

## Divorce: A Critical Analysis of Islamic Law

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### ABSTRACT

Talaq and Divorce though have always been used interchangeably yet the former is distinct in nature as it is the termination of marriage by the sole prerogative of the husband unlike English Divorce, which can be initiated by any partner. The Islamic concept of dissolution of marriage stands on power of announcement by Husband bestowed to the latter by Almighty Allah. It is this unique authority, which makes Talaq different from Divorce. This unilateral power of one partner though sanctioned under Islamic scriptures, nonetheless has often been exploited. A comparative case study of legislations adopted by different countries has been undertaken to evaluate this issue. Talaq-ul-Bain or Triple Talaq has been critically analyzed in the background of Islamic law and many scholars have suggested reforms to bring this law into conformity with the true spirit of Islam by treating both partners on equal footing in a society. Reconciliation or re-unification, which is an essence of Islamic form of divorce, is only possible in case of declaring Talaq-ul-Bain or Triple Divorce as null and void.

**KEY WORDS:** Irrevocable divorce, chance of re-uniting, equitable rights, Unilaterally, Judicial divorce, Reconciliation, Triple divorce.

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### INTRODUCTION

Divorce or Talaq under Islamic Law means the termination or dissolution of the contract of marriage between the husband and wife. Islam if on one hand strongly advocates a congenial relationship between a married couple, it on the other hand, also doesn't shut the doors for an amicable separation between the two when it becomes inevitable to depart rather than "being miserably bound together". [1] Talaq, though often considered as the sole synonym for divorce in Islamic law, does not have such a generic meaning as divorce. For the purpose of clarity in understanding, a divorce by talaq in Islamic law may be understood as that dissolution of marriage which is effected by the sole prerogative of the husband to end the marriage as opposed to any other type of divorce which may be brought about at the instance of either the husband or wife, and which is more varied in its form and character. A talaq, therefore, is a divorce forced on the wife by the husband without requiring her consent. However, both divorce and talaq have sometimes been used interchangeably, the meaning in such cases becoming clear from the context in which either word is used.

#### Different Modes of Talaq:

1. A talaq can be given either orally or through a written document called 'divorce deed' or *Talaknama*. [2] Divorce can be effected in three different modes i.e. Ahsan (the most proper or best),
2. Hasan (proper or good) and;
3. Bidd' at or Ba' in (irrevocable). The first two modes of talaq are given only during *Tuhr* (Period between two menstruations) which become effective and irrevocable after approximately 90 days, there being a slight difference of the number of pronouncements between the two forms. The third mode which is called Talaq-ul-Bidd' at or Ba'in takes effect immediately after it is pronounced. Once talaq becomes irrevocable, the right to reunite is seized unless the wife marries another husband and the latter dies or divorces her after fulfilling the condition that the marriage be properly consummated. [3] This practice has been termed *Halalah* or *Tahlil*, [1] the performance of which makes it permissible for the prior husband to get married again to the same woman.

Talaq, though permissible in Islam, has been considered 'the most detestable of lawful things' near Allah. [4] In other words, Allah hates talaq despite the fact that it has been lawfully sanctioned by

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Him.[5]Therefore, Islam encourages all those efforts, which prevent talaq from happening at all. This is because it brings unhappiness and destruction to the whole family set up. The two important and controversial issues regarding divorce or talaq in Shari'ah are; first whether the right of giving divorce is the sole prerogative of males only or can this right be bestowed on woman who apparently suffers more than the other partner and secondly, whether Talaq-ul-Bidd' at has any room in Islam.

The right to dissolve the marriage has been reserved exclusively for the man since ancient times with few exceptions. Under ancient Jewish and Athenian laws, the husband could divorce his wife whenever he wished without giving any reasons. There were no checks and balances on the power of the husband. In the early Catholic society, it was the Church, which could grant this power upon proof of adultery, cruelty or seizing to be a follower of the Church by one of the partners. It is relatively recent that this power was transferred from the Church to the state by the Protestant Reformist movement led by Martin Luther. [3]The old Hindu scriptures sanctioned the marriage as an indissoluble contract even after the death of the husbands. That was the reason why women were burnt alive along with the dead body of the husband (*Satti*),[1]Quran states at one place;

“When you divorce women, and they fulfil the term of their (*Iddah*), either take them back on equitable terms or set them free on equitable terms, but do not take them back to injure them, or to take undue advantage; if anyone does that, he wrongs his own soul,.....”[6]

The above verse clearly indicates the process of repudiation or separation on equitable terms. However, it does not make a rule that men should have unbridled control of this power. Before a man chooses to exercise it, Quran has imposed conditions and responsibilities,[7] which act as a strong check on the unilateral use of this power. For example, the time limit set in Talaq- ul- Sunnah (Ahsan and Hassan) clearly indicates that in case of divorce the husband has to provide maintenance to the wife for the whole duration of *Iddah*, i.e. three months. During this period the doors for reconciliation are always open. Moreover, the husband is liable to pay a sufficient amount of dower fixed at the time of marriage along with the cost of bringing up the children which has also been put on the shoulders of the father. [3] Similarly, the pinch of *Halalah* makes the husband think twice before he makes up his mind to divorce his wife. [1] Asma asserts that the “deeply egalitarian nature of Quran” promotes “compassion and tolerance” not only in matters of marriage but also in case of divorce. She says that the teachings of Quran on Talaq if properly understood and had men taken them “seriously”, can make divorce the hardest thing to be invoked. [8]

Under *Khula*, the woman has been given the right to dissolve the marriage on a condition that she has to withdraw from the dower she had been stipulated at the time of Nikah. She may return the dower in any other form or arrangement which benefits her husband like agreeing to nurse their child or maintain the child on her own expenses when she in normal circumstances is not bound to do so [1]. Many scholars are of the view that the reason behind the male's unilateral power to divorce is his financial responsibilities which have been assigned to him by God. Based on the Qur'anic teachings, some countries have shown a reformist approach towards women by giving her right of divorce through a court. For instance in Pakistan, under the Dissolution of Muslim Marriages Act 1939, a woman can take a plea of divorce on any of those nine grounds mentioned in the Act. [2]The grounds for divorce include failure of husband to provide maintenance, husband's whereabouts are not known, imprisonment of husband, impotency, cruelty, imprecation by husband etc. The wife may also be entitled to initiate the divorce on her own on the basis of “delegated divorce” and “conditional divorce”. [5]

The unrestricted use of husband's power to divorce his wife has raised many concerns. For example, Qadi Khan following Hanafi doctrine gave a Fatwa that a woman can kill her ex-husband when he advances to her for sexual desire. The husband is consistently denying his announcement of irrevocable talaq to which the wife is the only witness. Now according to the Mufti the only remedy available to her is to kill him not with a weapon but with a drug because by using the latter method she can easily escape the punishment of *Kisas* (retaliation) sanctioned by the state. This issue clearly raises many questions e.g. how can Qadi Khan give such an unlawful permission to her to poison her ex-husband so that she escapes from the law for causing unnatural death of her husband? Mufti allows her to do so because he knows she will not be able to prove it in the court that he had divorced her. Then another question arises as to why Islam doesn't recognise the evidence of a woman regarding talaq when she is the only witness and the plaintiff herself? What about her rights of remarriage and maintenance even if she escapes from the same husband for being forced to commit adultery or being raped in simple words especially when Qadi Khan doesn't even recognise her right of judicial divorce. [5]

### **Suggestions and Recommendations:**

In modern Islamic legal reforms, this power of a male to dissolve unilaterally the contract of marriage has been curtailed e.g. in Malaysia both the husband and wife whoever wants to repudiate has to come before the court to lodge his or her complaints. The court then either acts as arbitrator or awards the judgement. It is true that Quran makes no reference to women repudiating their husbands but it should not be inferred as they cannot exercise such a right. This interpretation was drawn in contrast to a custom in a pre-Islamic society when the women had to simply turn the entrance of her tent to face another direction indicating her desire to finish the matrimonial relations with a man. [7] The emphasis should be the distribution of mutual benefits and equitable rights between the two which has been clearly reiterated in the Quran. However, there are many scholars who are still not in favour of handing over the same unilateral power to the women for being different in “psychological and physiological make up” from the men. The pathological change as a result of the period of menstruation in women causes weakness and increased nervous tension, may easily affect their rational judgement. This biological change has been verified by those statistics, which show that a very large number of crimes committed by women are committed during their menstruation. [1] But I think even this so called ‘biological change’ in a woman can be counter-balanced to a large extent when there is also some sort of restriction imposed on her power to exercise i.e. she will only be allowed to give divorce to her husband when she is not in her menstruation just like men are not allowed to give divorce when the woman is passing through the same stage. This unilateral power of the husband over the wife has been termed as “a power of a master over slave” in which the former enjoys an absolute control over the latter. [5] Many countries have come up with a positive reformist approach towards divorce by making sure that the rights of the oppressed are not violated but still they are not sufficient. For example in Malaysian courts, it becomes very difficult for a wife to present two witnesses either to prove that she has not received any maintenance from her husband or that she has been physically abused by him.[9] According to the Working Group’s Recommendations, if marriage is considered a contract between a husband and wife as it is then both parties should have equal rights of divorce. A unilateral right of divorce with a husband goes against the concept of a contract since the mutual agreement of both partners is necessary for the formation of a contract. They further suggested that besides the list of grounds that would entitle the wife to a divorce, a clause should be inserted in the “*Marriage deed*”[5], to give the wife a right of ‘general delegated divorce’ in advance as it has been done by Muslim Family Laws Ordinance 1961, of Pakistan. It is none but the Quran itself that urges us to honour the deeds we make, “To fulfil the contracts which you have made”. [6] Now many Muslim countries which do not push for the enforcement of the marriage contracts or to penalize somebody for their breaches are actually not serious themselves to make the marriage contract Islamic. [8]

The Egyptian Muslim Family Law reforms 1926 and then 1979 brought two major reforms within their system i.e. the introduction of grounds on which a Muslim woman can sue for a judicial divorce and secondly, to limit the husband’s power to divorce his wife without being accountable. The former includes grounds of (1) husband’s failure to provide maintenance; (2) contagious disease of husband; (3) imprisonment of husband; (4) maltreatment. The latter reform rendered the divorce pronounced by husband under compulsion or in a state of intoxication invalid diverging from the Hanafi School which focuses on ‘*form* rather than *intention*’, hence declares such divorce as valid under this school. Dr. Aisha Ratib, a professor of Law at Cairo University suggested that the divorce should only be obtained through a court. In Iran a husband cannot divorce his wife unless and until he has secured a “Certificate of Irreconcilability” from the court. Pakistan (1961) has a more reformed law according to which the husband must inform the Arbitration Council and that divorce does not become operative until the expiry of ninety days during which all steps towards reconciliation between the divorcees have already been taken up. However, in all the above cases divorce does not become invalid but becomes only punitive. The only exception is Tunisia (1956) where divorce given outside a court is considered wholly ineffective.[10]

As far as the second part of this debate is concerned, Islam as I have mentioned above, does not encourage talaq between the couple rather it asks for the reconciliation first, “If they wish for reconciliation”. [6] The first two modes Ahsan and Hassan are truly reckoned as Talaq-ul-Sunnah or way of the Prophet (SAW) for the reason that they provide a reasonable time for reconciliation or reunification between the husband and wife which the Holy Quran is referring to. The period of three months is a reasonable check on harsh and hasty action of the husband. There is more likelihood that the husband would rethink his decision which he took either under extreme anger or misunderstanding. On the other hand, Talaq-ul-Bidd’ at which was introduced by the Umayyad monarchs in the second century of Muslim era [2], is completely unethical and irrational. This form is a clear innovation in Din and fulfils the selfish

desires of many *ignorant* Muslims. [1] Prophet Muhammad (PBUH) annoyed with the decision of a man who gave three divorces at one sitting said, “Are you playing with the Book of Almighty and glorious Allah while I am still amongst you?” [3]. This form of talaq violates the spirit of Islam by giving no opportunity at all for a compromise as it becomes irrevocable immediately after it is pronounced. Talaq-ul-bidd’at not only “bypasses the waiting period (Iddah)” but also makes the *ruju* (reunion) between the divorced couple impossible unless the wife passes through the stage of Halalah. [10]

Among the four schools of thought, the Hanafi and Shafi recognise this form of divorce but at the same time consider it as sinful. [3] Shia law does not recognise this mode of Talaq at all. The Shia doctrine requires the presence of “two competent witnesses” [2], even during Talaq-ul-Sunnah to make divorce a more serious and less exploitable matter. In *Zeenat Fatima Rasheed v. MdIqbal Anwar (1993)*, the Divisional Bench held that a Muslim husband can neither be allowed to divorce his wife on his “whim or caprice” nor can he give divorce without giving a valid reason. It was also decided that he cannot give it unless and until he conducts a “pre-divorce conference” to bring reconciliation.[11] Apart from Islamic law, the Muslim practice of Triple divorce at one sitting is also repugnant to one of the basic characteristics of modern law of divorce of fair play which is based on the “principle of equity, justice and good conscience.”[12] Many Muslim countries have passed legislation either to put a complete ban on this mode of talaq or by making a legislation as in the case of Egypt (Egyptian Law No. 25, 1929, Art 3) [10], to declare the three pronouncements at one sitting to be considered as only one single pronouncement. [5]

## CONCLUSION

From the above discussion, it can easily be deduced that the Islamic law of divorce has to be completely moulded according to the true spirit of Islam. The existing laws are not fulfilling the gaps between theory and practice. The unbridled power of husband to give *Talaq* to his wife should be thoroughly monitored. Allah has not restricted this authority to a male only but it can be given to a woman for the mutual benefits of both partners in a marriage contract. The woman can get a Judicial divorce or through a delegation of power by husband. Triple divorce has to be completely banned or should be considered only one *Talaq* as it totally negates the teachings of Islam by shutting the doors of reconciliation between the two partners as soon as it is pronounced.

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