



Talak in 21St Century : Custom or Superstition

**Dr. Sudhansu
Ranjan Mahapatra**

Professor, P.G. Dept. of Law, Sambalpur University, Burla, Odisha,
INDIA

**Shreemanshu
Kumar Dash**

Research Scholar, Department of Law, Sambalpur University, Burla,
Odisha, INDIA

ABSTRACT

The ongoing practice of talak makes the conscious citizens of the Muslim as well as non-Muslim communities think more and speak less on the subject. Talak is said to have its origin from the holy Quran. The Quran is the primary source of Islamic law, as it contains the entire fundamental directives and instructions of God. The Sunnah is the second source of Islamic law. Sunnah which means 'Method', refers to the statements, actions and agreements of the prophet Mohammad. Indian Muslim personal laws are based upon the Shariat Act, 1937 which is thus partially applied in India and laws and legal judgments adapting and adjusting Sharia for Indian society. The Muslim personal law is, thus an Act with a splendid blend of both divine and human acts. Acts which are divine are discerned to be objective where as human acts, so as not to impair the social fabric, often require repairing for their being subjective as has been in one of the cases like the case of Talak.

KEYWORDS : divine, dissolution, apostasy, compensate, khula, mubaraat, irrevocable, impotence, insanity, repudiation)

INTRODUCTION:

Divorce in Muslim Law may be broadly divided into the following categories:-

Divorce by husband
Judicial divorce at suit of wife.

Divorce by husband

Marriage under the Mahomedan law virtually is a contract which may be dissolved under certain circumstances in various ways such as (1) by the husband at his will, without the intervention of a court; (2) by mutual consent of husband and wife, without the intervention of the court; (3) by a judicial decree at the suit of the husband or wife. Muslim law doesn't give as much scope to the wife, in matter of divorce, as does it give to the husband. A Muslim wife in fact has a limited scope to get her marriage dissolved because she can make it possible only by a judicial decree.

What is talak:

The divorce when proceeds from the husband, it is called Talak. When divorce is effected by mutual consent, it is called Khula or Mubara'at.

Any Mahomedan who is of sound mind and has attained puberty, may divorce his wife whenever he desires without assigning any cause.

Form of Talak:

Talak may be effected by words either spoken or written. When it is written, the document is called a talaknama.

Oral talak: No particular form of words is necessary for effecting talak. Proof of intention is required unless the words are express (saheeh) or well understood. It is not required that talak should be pronounced in the presence of the wife. If the husband pronounced the word "talak" before a family council, it was held to be valid, as the wife was named. The talak pronounced in the absence of the wife takes effect though not communicated to her but for the purposes of dower.

Words of talak: The words of talak must indicate an intention to dissolve the marriage. If they are express (saheeh) like, "Thou are divorced," "I have divorced thee", or "I have divorced my wife for ever and render her *haram* for me" clearly indicates an intention to dissolve the marriage and proof of intention is not required. But in case of expressions which are ambiguous (kinayat) like, "Thou art my cousin, the daughter of my uncle, if thou goest" or "I give up all relations and would have no connections of any sort with you", the intention is required to be proved.

Pronouncement of the word talak in the presence of the wife or when the knowledge of such pronouncement comes to the knowledge of the wife, results in the dissolution of the marriage irrespective of the intention of the husband. If a man says to his wife that she has been divorced the previous day or earlier, it leads to a divorce between them, even if there is no proof of a divorce on the day before of earlier. Effect of a statement by husband in pleadings filed in answer to a petition for maintenance by wife that he had already divorced her long ago, wife shall be treated to have been divorced on the date on which statement to that effect was made by husband in his plaint.

Provisions under Shia law—Talak must be pronounced orally in the presence of competent witnesses and a talak communicated in writing is not valid unless husband is incapable of pronouncing it orally. Under Hanafi law a talak is valid irrespective of its form.

Talak in writing:- Atalak in writing or a talaknama is the record of the fact of an oral talak. It may be the deed by which the divorce is affected. Such a deed may be executed in the presence of the kazi or of the wife's father, or of other witnesses. A talaknama is said to be in the customary form if it is properly superscribed and addressed so as to show the name of the writer and the person addressed, or else it is said to be in unusual form. If it is in customary form, it is called 'manifest' provided that it can be easily read and comprehended. If the deed is in customary form and 'manifest', the intention is presumed. Otherwise, the intention to divorce has to be proved.

Shia law requires a talak to be pronounced orally in the presence of two competent witnesses. A talak communicated in writing is not valid unless the husband is physically incapable of pronouncing it orally.

Different Modes of talak: a talak may be effected in any of the following ways:-

Talakhasan- It consists of a single pronouncement of divorce made during a *tuhr*(period between menstruations) alongwith abstinence from sexual intercourse for the period of Iddat.

When the marriage is not consummated, a talak in the ahsan form may be pronounced even if the wife is in her menstruation.

Where the wife has passed the age of periods of menstruations, the requirement of a declaration during a *tuhr* is not required. This is only a requirement of oral divorce and not of one in writing.

Talakhasan- It consists of three pronouncements made during suc-

cessive tuhrs, without intercourse during any of the three tuhrs.

The first pronouncement should be made during a tuhr, the second during the next tuhr and the third during the successive tuhr.

Talak-ul-bidaat or talak-i-badai- it consists of the following:-

Three pronouncements made during a single tuhr either in one sentence e.g. "I divorce thee thrice"- or in separate sentences e.g. "I divorce thee, I divorce thee, I divorce thee" or

A single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage e.g "I divorce thee irrevocably".

When talak becomes irrevocable-

A talak in the ahsan mode becomes irrevocable and complete on the expiration of the period of iddat.

A talak in the hasan mode becomes irrevocable and complete on the third pronouncement, irrespective of the period of iddat.

A talak in the badai mode becomes irrevocable immediately it is pronounced, irrespective of the iddat. As the talak becomes irrevocable at once, it is called talak-i.bain, i.e irrevocable talak.

Until a talak becomes irrevocable, the husband has the option to revoke it which may be done either expressly or impliedly as by resuming sexual intercourse.

When Talak in writing becomes irrevocable- unless there is an intention to the contrary stipulated by words, a divorce in writing operates as an irrevocable divorce (talak-i-bain) and takes effect immediately on its execution.

Delegation of power to divorce- Generally the power to give divorce belongs to the husband. But under certain circumstances, he may delegate the power to the wife or to a third person, absolute or conditional, for a particular period or permanently. The person to whom the power is thus delegated may then pronounce the divorce accordingly. A temporary delegation of the power is irrevocable, but a permanent delegation may be revoked.

Stipulation by wife for right of divorce-

An agreement made, whether before or after marriage, by which it is provided that the wife should be at liberty to divorce herself in certain contingencies is valid, if the conditions are of a reasonable nature and are not opposed to the policy of the Muslim law. If such an agreement is there, the wife may, at any time after the happening of the contingent event, repudiate herself in the exercise of the power, and a divorce will then take effect to the same extent as if a talak has been pronounced by the husband. The power so delegated to the wife is not revocable, and she may exercise it even after the institution of a suit against her for restitution of conjugal rights.

Talak under compulsion- If the words of divorce used by the husband are "express", the divorce is valid even if it was pronounced under compulsion, or in a state of voluntary intoxication, or to satisfy his father or someone else.

Talak when marriage solemnized in England-

A marriage solemnized at a Registrar's office in London between a Mahomedan domiciled in India and an English woman domiciled in England can't be dissolved by the husband handing to the wife a talaknama, although that would be an appropriate mode of effecting the dissolution of a Mahomedan marriage under Muslim personal law.

Ila- Dissolution of marriage by Ila is a specie of constructive divorce which is effected by abstinence from sexual intercourse for a period not less than four months pursuant to a vow.

According to the safai law, the fulfilment of such a vow doesn't per se operate as a divorce, but gives the wife the right to demand a judicial divorce.

Zihar- Zihar is a form of inchoate divorce. If the husband compares

his wife to his mother or any other female within prohibited degrees, the wife has a right to refuse herself to him until he has performed penance. In default of expiation by penance the wife has the right to apply for a judicial divorce.

Khula and Mubara'at-

Besides talak, a Muslim marriage may also be put to an end by agreement between the husband and the wife to that effect. A dissolution of marriage by agreement may take the form of Khula or Mubara'at.

A divorce by khula is a 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 bond. In such a situation, the terms of the bargains are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her dower and other rights, or make any other arrangement for the benefit of the husband.

Conclusion:

The present scenario is that as the Muslim women seek the Supreme Court's intervention to put an end to the practice of triple talak and polygamy, the Apex Court of late chose to tread cautiously. It has called for an open-court debate on the highest judiciary's authority to look into Islamic personal law and possibly subject it to the regime of fundamental rights under the constitution.

While agreeing to hear all stakeholders equally in the matter, Chief Justice of India T.S.Thakur observed it to be a very important issue for the same affects a very large section of the population.

Petitioners before the Supreme Court alleged that practices like triple talak and polygamy were "illegal, unconstitutional and violative of the right to equality, dignity, life and freedom of religion of Muslim women under the constitution.

The Bench comprising Justice A.M.Khannalkar gave the parties sufficient time to prepare their arguments for and against its retention for referring them to a larger Bench. A lawyer, Farha Faiz, who appeared in person, made an emotional appeal in the court in a written representation alleging that the All-India Muslim Personal Board (AIM-PLB) was using the media to discredit women who had approached the apex court and the said Board ought to be refrained from mis-using the platform of media and creating a harsh communal atmosphere. The Bench assured her of the sanctity of the proceeding and that it would not be influenced by remarks in the media while taking a call.

The petitioners, including individual Muslim women and Human Rights Organisations, argued that women who practice Muslim faith were being subjected to grave social evils that found sanction in the Shariat law. They said the community was stuck in time warp since the passage of the Muslim Personal Law (Shariat) Application Act by the British in 1937. Progressive laws like the Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986, had not been able to wean the community away from discrimination shown to Muslim women.

They contended that courts could adjudicate under Article 13 of the Constitution if the Shariat law was found to be "inconsistent with or in derogation of the fundamental rights" of Muslim women.

Countering this, the Muslim religious bodies said a court could not adjudicate on Muslim personal laws and this amount to "judicial legislation". Jamiat Ulama-i-Hind, a Maharashtra-based organization committed to protecting the Islamic way of life, has argued that the minority religious community's personal laws draw its authority from the Holy Koran and not the Indian Constitution. It may here be added here that we see a thing, not as the thing itself is rather as we ourselves are. Laws are more to be interpreted than to be understood. Interpretation is always wider in scope than a mere understanding. What is the demand of the hour is a proper interpretation of the Holy Koran for its sanctity ought to be kept intact by all concerns rather than its being taken for granted to perpetuate an evil practice howsoever long standing it may be.

However on October 16, 2015, the Supreme Court had decided to

register a PIL suo motu titled "Muslim Women's quest for equality," on the gender discrimination women face under the Muslim personal law.

With the passage of time things complicated are made simplified. Such simplifications again create complicacies, for simplification of which ways and measures are thought up; process goes on. Mankind is now boarded on the bullet-train of development. Development is a process not a destination. It is not static for the reason that it cannot be static. And it is evinced that the most intelligent as well as the strongest creature on the earth are set at rest in the velvet oblivion owing to their inability to cope up with the flux of perennial change. On the other hand survival is destined to only those who have that positive malleability with the continuum of the uncertain perpetual transformation.

Suggestions:-

Triple talaq should be tested on "touchstone of constitution".

Arguments for and against the retention of triple talaq practice should be put forth preferably by advocates from Muslim community and if possible, it should also be adjudicated upon by Muslim Justices along with the Chief Justice of India so that it would not impair the feeling of the people of the Muslim community at large.

Brethrens of Muslim community should have that mind set to accept the judicial decision for the sake of the larger interest of the community.

Triple talaq system should be filtered through the triple test of justice, fairness and reasonableness that a civil society always demands.

Any variation, modification or simplification in matter of anything if tested by law ought to be accepted objectively or else its subjective refutation may peter out the social fabric.

References:-

1. The Shorter Constitution of India: DD Basu.
2. The principles of Mohammedan Law: Dr. Nishi Purohit.
3. Mulla Principles of Mahomedan Law: M. Hidayatullah & Arshad Hidayatullah.
4. International Human Rights Laws
5. Muslim Personal Law (Shariat) Application Act, 1937
6. Dissolution of Muslim Marriages Act, 1939
7. The Hindu (daily English News paper)
8. The India Today (daily English news paper)
9. The Hindustan Times (daily English news paper)