



INTERNATIONAL JOURNAL OF ADVANCE RESEARCH AND DEVELOPMENT

(Volume 2, Issue 11)

Available online at www.ijarnd.com

Talaq and Shariath Law – A Study after Supreme Court Judgment on Talaq-I-Biddat

Pathuri Venkata Subrahmanyam

Rachana Journalism College, Hyderabad, Telangana
advocate.pathuri@gmail.com

ABSTRACT

The concept of living together of a man and a woman is as old as the human race history but the institution of marriage came into existence with the development of civilization. In other words, it can be said that civilization has started with the marriage. Marriage is treated in all religions as a respectable relationship between the man and women. Where children are treated as the legal heirs. In most of the societies in case of death male partner, the children are conferred with all the rights for the deceased man's property. Before going into the various types of the institution of marriage in various civilizations across the world. Every religion has accepted marriage as a recognized relationship.

Coming to the Indian scenario the main religion is Hindu where the marriage is sacramental. In the ancient Indian mythology, there are several examples of monogamy bigamy polygamy and even polyandry.

But the people those who are living in India and following Islam are also following monogamy. The marriage is a contract in Muslim law. The government employees irrespective of their religion have to follow monogamy only. But there are several instances of polygamy also which are not reported. The question of polygamy in Muslim has come to lime light after the recent Supreme Court judgment which is known as 'triple talaq case'. An effort was made to discuss the triple talaq and its consequences in the light of the Supreme Court judgment were discussed in this paper. Before discussing much the impact of this judgment and Muslim marriage and diverse let us have a brief look at various aspects of Muslim marriage and diverse.

Keywords: *Talaq, Quran, Sura, Hadis, Triple Talaq, Qula, Talaq-e-Ahasan, Talaq-e- Hasan, Talqaq-e-Biddat, Talaq-E-Tafweed, or Delegated Divorce, Turh, Nikha-nama.*

1. INTRODUCTION

Marriage is marriage. There is no Hindu marriage. Paris marriage, Christian or Muslim marriage. Nevertheless, the concept of marriage differs and that really marks out the difference. The concept of marriage under Christian Law is that is (1) sacrament, (2) an indissoluble union, and (3) for one life. Similarly, under Hindu Law, the concept of marriage is (1) sacrament, (2) an indissoluble union, (3) for seven lives. As against this concept, under Muslim law, the marriage is sacrosanct (sacred contract) and it is a dissoluble union. It means, marriage is not only sacrament but also a civil contract, pure and simple. The terms pure and simple are not the terms of edifice but of legal connotations: 'pure' means free from condition or restrictions and 'simple' means not evidenced by seal, writing or record. Thus while under Muslim law. Divorce is implicit in the marriage contract, it is not so in other legal systems because they do not treat marriage as contract. The other legal system have, therefore,

reformed their matrimonial laws and included in it the 'Divorce' some of the western countries have begun to believe that there is no point in finding out as to where from the bitter water of matrimonial dispute flows. It is best to arrest the flow, the moment it starts and (some of the Western Countries) prescribe Divorce on the asking. But it goes to the credit of Muslim law only that it invented and originated Divorce on the asking in the form of Talaq. A form of divorce on the asking but that does not invest any right in Muslims to misuse and abuse it grossly and with total immunity.

Before catching Muslim law with thorns. The other "firsts" invented and originated by Muslim law may be enumerated. The bridegroom or their parents can enter into a marriage contract, "Marriage Deed". Kabin-Nama or Nikah-Nama. The significance and importance of Marriage Deed are that both the parties have the 'complete freedom of contract' on terms and conditions peculiarly suitable to them. Thus, the parties can provide for maintenance and so also for the manner and method of giving divorce and so on. In the 'Marriage Deed', the boy made to agree to delegate his power of Talaq to the girl herself and /or condition/s can be stipulated in such a way that the girl can divorce her husband. It is called as the 'Delegated Divorce' - "Talaq-E-Tafweed". The power to give a divorce (Delegated Divorce) can be obtained by wife from husband, if not before or at the time of marriage, even thereafter. It happens only in Muslim law unfortunately, many Muslims are totally unaware of the 'Delegated Divorce' and those who are aware, are to take advantage for several and diverse reasons. One of the reasons is total ignorance of Muslim themselves.

THE MENTION IN THE NOBLE QURAN ABOUT MARRIAGE

1. The mention of the marriage has been made in the Noble Quran.
2. 'There is no blame on you that you make them an offer of marriage, but do not make a secret contract except in terms honorable non resolve. On the tie of marriage till the term prescribed his fulfilled.

.....Sura 2, Ayat 235

To whom marriage is permissible - 'Lawful unto in marriage is only chaste women who are believers'.

3. Quranic injunctions regarding marriages

In the first place, it would be appropriate to mention what Quran has to say in connection with marriages because Quran is the supreme and basic source of Islamic law

"There is no blame on you that you make them an offer of marriage But do not make a secret contract except in terms honorable. Nor resolve on the tie of marriage till the term preserved is fulfilled."

----Sura 2, Ayat 235

- I. To whom marriage is permissible - "Lawful unto in marriage is only chaste women who are believers, but chaste women among the people of the Book revealed before your time - when you give them their due dowers and desire chastity and not lawdness nor intrigues"

---- Sura 5, Ayat 6

"if any of you have not the means wherewith to marry free believing women, they may wed believing maidens; marry them with the permission of their people and give them their due, they being chaste and not fornicating and not receiving paramours."

---- Sura 4, Ayat 25 to 29

"We have made lawful to thee thy wives to whom thou hast paid their dowers;And daughters of thy paternal uncles and aunts, and daughters of thy maternal uncles and aunts, and any believing woman."

--- Sura 33, Ayat 50

II. Modesty and chastity - "Say to the believing men that they should lower their gaze and guard their modesty; that would make greater purity for them (30). And say to the believing women that they should lower their gaze and guard their modesty; they should draw their beauty and ornaments except those which are outside; they should draw their veils over their bosom and not display their beauty except to their husbands, their father,

their husbands fathers, their sons, their husbands sons, their brothers and their brothers sons or their sisters son. Or other women, or the slaves whom their right hand possess, or male servants free of physical needs. Or small children who have no sense of shame of sex; and they should not strike their feet in order to draw attention to their hidden ornament (31).

--Sura 33 Ayat 30 and 31

III. The prohibited class--“Do not marry unbelieving women until they believe. Nor marry your girls to unbelievers until they believe.” Sura 2-Ayat 221

“Any marry not women whom your father married, - Except what is past: it was shameful and odious, an abominable custom indeed (22). Prohibited to you are –your mother, daughter; sister, father’s sister, brother’s daughter, sister’s daughter; foster mothers (who gave you suck), foster sister; your wives mother, your step-daughters under your guardianship, born of your wives of your sons proceeding from your lions; and two sister in wedlock at one and the same time, except for what is past (23). Also prohibited are women already. Except for these all others are lawful provided you seek them (in marriage) with gifts from your property, desiring chastity, not lust-give them their dowers as prescribed (24). ----Sura 4 Ayats 22 to 24

“Let no man guilty of adultery or fornication marry any but a woman similarly guilty To the believers, such a thing is forbidden”. Sura 24 –Ayat 3

IV Marriage to poor encouraged –“marry those among you who are single, the virtuous ones among your slaves, male or female: if they are in poverty God will give them means, out of His grace.

.....Sura 24 Ayat 32

V Nikahnama as a contract.-“O ye who believe when ye deal with each other in a transaction involving future obligation, reduce them to writing let a scribe write down faithfully as between the parties; let him who incurs the liability dictate, but let him fear Lord God and diminish aught of what he owes. If the party liable is mentally deficient or weak. Or unable himself to dictate, let his guardian dictate faithfully, and get two witnesses out of your own men, and if there are not two men, then a man and two women, such as you choose for witnesses; it is juster in the sight of God, more suitable as evidence and more convenient to prevent doubts among yourselves.....”

-- Sura 2 Ayat 282

VI Number of wives,- if ye fear that ye shall not be able to deal justly with the orphans (orphan wives and their property) ; marry woman of your choice, two or three ; But if you fear that ye shall not be able to deal justly (with them), then only one..... That would be more suitable to prevent you from doing injustice.

---- Sura 4 Ayat 3

The Apex court has held that Muslim law permits but not mandates 4 marriages. No religion in India mandates as an obligation to enter into bigamy or polygamy. (Javed and others the V State of Haryana, AIR 2003 SC 3057)

2. THE PROPHETS VIEWS ABOUT DIVORCE

The Prophet should dislike about it. It was regarded by the prophet to be the most hateful before the Almighty God of all permuted things Talaq(Divorce) amongst Mohammedens may be oral evidence is required to prove Talaq as divorce by the husband is complete just by utterance of words ‘Talaq Talaq Talaq’ trice and the presence of a third person is not necessary. There is no option the wife the challenge Talaq (Mohd .Umar khan) V. Gulshan Begum, II (1991) DMC15:1991 MPLJ 586.

Modes of pronouncement-A talaq may be effected:

- i) Orally (by spoken words).
- ii) By written document (Talaqnama).

There are in total three modes of talaq namely:

i) Talaq Ahsan –This consists of a single pronouncement of divorce made during a Tuhr (period between menstruation s)

Followed abstinence from sexual intercourse for the period of iddat:

ii) Talaq hasan –This consists of three pronouncements made during successive Tuhrs, no intercourse taking place during any of the three Tuhrs.

iii) Talaq –Ul-Biddat or Talaq-I-Badai –This consists of three pronouncements made during a single Tuhr either in one sentence or a single pronouncement made during a Tuhr clearly indicating an intention irrevocably to dissolve the marriage.

It was held that Talaq should be pronounced in express words which are very well understood to imply a divorce.

In the compendium of Fatimid Law by ASAF A.A.FYZEE, at paragraph 212 at page 47, it is stated that a divorce pronounced by the husband takes immediate effect of which one of the categories is a woman whose husband has been absent for a long time. Then it is stated that the women whose husband has been away for a long time have to observe 'Idda' from the date the women come to know of the divorce by her husband. That means the husband can give a valid divorce during the absence of the wife but wife's duty to observe Iddat comes into effect from the date she gets the knowledge of the divorce.

The husband pronounced Talaq in case the wife visits a lady friend again. Talaq was not operative because the wife did not visit the friend after pronouncement.

When a Talaq was pronounced in writing. It may be destroyed and may never be communicated, therefore, there is a difference between oral and written Talaq. Because in oral Talaq there must be a speaker and an audience.

3. DIFFERENT MODES OF TALAQ

A Talaq may be effected in any of the following modes:

- 1) Talaq-Ul -Sunnat, and
- 2) Talaq –Ul-Biddat.

1) Talaq –Ul-Sunnat-it is effected in accordance with the traditions of the prophet. It has been further subdivision into:

- (i) Ahsan, and
- (ii) Hasan

Ahsan,-This Arabic Word 'ahsan' means 'best' or as Wilson puts it, 'very proper'. This signifies that the talaq pronounced in the ahsan form is the best kind of talaq. To be in ahsan form. The proceeding of divorce must satisfy certain conditions.

When the marriage has not been consummated a talaq in the ahsan form may be pronounced even if the wife is in her menstruation. Where the spouses are a way from each other for a long period or where the wife is beyond the age menstruation the condition of tuhr (purity) is not applicable.

A pronouncement made in the ahsan form is revocable during iddat. After the expiration of the iddat, the divorce becomes irrevocable.

Following are the requirements of an Ahsan Talaq:

1. Marriage must be consummated.
2. A single pronouncement of Talaq such as "I have divorced thee" must be made.

3. Such pronouncement must be made during tuhr i.e. the period of purity between menstruation s.
4. The requirement that pronouncement of Talaq should be made during tuhr applies to an oral divorce, but it does not apply to a written Talaq.
5. The requirement that pronouncement of Talaq should be made during Tuhr does not apply to a wife to has crossed the age of menstruation or the parties have been away from each other for a long time, or when marriage has not been consummated.
6. There must be no sexual intercourse during Tuhr.
7. There must be no sexual intercourse during the period of Iddat. In case of a pregnant woman, there must be no sexual intercourses until the birth of the child. It could be revoked if the husband makes a Ruju (sexual intercourse) to words wife during the period of Iddat by conduct or even by express words.

If a civil marriage conducted in England between a Mohammedan of Indian domiciles with a Christian whom of British domicile, the marriage cannot be dissolved by mere Talaq because their marriage is not performed according to Mohammedan Law.

The Concluding part of the Famous judgment of Supreme Court of India is as follows:

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. the State of U.P.**, (2002) 7 SCC 518, this Court after referring to a number of authorities including certain recent High Court judgments held 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 between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, *talaq* may be effected (para 13). In *Rukia Khatun case* [(1981) 1 Gau LR 375] the Division Bench stated that the correct law of *talaq*, as ordained by the Holy Quran, is:

ithat “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 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.

We are in respectful agreement with the above said observations made by the learned Judges of the High Courts.” (at page 526) 57. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in **Rashid Ahmad** (supra), such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds well after **Shamim Ara** (supra). This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violate of the fundamental right contained in Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce 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.”

4. CONCLUSION

With the above judgment which is law of the land under Article 141 of the Constitution of India now, it is not possible for a Muslim male to divorce his wife without following the procedure explained in the judgment. This has given relief to a large number of Muslim women in India.

5. CITATIONS

1. Maria Munnisa Begum V. Noore Mohammad Saheb, AIR 1965 AP231 at p.235.
2. Musstt. Rebun Nessa V. Musstt. Bibi Ayesha, AIR 211 Gau 36.
3. Sheik Alimuddin V. Tajmunnisa, I (1998) DMC 233 at p.238.
4. Reshid Ahmad V. Anisa Khatoon, AIR 1932 PC 25.
5. Banu V. Kutibuddin Sulemanji Vimanwala, II (1995) DMC 390 at pp.400, 401.
6. Btlquees Begum V. Manzoor Ahmad, PLD 1962(WP) Karachi 491.
7. Rasul Baksh V. Mst. Bholan, AIR 1932 Lah 498.

6. BIBLIOGRAPHY

1. The Honourable Apex Court Judgment in the matter of Shayara Bano Vs. Union of India (famously known as The Triple Talaq case).
2. Mulla. I, Mulla on Mohammedan Law, 3rd Edition 2013, Reprint 2014, Dwivedi Law Agency, Allahabad.
3. Dr. Muhammad Taqi-ud-Din Al-Hilali Dr. Mummammad Mushin Khan, The Noble Qur'an, Mohd. Sirajuddin, Masab Tank, Hyderabad.
4. Moulana Jaleel Ahasan Nadvi, Transaltion into Telugu S M Malik, 'Hadeesu Velugu', Telugu Islamic Publications , Sandeshabhavanam, Lkkadkoth, Chattha Bazar, Hyderaqaabad 500 002.