

## AN ANALYSIS OF TRIPLE TALAQ WITH REFERENCE TO INDIAN CONSTITUTION

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**Received: 02 Jul 2022**

**Accepted: 05 Jul 2022**

**Published: 08 Jul 2022**

### **ABSTRACT**

*Many countries in the world agree that marriage is a union of two individuals, man and woman; and it is very important aspect for society whether it is considered as a contract or a sacrament.*

**KEYWORDS:** *Indian Constitution*

### **INTRODUCTION**

Many countries in the world agree that marriage is a union of two individuals, man and woman; and it is very important aspect for society whether it is considered as a contract or a sacrament. Basically in India, family is the unit of our society on which the social institution stands. According to Muslim Law, marriage is purely a civil contract, there is no religious ceremony required and there must be an exchange of offer and acceptance in the presence of each other. This contract may have conditions and has a mandatory 'consideration' (Meher) which is paid at the time of the marriage. This consideration is paid by the Muslim man to his wife and can be at time waived off by the woman as per her own will. Some stated it as civil contract, but this view is quite incorrect; the Muslim marriage is not a mere civil contract.

Even though 'Holy Quran' considered marriage as sacred institution, the situation is not coping with Quranic verses. Quran prefers that men and women marry (4:25) and within the marriage there should be harmony (4:128) mutually built with love and mercy (30:32). "The bond of marriage is considered a security for both the male and female. They (female) are raiment for you (male) and you are raiment for them (2:187). As the Personal Law of Muslim stands today, a woman suffers from many serious disabilities which turn her into a second category individual everywhere. Once, the marriage is performed, the contract of marriage has no importance in any respect or in regard to any right and liability arising under it".<sup>[1]</sup>

Talaq is the deletion of marriage contract in event of the breach of marital obligation towards the one party. The provision of divorce have been brought for the regulation in legalized form by enactment of various personal law statutes for example, Hindus are governed by the Hindu Marriage Act, 1955; Parsis by the Parsi Marriage and Divorce Act, 1936; Christians and Jews and others by the Indian Divorce Act, 1869 and Muslim women by the Dissolution of Muslim Marriage Act, 1939. Generally Muslims are governed by their personal laws under which Nikah is a contract. A husband can divorce his wife without any reason merely by pronouncing thrice the word 'talaq', so it is a suppressor practice of divorce by Muslim husbands.

In Islam, “everything is followed as per Sunnah (Deeds of the prophet). Therefore, majority of Muslim women oppose ‘triple talaq’ want Muslim to adopt ‘Talaq-ul-Sunnat’ (Divorce as per the Prophet’s sayings and Quranic dictation) and disclaim ‘Talaq-ul-Biddat’ (Divorce as per a later formed mode of divorce which propagates instant divorce)” [2]

## ORIGIN OF TRIPLE-TALAQ

The Shariah in Islam which formulated more than 100 years after the death of the prophet and it had evolved under complex influences of various civilizations and took away what was given to women by the Prophet and the Quran; the issue of triple talaq in single say reflects this very well. This was the practiced during period of jahiliyah (times of ignorance) before the advent of Islam.

“The triple talaq was not permissible during the lifetime of the Prophet’s, during the first Caliph Abu Bakr’s reign and also for more than two years during the second Caliph Umar’s time. Later on Umar permitted it on account of a peculiar situation. When the Arabs conquered Syria, Egypt, Persia, etc., they found out women there much more beautiful than their own women and hence were tempted to marry them. But those women did not know about Islam’s abolition of triple-talaq in one sitting, and therefore insisted that before marrying them the men should pronounce talaq thrice to their existing wife which they readily accepted to do (as they knew that Islam has abolished triple-talaq and that would not be effective) and even after marrying with the Syrian or Egyptian women they would also retain their earlier wives. When the Egyptian and Syrian women discovered that they had been cheated, they complained to Umar, the Caliph, to enforce triple divorce again in order to prevent its misuse by the Arabs. He had complied with their demands to meet an emergency situation and not with an intention to enforce it permanently, but later on jurists also declared this form of divorce as valid and gave sanction to it” [3]

“It has been observed that triple-talaq came into being during the second century of Islam when Umayyads monarch, finding that the check imposed by the prophet on the facility of repudiation interfered with the indulgence of their caprice; they endeavoured to find an escape route from strictness of law” [4] It is noted that it was not Quranic practice but the Umayyad practice which gave validity to these divorces.

Abdur Rahim is more pungent when he says “I may remark that interpretation of the law of divorce by jurists especially of the Hanafi School is one flagrant instance where, because of literal adherence to mere words and certain tendencies toward subtleties they have reached a result in direct antagonism to the admitted policy of law in subject” [5]

Such talaq is lawful, although sinful in Hanafi law; but in Ithna, Ashari and Fatimi law it is not permissible. According to Tyabji, “by a deplorable development of the Hanafi law the sinful and the most abominable forms have become the most common for men have always molded the law of marriage so as to be most agreeable to them” [6]

## “SUNNI LAW

Talaq is a mode by which a husband can dissolve the matrimonial bond. Hanafi school of Sunnie law recognized two kinds of talaq.

### The Talaq-ul-Sunnat

The talaq-ul-sunnat is the divorce which is effected in accordance with the rules laid down in the traditions or sunnat handed down from the Prophet. It is, in fact, the mode or procedure which seems to have been approved of by him at the

beginning of his ministry, and is, consequently, regarded as the regular or proper and orthodox form of divorce. This form of Talaq also gets the approval of Shia School of Law.

### **The Talaq-ul-Biddat or Talaq-ul-Bad'ai**

The talaq-ul-biddat, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Muslim era. It was then that the Omeyyade monarchs, finding that the checks imposed by Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found in the pliability of the jurists a loophole to effect their purpose.

Triple-Talaq is a form of talaq-ul-biddat in which, the husband may pronounce the three formulae at one time, and it is irrelevant that whether the wife is in state of tuhr or not. It is denoted in Arabic as Mugallazah, means very hard-divorce which is most disapproved and which does not conform to Talaq-ul-sunnat. The separation then effects definitely after the woman has fulfilled her iddat or period of probation.

## **SHIA LAW**

Under the Shia law talaq is divided in two main classes, namely:

### **Talaq-ul-Bid'ai**

It is considered irregular. It is constituted in the following three ways:

- Divorce against an enjoyed wife who is not pregnant and who is in her courses, or Nifas (puerperal discharge) when her husband is present with her or absent from her for a period less than the prescribed period. It is the discharge after childbirth and, according to the Shiah jurists, its maximum period can be ten days while according to the Sunnis it can last for forty days.
- Pronouncement of divorce against a wife, who is not pregnant, in that period of the wife's purity in which the husband has been intimate with her. Period of purity means the period when the wife is free of her menstrual courses.
- Pronouncement of three divorces whether by one sentence or one after another when there has been no intermediate revocation".<sup>[7]</sup>

"The first two forms of divorce are considered void and absolutely ineffective under the Shiah law".<sup>[8]</sup> This also holds good in respect of three pronouncements at the one or same time. But if they are pronounced at different times then the first pronouncement may be given effect to and it cannot be accepted at triple talaq.

### **Talaq-ul-Sunnat**

The second class of talaq is called Sunnat. The word Sunnat is used in contradistinction to Bida'i.

Talaq-ul-Sunnat is divided by Shia jurists into three classes namely:

- Talaq-i-bain,
- Talaq-i-rajai, and
- Talaq al-iddah.

- Talaq-i-Bain: It is that divorce which cannot be revoked. It is constituted in the following ways:
  - Divorce to a wife with whom there has been no intimacy.
  - Divorce to a wife whose child-bearing age has been passed.
  - Divorce to a wife of such a tender age that she is not subject menstrual courses. The age has been fixed as nine years.
  - Divorce to a wife who has obtained a Khul divorce for consideration.
  - Divorce to a wife who has secured a divorce under the doctrine of Mubarrat.
  - It is compulsory in case of fourth and fifth class of divorce with consideration for Khul or Mubarrat has not been revoked. If it is revoked then the divorce shall be a Raja'i-talaq divorce and not a Bain Talaq.
  - Divorce against a wife who has been thrice repudiated with two intermediate revocations.
- Talaq-i-Raj'i: Talaq Raj'i is that kind of divorce in which the husband has got a right to cancel it. This he can do before the expiry of the wife's iddat. If the period of the wife's iddat expires then a revocable divorce is effected. But if the spouses want to unite then they can remarry without the necessity of there being an intermediary marriage.
- Talaq al-Iddah: In this form of divorce, "the husband divorces his wife under the requisite conditions he then recalls her and cohabits with her before the expiration or completion of her iddat. He again divorces her second time in another tuhr, that is, other than that in which he was intimate with her. He recalls her again and cohabits with her and then divorces her in a subsequent tuhr. This kind of divorce effects what is called a mughallazah divorce in which the wife becomes forbidden to the husband. She can become lawful to him only if after the divorce she marries another person and that marriage is dissolved after consummation". [9] It is only then that she can marry the former husband. It is a necessary condition of such Talaq that there must be inter-course after each revocation. If the husband divorces his wife before such intercourse, the divorce would be effected, but it would not be Talaq-al-iddah.

## WOMEN'S RIGHT TO DIVORCE HER HUSBAND

"There are mainly two kinds under which a Muslim wife can claim the divorce; first is Talaq-e-Tafweez and the second is Talaq-e-Khula. Under Talaq-e-Tafweez: the husband may delegate his power to give talaq to his wife or any third party. This right has to be in the form of a contract with conditions, like, 'if a man marries again' then she can give divorce, etc. But this contract will not be without conditions or may be absolute. The second one is Talaq-e-Khula: this is a divorce which is at the 'request' of the wife. In such case woman has to divorce to the man. The man must accept the offer with consideration, which often means the woman, has to give back the Meher taken during marriage. After these two steps, a Khula is granted. The woman often approaches a qazi-court as well to demand a Khula from the man. There needs to be an execution of a Khulanama. But something which needs to be broadly observed is that in both the cases, it's only a request or a husband's wish to draw up a contract to give the wife an option to divorce him. Thereby, putting the husbands first, and somehow lacking in achieving gender equality in this regard"<sup>[10]</sup>

A Muslim organisation, Bharatiya Muslim Mahila Andolan (BMMA) raised voice to ban triple talaq and ‘nikah halala’ – the practice where a divorced woman has to marry with other person to retain her first marriage.

- In 2015, Shayara Bano, a Muslim women from Uttarkhand, filed a petition in the Supreme Court of India seeking ban on the practice after her husband ended 15-year marriage by sending a letter pronouncing the word talaq thrice. Her petition seeks the Supreme Court to declare talaq-e-biddat, polygamy and nikah halala illegal and unconstitutional on the grounds that they violate the rights guaranteed by the Constitution under Articles 14, 15, 21 and 25.

### **TRIPLE TALAQ AND THE CONSTITUTION OF INDIA**

- “Article 25 of the Constitution guarantees religious freedom as Freedom of Practice and Propagation of Religion.
- Like all other Fundamental Rights, it is subject to restrictions and does not protect religious practices that can negatively affect the welfare of citizens.
- Hence, Article 25 is overridden by Article 14, which guarantees the Right to Equality as triple talaq denies a Muslim woman’s equality before the law.
- Article 25 is also subject to Article 15 (1) which states that the State ‘shall not discriminate against any citizen on grounds only of religion, race, caste, sex...’ Since triple talaq does not work in the favour of women, it violates Article 15 (1) of the Constitution.
- However, section 2 of the Muslim Personal Law (Shariat) Application Act of 1937 recognises triple talaq as a statutory right, bringing it under the ambit of Article 13 of the Constitution. Article 13 defines 'law' and says that all laws, framed before or after the Constitution, shall not be violative of the fundamental rights”.<sup>[11]</sup>

### **EFFECT OF TRIPLE-TALAQ ON SOCIETY**

“In Islam marriage has been regarded as an important function which an ideal Muslim whether male or female should perform firstly in order to save the society from unchastity and to build up a healthy society” [12]

This practice of talaq has deleterious effect on women; “breaking of a marriage contract has emotional and financial concerns. Often it is not interest of women, which are at stake, but those of their children as well” [13]

The trauma of triple-talaq is rife in the reality of women. For example “Sameera, a resident of Dounгри, married a Maulana in 2001. When she fell ill after her marriage and was advised to go to a specialist, her husband was reluctant to spend money on her medical expenses and refused to take her back. A month later, he called from Lucknow and pronounced triple-talaq on the phone” [14]

In another situation, “Amira was refused entry into the house along with her children by her husband on returning from visit to her mother house. Her husband claimed he had divorced her by pronouncing triple-talaq, while Amira did not even know of it” [15]

Another is the high profile case of Najma Bibi from Orissa, “where the husband divorced his wife in inebriated condition only to regret it later, brought to the forefront the regrettable consequences of the triple-talaq practice” [16]

The scholars of Muslim law, who consider three divorces at a time as one, argue that “in our present social set up religion has been relegated to such an extent that religious values have become eclipsed. It has ceased to be a way life, a guiding source and an inspiration. This is because we have neglected our prime duty to learn, explore and acquire religious knowledge” [17]

But to this distortion of the true Islamic law of divorce has now come a refreshing fatwa from some Indian theologians: “If a man who has pronounced a triple-talaq say he did it either in ignorance of law or merely to put emphasis on his words, his marriage remain intact until the expiry of his wife’s iddat- during this period he can unilaterally revoke the talaq, if he has not done so within that time, any time later he can marry her with her consent.”[18]

## CONCLUSION

Although the talaq is permissible in Islam it is detestable, and should only be resorted in extreme circumstances, permitted by the theory of irretrievable breakdown of modern world. Under Islam the relationship between the husband and wife is pious and private and it is not conducive to bring it outside the home, this is the reason that Holy Quran ordains that before the proceeding for talaq can be started there may be steps taken by members of both the families to have reconciliation between husband and wife and when all these efforts fail then only talaq should be pronounced. Further the Quran has in detailed laid down the rules and condition to be followed by husband while pronouncing talaq on his wife.

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16. *In this case Nazma Bibi's husband divorced her in May 2004, following a quarrel in an inebriated condition. Later her husband regretted his decision and the couple continued to stay together. However, village elders objected to their living together after the Talaq. The couple went to the local Maulvi and obtained a 'fatwa' nullifying the divorce. This was not accepted to them who physically assaulted the couple*
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