by the wife from her family and the other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law. 14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts."

Therefore, the court declared Triple Talaq void under the shadow of article 14 of the constitution as being a capricious, whimsical and unbridled right granted to the husbands to break matrimonial tie irrevocably and without any scope of reconciliation and thereby leaving the wives in a misery.

Further it was held, *Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.*[22]

CONCLUSION

In the words of Hillary Clinton, Human rights are women's rights and women's rights are human rights. We live in a century of gender equality and gender justice, a time has come where it is a recognised fact that we cannot succeed in totality and nor can there be full progress of any nation in be it in any field, science, art, politics, law unless there is respect for the both the sexes and progress amongst both. Social welfare of women is on the top agenda of most nations and with the coming of several conventions, many of which even India is a part of (eq. CEDAW) it is quintessential to manifest equality in all spheres.

Many nations which are theocratic or those who have declared Islam as their religion have also taken a step forward and abolished Triple Talaq, such as Egypt, Algeria, Iraq, Lebanon etc.

In such an atmosphere where rights of women are proliferating vehemently, it was indeed one of the best decisions of the Apex Court to have declared Triple Talaq void.

[22] *Supra* note 15