

Triple Talaq: The End of a Popularised Lie

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Abstract

The laws governing marriage and divorce among the Muslims in India witnessed a controversy much recently when the matter of 'triple talaq' came before the Indian Supreme Court for its final adjudication. There were opinions regarding the laws being 'orthodox' in nature thereby clogging the progress for the community. The Court finally, after witnessing a period of enormous discussions and explanations, came to the conclusion that the triple talaq is unconstitutional in nature. However, the journey is more interesting than the outcome of the case. This paper is an attempt to present the journey of the long-accepted practice of triple talaq, from Quran to British India and from British India to independent India. It is an attempt to find out the reason behind the ever-existing conflict between the personal law and the Constitution by glimpsing the Islamic Jurisprudence and various judgements of the Courts of this country. Attempt has also been made to trace the timeline so as to know how the cause of development of authoritative value of this practice. Lastly, a suggestion has been included to share a conducive mechanism to resolve this conflict.

Keywords: Talaq, Constitution, Fundamental rights, Quran, Religion, British

INTRODUCTION

Talaq is an Arabic word and its literal meaning is "to release". Under Muslim law, talaq means 'repudiation of marriage by the husband' [1]. The word talaq comes from a root (*tallaqa*) which means "to release (an animal) from a tether" hence, to repudiate the wife or free her from the bondage of marriage [2].

Divorce is the repudiation of the most pious relationship between a man and a woman. Talaq in its original sense means 'rejection of marriage', but in Islam, it means a termination of the contract of marriage forthwith. It is well-known that marriage is a contract as per the Islamic law, so talaq in its essence reflects the termination of the contract of marriage.

Even though, the provision of divorce was recognized in all religions, Islam is perhaps the first religion in the world which had expressly recognized the dissolution of marriage by way of divorce. In England, divorce was introduced only hundred years back.

Divorce signifies the dissolution of the marriage tie. In its literal sense, Talaq means "the taking off of any tie or restraint". The right of divorce is conceded in Muslim law, but the law prohibits its exercise by threats of divine displeasure.

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Where a marriage is terminated by act of parties, the dissolution is called divorce. Under Muslim law, the divorce may take place by the act of parties themselves or through a decree of the court of law. In Islam, divorce is considered as an exception to the status of marriage. The Prophet declared that among the things which have been permitted by law, divorce is the worst.

According to Baillie [3], the term divorce includes all separation originating from the

husband and repudiation for talaq in the limited sense, namely, of separation effected by use of appropriate words. In Islam, the term 'talaq' means, absolute power which the husband possesses of divorcing his wife at all times.

TEST OF TALAQ WITH RESPECT TO THE ISLAMIC JURISPRUDENCE

Before the advent of Islam, the power possessed by men with regard to divorce was absolutely unfettered. They could divorce their wives at any time, for any reason or even without a reason. There was also no bar as to the number of times they could give divorce to their wives. They could also revoke their divorce, and divorce again as many times as they preferred. There was a scarcity of stringent rules to regulate the responsibility of a man after he has given divorce to his wife.

This practice as well as the misery it caused to the women was hated by the Prophet Mohammad, who considered it to be the ugliest of all the things permitted by the Almighty [4]. He even warned his followers that [5]:

1. "Curse of God rests on him who repudiates his wife capriciously" and
2. "Divorce shakes the throne of god".

After the advent of Islam, the Prophet tried to change the pitiable condition of women by providing them status at par with men in matrimonial relations. The Prophet introduces several significant reforms in the Islamic system of divorce. All of these were sought to limit the unfettered power and dominion of the men in the matters of divorce. In the prevailing notions of the society at that time, it was practically impossible to eradicate this practice in its entirety. However, several significant changes were attempted in this direction.

The Prophet did this by allowing the women a right to end the matrimonial ties by exercising '*khula*'. *Khula* signifies divorce with the consent and at the instance of the wife in which, she gives or agrees to give a consideration to the husband for her release from the marriage tie.

The following verses of the Quran authorises divorce by *Khula*:

"If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if you do good and practice self-restraint, Allah is well-acquainted with all that you do" [6].

Another check placed by Islam on frequent divorce and remarriage was that, in case of irrevocable separation, it would be essential for remarriage that the wife marries another man, and this marriage be consummated before divorce and that the wife observes the *iddat* period. This measure was a doubtless success and made separation a rare situation. This method has however been criticised of being disgusting. It is however important to highlight that a condition as such is the strongest antidote for the evil. This is because it attacks the strongest feelings of the proud, jealous, and sensitive race like the Arabs, which is the sense of honour [7].

The express provisions of Quran also mandate that marital ties should not be broken unless it is the only solution available. The Quran says that the steps of reconciliation should not be kept in cold storage at the time of dispute between the husband and wife. Certain verses of Quran which elucidate the mechanism to be adopted under such situations are as follows:

1. Verses 1, contained in 'section' 1 of 'sura' LXV says that divorce is the most hateful, of all the things permitted, in the sight of God. Reconciliation is recommended at every stage, whenever possible.
2. 'Verses' 226 and 227 prescribes that an attempt should be made for reconciliation between the husband and wife. In case the couple is against it is unfair to keep the wife tied to her husband indefinitely.

3. 'Verses' 229 to 231 contained in 'section' 30 of 'sura' II cautions the couple to not act in haste in the matters of divorce.

It is a great fallacy that despite the ideal steps taken by the Prophet and the holy teachings of the Quran, the ideas of unfettered rights of men in case of divorce finds its dominance. It is the wrong interpretation which is to blame. The Islamic guidelines have been ignored as a result of which there is no legal control over the unfettered right of a Muslim husband to dissolve the marriage by uttering few words.

People have chosen to translate the teachings in the way it suits them. Adding to this is the lackadaisical attitude of the members of the Muslim community. It is this attitude of people that has led to the social evils like 'triple talaq'.

The idea of triple talaq finds its roots in the time of Caliph Omar. During that time people started indulging in widespread triple divorce, reverting back to the wife after swearing to their intention of giving a single divorce. Aggrieved by the fact that the facility of oath taking had been turned into a meaningless game by many, Caliph Omar decreed that triple divorce would become effective, refusing to allow the couple to revert to each other.

The object of Caliph Omar in treating it as a Mughallazah divorce was clearly to stop people from merciless repetitions of divorce and from treating the matter of divorce in a light and non-serious attitude.

However, with the moral turpitude which humanity went through times changed this effective remedy into a superb escape route for the re-erection of the husband's overturned might. From then onwards, the practice has been blatantly misused in the modern times and has resulted in a great deal of harm. People in the excitement of moment, give three divorces to the wife at one and same time without least intention to pronounce a Mughallazah divorce [8].

Thus, it implies that the teachings of Quran and the ideas of Islamic doctrines portray divorce as a sin and allow it only as a last resort. There is not even the slightest evidence of Quran supporting the practice of triple talaq. This ill practice has developed due to the wrong interpretations of the teachings of Islam done deliberately in order to restore the dominant status of patriarchal society.

The Development of Authority of Personal Law with the Lapse of Time

As the name suggests these are the internal laws of a religion. Usually, these laws control personal matters such as marriage, divorce, succession within the community. Muslim personal law is identified as the Muslim Personal Law (Shariat) Application Act, 1937.

It has a long history and its enactment dates back to the pre-independent India. Although its authority has always been under question in India, it exercises almost unfettered authority in the matters of marriage, divorce, and succession.

Before the advent of colonialism in India, the Muslim community followed the Shariat law to govern its internal affairs. These laws were based on the teachings of Quran. But the Britishers in consonance with their agenda of divide and rule created a separate set of laws for the Muslims and termed it as Muslim personal laws. Later they even enacted a separate Act in 1937 which is followed even now.

The course of events took place as follows:

Post Colonialization

The British rule in India took its initial steps through the assent of the Mughal rulers. Initially they were given only the taxation rights, however with the passage of time they acquired an absolute control over the social and political affairs of the Country.

Since the Indians became the subjects, the British Government acquired the right to frame laws for them. As per its policy of divide and rule it divided all the indigenous legal arrangements into two categories namely, the Hindus and Muslims.

When it found that even this was inadequate to contain the diversity of social groups in India it created “Mohammedan law”. This Mohammedan law clearly ignored the customary laws, regional variations, and inaccuracies in translation. It was clearly in defiance with the Quran and the actual practices being followed at the grassroot level [9].

Since then, these new laws started to operate and the misinterpretation done by the Britishers was carried forward.

In an attempt to mould the personal laws of Muslims in accordance with their motive to rule the Britishers formulated the following Acts:

East India Company Act, 1772

Section 27 of the Act enacted that “in all suits regarding inheritance, succession, marriage and caste and other religious usages or institutions, the laws of the Quran with respect of Mohammedan and those of the Shastras with respect to Gentoos (Hindus) shall be invariably adhered to.” Criminal proceedings in particular were assumed to be governed by the Shariat unless the Company’s Government should think fit to order otherwise [10].

The Act of Settlement 1781

This was an amendment to the Regulating Act of 1773. It pressed a duty upon the Courts to apply to the Hindus and the Muslims their respective laws on the matters of inheritance, succession, contract and dealing between party and party [11].

Muslim Personal Law (Shariat) Application Act, 1937

It was the final step towards affirming the authority of personal laws. It came into existence on 7th October 1937 as a British law. It states that all the matters relating to marriage, divorce and succession etc. shall be invariably governed by this law. As per section 2 [12] these matters are as follows: (a) intestate succession, special property females, gift, (b) marriage, various forms of dissolution of marriage, dower, guardianship, maintenance, (c) trusts, trust properties and wakfs.

Thus, it can be reasonably inferred from these events that the British government mutated the customary laws of the Muslims in order to facilitate themselves in ruling over the diverse communities of India. This attempt met its objectives with the enactment of Muslim personal law in 1937. This law however is not a divine book. It is rather a man-made law which was enacted by the British government and was later accepted by the Constitution of India. It was applied to Muslims in British India as a matter of policy, and not as a matter of religion [13].

Strife between Personal Law and the Constitution

It is quite lucid that the holy Quran is against the idea of divorce except in case the differences between the husband and wife are insurmountable. The Islamic jurisprudence renders a clear obligation upon the couple and the members of the family to protect the ties of marriage from being repudiated. The Islam expressly discourages the abrogation of rights of the women in disguise of divorce.

The possibility of triple talaq extracting its authority from the Quran is clearly ruled out after construing the ideas of Quran and Islamic doctrines. The question then arises as to what is the authoritative backup of this ill practice?

It is also evident that the Muslim Personal Law (Shariat) Application Act, 1937 has a major say in the matters of marriage, succession, and inheritance. So, it transpires that the practice of triple talaq derives its authority from this personal law of the Muslims. However, it is expressly clear that this law is not a divine dictum and derived its authority from the British laws.

So, the Real point of Conflict Appears to be Whether a Man-made Construction, Wearing the Cape of Religion, Cause the Supreme Law of the Land to Succumb

This conflict has been handled by the Hon'ble Supreme Court from time to time and was disposed off completely in the year 2017 through its judgment in *Shayara Bano v. Union of India* [14].

The first strike on this malpractice was done by Hon'ble Mr. Justice Krishna Iyer in *Assan Rawther v. Ammu Umma* [15] where he opined that the personal law so called is law by virtue of the sanction of the sovereign behind it and is, for the very reason, enforceable through Court. Not Manu or Muhammad but the Monarch for the time makes 'Personal law' enforceable. Since it is the state's legislative authority that is the basis of personal law, there is no reason why it cannot be subjected to the Constitution, just like other actions of the state.

Finally in the year 2017 the sufferings of the Muslim women came to an end when a five-judge Constitution Bench was set up to decide on the abovementioned issue in the case of *Shayara Bano v. Union of India* [16]. The bench came up with the following observations:

Triple Talaq is Against the Principles of Quran

The Holy Quran considers talaq as the most sinful practice. It permits talaq only in extremely unavoidable situations. But even under such circumstances the every attempt should be made to arrange reconciliation between the couple. This reconciliation is an essential step before talaq attains its finality. Since this arrangement is totally precluded while practicing triple talaq, it is against the basic tenets of Quran and consequently is violative of Shariat.

It was further observed that the whole purpose of the 1937 Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat activities. Hence, no constitutional protection can be granted to triple talaq as it goes against the tenets of Quran.

Triple Talaq is against the Constitution

The Hon'ble Court observed that the since Triple Talaq is instant and irrevocable no attempts could be made to save the marital ties from being repudiated. This is suggestive that this practice is manifestly arbitrary and is subject to the whims and fancies of the husband. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India.

It was further observed that Triple Talaq is recognized and enforced under the Muslim Personal Law (Shariat) Application Act, 1937 which is pre-independence legislation. Therefore, under Article 13(1) [17] of the Constitution, it is void as it is violative of the fundamental right Article 14 [18] of the Constitution because the practice is arbitrary and unreasonable in nature. The practice made the marital tie unstable and mercurial.

No Constitutional Protection to Triple Talaq

The Court reprimanded that Article 25 [19] protects those essential practices without which the religion would lose its fundamental character. However, in the present case Talaq-e-Biddat is only

one form of Talaq permissible in law, it is not an essential part of the religion and therefore it does not require to satisfy the test under Article 25 (2) (b) of the Constitution. Hence it is not eligible for any constitutional protection and is liable to be struck down.

Thus, it can be found out that the practice of triple talaq was violative of the fundamental rights of the women. However, this practice was overtly practiced by the Muslim husbands under the veil of the personal laws. There was a misconception that these practices are the religious practices under the Quran and hence are eligible for the protection under the Constitution. However, this misconception was finally cleared by the Hon'ble Supreme Court, which after thorough consideration of the tenets of Quran came to this conclusion that, actually, this practice of triple talaq does not find its place anywhere under the teachings of the holy Quran. This derives authority from a legislation and no legislation can supersede the principles of the Constitution of India.

CONCLUSION

Finding Solutions through Transformative Constitutionalism

The concept of utilitarianism given by the great philosopher Jeremy Bentham advocated the utility of laws. This concept elucidates that the laws should be such that they are of some utility to the society. The moment these laws lose their utility they should be replaced with new laws that fit the requirements of the people.

The same is the case with personal laws. The Indian society has witnessed enormous changes in recent years. Our society is moving towards a change where the women have left the passenger seat and grabbed the steering wheel of the development of the Country. To handle these changes, it is very important to improvise the laws in a manner that acquires the suitable efficiency to move at pace with these societal changes.

This can be achieved through *Transformative Constitutionalism* whereby the existing laws which are acting as an impediment to the social revolution must be replaced with a new law to recognize the advanced standpoints. It can be done either by amending the existing provision or enacting new legislation for it if required to do so. The fundamental goal is to obliterate the deeply rooted long on-going injustices in the society that have taken an institutional character that is religion.

Even the Prophet Mohammad himself was an ardent preacher of this idea. He said to his disciples that 'when one walks in the path of knowledge, one walks in the path of god.' There are certain Islamic doctrines provided by Prophet Mohammed him, that take care of situations where the Quran and the sunnah did not disclose the precise path to follow. One such technique is 'ijtihad', which literally means 'independent reasoning' and signifies the exercise of one's reason to formulate a rule of law.

Hence, it can be concluded that the reconceptualization of family laws based on democratic principles is important to cope up the emerging changes in the society.

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