

Triple-Talaq And Judiciary In India: Reforms Of Sharia Law - Continuity Or Change?

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Abstract: Divorce in Islam usually takes variety of forms. The Traditional legal categories of Islamic divorce are talaq (repudiation by husband), khula (buying of freedom by the wife) and mubarat (mutual consent). The rules of divorce have always been governed by Sharia, as interpreted by traditional Islamic jurisprudence. However practices have often digressed from true Islamic spirit. Though Quran is egalitarian and justice its cornerstone but gender inequality of divorce practices that have existed in pre-Islamic Arabia are still vogue. By all reasons, women are particularly vulnerable. Triple-talaq has been an issue of much controversy and debate. The practice has been criticized on grounds of gender justice, equality and human rights. The Supreme Court of India in its landmark judgment on 22nd August 2017, have declared the practice of triple talaq as un-constitutional and has left to the government to legislate on the issue. However, what the court has banned is the 'instant' version of triple talaq, where the husband utters the word talaq thrice and capriciously breaks the marriage-bond. It must be pointed out that as regards the Muslim community all issues relating to family sphere are regulated by the Muslim Personal Laws. The Constitution of India lays down that personal laws of the community would remain untouched and all issues where both parties are Muslims should be adjudicated in the light of their personal laws.

Keywords: Quran, Sunnah, Sharia, Triple-talaq, Nikah, Khula, Islamic Law, Hadith

I. SHARIA: ITS MEANING AND PHILOSOPHY

About 14.23% or roughly 17.22 million of the Indian population (2011 census) are followers of Islam; as such the lives of Muslim population in the subcontinent are largely guided by the 'Muslim Personal (Shariat) Application Act, 1937. This act overtly accepted that Muslims in the country shall be governed by their personal laws as Section 2 of the *Shariat Act, 1937*, which is the authority of the Indian courts for applying the Muslim Personal Law relating to marriage and dissolution of marriage says that the said law will be the rule of decision in cases where the parties are Muslims." (Mahmood, T. 1982, 5th ed., p. 57.)

The Act states, "Notwithstanding any customs or usage to the contrary, in all cases regarding adoption, wills, women's legacies, rights of inheritance, 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 *waqfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties to a case are Muslims shall be the Muslim Personal Law (*Shariat*)." (Mahmood, T. 1983, 2nd ed., p. 24)

"*Sharia* ... by its very definition has evolution built into its meaning and cannot be rigid. The term *Sharia*' means a watering place, a flowing stream, where both animals and humans come to drink water. Stagnant and standing water is not *Sharia*." Technically, the term *Sharia* denotes 'the Canon Law of Islam, the totality of *Allah's* commandments." (Fyzee 2012, 5th ed., p.10). In the words of Fazlur Rahman, "in its religious usage, from the earliest period, it has meant 'the highway of good life', i.e. religious values, expressed

functionally and in concrete terms, to direct man's life." Embracing all human actions, *Sharia* laws are not merely laws in the ordinary sense of the term, but 'an infallible guide to ethics'. 'As a doctrine of duties', 'a code of obligations,' *Sharia* relegates legal considerations and individual rights to a secondary position. The result of a continuous process of evolution since its existence of over some fourteen centuries, *Sharia* laws or Islamic laws as it exists today, denotes Islamic moral order. "Islamic law, says Fyzee (2012, 5th ed., p. 1), though not a systematic code, but is a living and growing organism...." The historical foundation of *sharia* is essentially normative, the development of which dates back from the seventh century to the present. Therefore, to view *Sharia* as something static and rigid would be to ignore and disregard centuries of juristic literature and legal rules; the laboured fruits of Muslim juristic analysis and interpretations. "The *Sharia* tradition comprises considerable juridical literature, much of which illustrates that jurists often went beyond scripture, utilizing their discretion in various ways to articulate the law ... that balanced the need for authority, legitimacy, and discretion in a way that ensured a just outcome under the circumstances."

Since the *Quran* is *ipsissimaverba*, (the very word of God Himself ...) and *al-furqan*, (ie, showing truth from falsehood and right from wrong) (Mahmood, T, 2008, p. 98), the basic outlook and philosophy of *Sharia* is egalitarian. As such the concept of justice is ingrained in Islamic teachings. The *Quran* has emphasised upon both the right and duty to seek and do justice. A thorough and in-depth study of the *Quran* reveals that Islam enjoins upon women a number of rights upholding the ultimate spirit of equality between men and women. In Islamic tradition rights enjoined upon women springs from the Holy '*Quran*' and '*Sunnah*' (Traditions of the Prophet) apart from '*Ijma*' and '*Qiyas*'. In this context, one should not forget to mention '*Ijtihad*'. Taking into account, the evolutionary character of Islamic teachings, the dynamic nature of *Sharia* and the principle of justice and equality in Islamic tradition there is little room to argue that the principle of gender equality is alien to Islam.

Often raging controversies have erupted over the question, 'Whether Islamic law is compatible with gender equality? Allegations have cropped that Islamic laws are not in consonance with the spirit of Human Rights, to be more precise the rights of Muslim women. There are voices that perceive that discrimination exists against women, albeit Muslim women in specific spheres of family laws, particularly in areas of marriage and divorce despite the fact that it is "clear in the *Quran* that men and women have equal religious duties, rewards and punishments before God." Shaheen Ali Sardar (2008) brings forth the point that though there are verses in the *Quran* which 'validates the creation and reinforcement of hierarchies based on gender ...' but these are few in number. The *Quran* contains 6,666 verses and out of such huge number only 6 verses (2:221, 2:228, 2:282, 24:30 and 4:3) accord Muslim men the privileged status enjoining them the authority and responsibility of control over and care of women. However, one point that should be noted here is that while delegating men the right of authority over women, the same six verses enjoins that Muslim males should remain equally responsible for the care of orphans, poor and needy.

She raises a pertinent question, "Why and how these 6 verses outweigh the remaining 6,660?" Scholars have contended that discrimination against women do not emanate from Islamic laws rather it is the patriarchal reading and interpretation of *Quran* which leads to discrimination against Muslim women. Discrimination against women according them inferior status has been the result of restrictive interpretations of Quranic verses. Historically, it is men either in the form of religious leaders, interpreters, commentators and jurists who have maintained their sway over religious and authoritative scriptures. Therefore, it is obvious that these Muslim men would interpret religious rulings in their favour to maintain their hegemony over women.

II. MARRIAGE AND DIVORCE IN ISLAM

Though marriage or *nikah* in Islam is a contract, nonetheless Islamic law accords women a high social status post marriage. In its legal connotation marriage (*nikah*) is a contract in the sense that remains dependent upon a proposal and consent, permits for breach and allows modifications and revisions to suit the merit of each case. Marriage is *Sunnah* as the Prophet positively encouraged it and this is enjoined to *His* saying, "There is no monkery in Islam." Being the cornerstone of Islamic culture, marriage as an institution stands "for protection of society and its members from foulness and unchastity." As means for continuation of human race, it promotes normal family life and legitimizes children. By virtue of being a contract, marriage in Islam, as such is, reputable; there is nothing immoral in divorce. Though Islamic law recognizes the right of the husband to divorce nonetheless Islamic morality requires that men divorce only after they had demonstrated valid reasons. It is ordained that men do not abuse the power of divorce and if it must be exercised it should be in conformity with the more exacting requirements of moral and ethical principles. The practice of the right to divorce on frivolous and trivial grounds is highly condemned as it destroys the family unit and social fabric. Divorce has been condemned by the Prophet as something most reprehensible and repugnant of all things in the sight of *Allah*. The Prophet said, "Of all the things that Islam has permitted, divorce is the most hated by *Allah*." As such divorce is *makruh* (disapproved, which is not essential). Islam conceives of marriage as the rule of life and divorce only an exception as the Prophet said, 'marriage is one of my *Sunnah*. One who does not follow it does not belong to me'. Neither the *Holy Text* specified any matrimonial offence nor has the Prophet laid down any bars to matrimonial relief. The law givers of Islam did not want the issue to be taken to courts unless it became unavoidable. The *Quran* and *Sunnah* repeatedly warn spouses that divorce is '*abghad-ul-mubahat*' or the worst of all permitted things'. And if such worst things should unavoidably happen, then they should privately and jointly try to resolve the issue; and it is only in exceptional circumstances that judicial intervention should become necessary.

Though the husband can terminate the marriage unilaterally and extra-judicially by pronouncing *talaq*, the women's position to some extent may be protected by the fact that her '*mehr*' or (deferred) dower becomes payable upon the

termination of the marriage. Although pronouncing *talaq* remains the initiative of the husband the women too can annul the marriage by *khula* having its source in the Quran. *Khula* is divorce at the instance of the wife where she willingly parts with a part or whole of her dower or any other valuable for her release from the marriage-tie. *Khula* is more of a bargain between spouses where the wife buys her freedom in lieu of some material or financial arrangement. The Fatawa Alamgiri lays down, 'when married parties disagree and are apprehensive that they cannot observe the bounds prescribed by the divine laws, that is, cannot perform the duties imposed on them by conjugal relationship, the woman can release herself from the tie by giving up some property in return for consideration of which the husband is to give her a *khula*' In the words of the *Hedaya*, she purchases a divorce from her husband by "offering compensation as may induce him to liberate her." *Khula* remains independent of the husband's will and consent. Another form of divorce prevalent in Islam is *mubarat*. This form of divorce occurs at the joint or common initiative of spouses and should not be confused with *khula* (which is divorce at the instance of the wife).

Apart from such extra-judicial forms of divorce, Islamic laws also provide for judicial divorce. A Muslim marriage may be dissolve either by *talaq* (repudiation) or *faskh* (resolution). *Faskh* literally refers to the power of the *qazi* to annul a marriage by judicial decree on being approached by the aggrieved wife. The law of *faskh* operates on the basis of Quranic injunction and Traditions of Prophet; the *Hadith* says, 'If a woman be prejudiced by a marriage let it be broken off'.

A general perception prevails that men possess the unilateral right to divorce through *triple-talaq* formula, however to accept it is to exhibit ignorance about Islamic teachings. The *Quran* informs that unilateral right of *talaq* does not mean that Islam permits men to use it irrationally and arbitrarily and if situation warrants, it is expected that he will exercise it with a sense of *adl* and *maquliyat* (justness and rationality respectively) in God-fearing way because *Surah 2 Verse 229* (2:229) of the *Quran* commands, 'to hold together on equitable terms or to separate with kindness'.

Talaq is not an unfettered right of the husband. The formula of *triple-talaq* is clearly mentioned in the *Quran*. The *Quran* permits *talaq* only on condition that there is a complete breakdown of marriage. Parting of ways must be graceful and utmost care must be taken to ensure that no suffering is inflicted on the wife. Though women suffer from the profligate use of *talaq* but the *Quran* admonishes any *such act* unless preceded by mediation or reconciliation. The *Quran* emphasize reconciliation rather than divorce. *Surah 4 Verse 35* of *Quran* calls for appointment of arbiters to curtail unbridled exercise of this right. *Verse 4:35* reads, "And if you fear a breach between the twain, appoint two arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: for Allah has full knowledge and is acquainted with all things."

Triple talaq is not the right form of divorce; mere pronouncement of *talaq* by the husband is neither sufficient nor does it meet the requirements of Islamic law for divorce. Islam never permits such acts; it is a misconception that *nikah* would be annulled by repeating the word thrice. *Triple-talaq* is actually *talaq al-biddat* or innovation with no support in

Quran and *Sunnah*. Divorce inevitably has to be quite fairer to women, as the *Quran* repeatedly exhorts men to either retain her (in marriage) in goodness or leave her (divorce her) in kindness (Sura 2 Verse 229). Verse 2: 229 of 'Quran' reads, "A divorce is only permissible twice: after that, the parties should hold on equitable terms, or separate with kindness ..."

In Islamic law, divorce can be categorized into *talaq-al-Sunnah* and *talaq-al-biddat*. Consistent with Prophet's teachings is the idea of *talaq al-sunnah* where the husband utters a single pronouncement of divorce and abstains from physical relationship with his wife. Such abstention continues for a period of three months, known as *iddah*. This first pronouncement of *talaq* is revocable during the whole period of *iddah*. In reality, the period of *iddah* provides room for reconciliation and offers the husband the time to reconsider his decision. Each *talaq al-sunnah* has to be uttered once at a time.

Opposed to *talaq al-sunnah* is *talaq al-biddat*, not consistent with the Prophet's decision. In *talaq al-biddat* the husband pronounces the *triple-talaq* formulae in one instance. With the husband's pronouncement 'I divorce you, I divorce you, I divorce you' at a single instance the separation takes place. Disagreement prevails among jurists as to whether *talaq al-biddat* with or without reason renders the marriage invalid. *Talaq al-biddat* is a reflection of the social custom prevalent in pre-Islamic Arabia where the husband enjoyed unfettered right of divorce. This unwanted form of *talaq* transformed itself into common practice through the force of social custom and got incorporated into the corpus of Islamic law. If we go by the spirit of Quranic dictation, *triple-talaq* does not indicate uttering of *the same* in one utterance.

III. TRIPLE-TALAQ AND JUDICIAL RULINGS

There are ample evidences in the legal circle to show that courts in India at various times had provided significant rulings on Muslim religious beliefs and practices. In recent times, it has shed its wisdom on the controversial issue of *triple-talaq*. The issue of *triple-talaq* is a contentious one exhibiting how patriarchy and patriarchal interpretations predominantly prevail in contemporary society.

In response to the petition filed against *triple-talaq*, the All India Muslim Personal Law Board (AIMPLB) strongly defended the practice in the name of religion. The Board strongly declared that *Sharia* grants the right to divorce to husbands because men have greater power of decision making. Such statements from custodians of religion manifests complete disregard for reason and sensitivity because 'the *Quran* itself grants equal rights and responsibilities to both men and women. When the authoritative text makes no gender discrimination then gender equality and right to dignified life should not be negotiable.

Describing *triple-talaq* a popular fallacy, a single judge bench on 5th November 2016 noted that the practice of instant divorce or *triple-talaq* is not in consonance with the letter and spirit of Islam. The practice runs contrary to the spirit of *Quran* and the *Prophet* because divorce in Islam is permissible 'only' under extreme circumstances when all possible efforts at reconciliation have failed. The court further observed, "The

Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy, but in the absence of serious reasons, no man can justify a divorce, either in the eyes of religion or the law.”

However, the issue of declaring *triple-talaq* unconstitutional has nothing to do with uniform civil code. The right to follow one's personal law is a right guaranteed by the Constitution and this right cannot be done away in the name of uniform civil code. The attempt to implement Uniform Civil Code (UCC) across the length and breadth of India will surely kill the plural ethos of the country. Uniform Civil Code bears the potential to threaten the pluralism and diversity of a multicultural society like India. In a public lecture on the subject of Uniform Civil Code, Justice Ruma Pal (former judge of the Supreme Court) out rightly rejected the idea of UCC and made a strong pitch for intra-community reforms. Emphasising the importance of plural cultures, the Hon'ble Judge said, "For India to thrive as a vibrant multicultural society, cultures must be preserved for that is the very essence of India." Rather than harping on the issue of implementing UCC and linking it with *triple-talaq* the authorities should concentrate more on bring peace and security in society.

Of late, the Supreme Court in a landmark judgment on 22nd August, 2017 struck down *triple-talaq* squashing it on grounds of being against the basic tenets of *Quran* and *Sharia*. The Supreme Court pronounced its verdict in three separate judgments running into 395 pages. Sensing the absence of constitutional protection for *triple-talaq* the Supreme Court in a majority judgment of 3:2 declared "the practice of *triple-talaq* among Muslims is void, illegal and unconstitutional." The Supreme Court verdict was hailed across the spectrum ranging from several affected Muslim women and political leaders as well as by Bharitya Muslim Mahila Andolan (BMMA) Though the verdict was delivered by five senior-most judges from five different faiths but such a crucial panel deliberating on such a vital issue was conspicuous by the absence of any female judge.

It is true that customary practices divergent from values and principles of *Quran* have emerged and *triple talaq* is one of them. Though practiced it is supposed to be sinful by the Hanafi School of Islamic thought. The practice is manifestly arbitrary since it breaks the marital bond capriciously and whimsically without any attempt at reconciliation. Running against the spirit of the institution of marriage, the practice of *triple-talaq* is also violative of the very sanctity of the original concept of *talaq* in Islam. Therefore, what is bad in the *Scriptures* cannot be good in *Sharia* and in that sense what is bad in theology is bad in law as well. Justice Nariman in his judgment had said, "this form of *talaq* must, therefore, be held to be violative of the fundamental rights contained under Article 14 of the Indian Constitution."

However, "Justice Kurian Joseph intervened to point out that the Constitution also says to leave personal laws and customs alone. Yes, the Constitution says we will preserve your religion, whatever it is." In this context it is important to remind ourselves of some previous rulings of the Hon'ble Supreme Court. "In a decision of the case *Krishna Singh vs Mathura Ahir*, a two judge bench of the Supreme Court

decided on dated 21-12-79 that Part III of the Indian Constitution does not touch upon the personal laws of the parties." Since both the Supreme Court and High Courts follow the Muslim Personal Law in adjudication when both parties are Muslims, members of the Muslim community are free to follow *Sharia* rules for responding to their specific personal and community needs. It is often argued that personal laws ought to be opened to scrutiny under Article 13 (laws inconsistent with or in derogation of the fundamental rights) of the Indian Constitution. At the same vein, it is counter-argued that if personal laws are brought under scrutiny under Article 13 of the Indian Constitution then Article 25 (Right to freedom of Religion) of the same would be rendered redundant. Another cornerstone of the Indian Constitution is "Article 225 which justifies the continuation of personal laws for the Muslim community. Arguing on the justifiability of personal laws it is held that since the source is *traditional scriptures or texts*, the same would not be opened to constitutional Challenge."

However, one must remember that what the Supreme Court has struck down is the practice of *triple-talaq 'only'* or the 'utterance of *talaq* thrice in one sitting. The other means of *talaq* are still valid. However, it is not the first time that the judiciary had stood against the practice of *triple-talaq*. Earlier in 2016 a single judge bench of the Kerala High Court ruled that the practice is not valid as per *Quran* and that its practice should be punishable under the Indian Penal Code (IPC). Unlike the Supreme Court the Kerala High Court had taken a step forward and declared that the power of pronouncing *triple-talaq* should be taken away from men and should be vested with the courts 'alone'.

IV. CONCLUSION

Repeated attempts at intra-community reforms within the Muslim society have fallen short of the desired aim, courtesy the traditional ulamas reluctance to cede their sway over Islamic traditions and practices. The Supreme Courts' verdict on the issue of *triple-talaq* clearly exposes the need for social reforms within the community. It should be borne in mind that Islam is not responsible for the fact that the concept of *triple-talaq* is abused or misused by members of the Muslim community. The frequent and arbitrary practise of *triple-talaq* has given the general impression that marriage can be dissolved by uttering 'I divorce you' three times at one instance. The Supreme Court's verdict in no way would influence the use and practice of *triple-talaq* as per the Quranic spirit and dictation. It must be borne in mind that the formula of *triple-talaq* as per *Quran* in letter and spirit is an exception to be used in exceptional circumstances.

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