

RIGHT TO TRIPLE TALAK: IN CONSONANCE WITH THE QURANIC INJUNCTIONS AND HADITH: AN ANALYSIS

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ABSTRACT

Interestingly in the media we regularly find the politicians discussing about the vulnerable position of the Muslim women. Muslim women are portrayed as the most deprived and oppressed, due to the man's right to unilaterally terminate the marriage by Triple Talak or Talak ul biddat. Talak ul biddat means innovation. By innovation (biddat) we mean a development which occurred in religious matters after the second age i.e. after Prophet Muhammad and his companions. In order to understand the law on triple talak, it is necessary to understand the importance of marriage in Islam and whether the Muslim husbands enjoy an arbitrary power to dissolve the marriage. Muslim law is primarily based on the Quran and Hadith. This paper is an attempt to analyse whether the law on triple talak is according to the Quranic principles and the Sunnah of Prophet Muhammad. It attempts to analyse Quranic verses, that describe the beauty of marriage and the prohibitions which are required to be adhered with in divorce. It discusses the decision of the Supreme Court on triple talak and makes recommendations as to how Muslim men should be dissuaded and discouraged from resorting to triple talak which is an evil way of ending their marriage. To create awareness among them that talak is the most hateful thing in the eyes of God and that it should be resorted as the last mode for terminating marriage when all the hopes of reunion are lost.

Key words: Muslim Women, Marriage, Iddat, Talaq-e-Biddat, Khula, Supreme Court.

THE STATUS OF WOMEN DURING THE PRE-ISLAMIC ERA

In order to evaluate and understand the status of Muslim women, it is very essential to determine their position before the advent of Islam. Historically, the lives of the Arabs were regulated by nomadic traditions and customs with sudden attacks and wars, thereby, making it inevitable to

have physical strength for men to protect themselves and their land.¹ More and more men were needed at that time for protection of the people and this led to lower the esteem of women and causing “female infanticide”.²

The earlier Arabs considered women as cattle and used them for pleasure.³ In order to obtain a bright child the women were generally forced to have immoral relations with a man whose bravery was admired.⁴ Apart from other evil matrimonial customs, there was also a custom that a son would inherit apart from the property, the wives of his father and marry them.⁵ The earlier Arabs had the exclusive right to dissolve the marriage one-sidedly and thereby, immediately abandoning all their duties over their wives.⁶

The Prophet was successful in curbing the inhuman and evil practice of female infanticide through the teaching of Islam.⁷ He said that God will give Heaven to those who bring up the girl child with utmost care and love, and hell to all those who kill the girl child.⁸

MARRIAGE A RELIGIOUS RITE AND A CIVIL CONTRACT

Man by nature cannot lead an isolated life and needs a partner. In fact he is destined not to live alone and even, when Adam was created he was not left alone to live.⁹ The Holy Quran says “ O men, fear your Lord, Who has created out you out of one soul, and out of that created his spouse, and from them both has multiplied men and women in great numbers. And fear Allah, by Whom you beseech one another: and (regard) women (with piety) for Allah is watching over you” (4:1)¹⁰. So, Allah has asked the men not to maltreat, but, to respect their wives. “Marriage has been described as an institution to protect the society and the human beings from unchaste and foul activities.”¹¹

¹FATIMA UMAR NASEEF, WOMEN IN ISLAM, A DISCOURSE IN RIGHTS AND OBLIGATIONS, 33 (1999).
²*Id.*, 33.

³ SYED M. H ZAIDI, THE MUSLIM WOMANHOOD IN REVOLUTION 1937, 17.

⁴*Id.*, 17.

⁵*Id.*, 17.

⁶THE ENCYCLOPAEDIA OF ISLAM [X] 151 (2000).

⁷ZAIDI, *supra* note 3, 9.

⁸ ZAIDI, *supra* note 3, 9.

⁹DR. ABDULLAH O. NASSEEF, MUHAMMAD ENCYCLOPEDIA OF SEERAH [II] 6 (1982).

¹⁰*See*, The Quran.

¹¹ZAIDI, *supra* note 3, 82.

According to kifayah, marriage has been given preference over jehad (religious war).¹² Marriage has been regarded by the Muslim jurists as “Sunnah e Muvakida”, i.e. those who comply with it will be rewarded in the next world and those who do not, commit a sin.¹³ Prophet Muhammad (pbuh) also stated that “Marriage is my sunnat and those who do not follow it, are not my followers.”¹⁴

Marriage under the Muslim Law is not merely a civil contract but it is an ibadat or a religious devotion for the procreation of children and for regularization of the social life.¹⁵ The author of Darrul Mukhtar observes that “ A devotion or worship which has all along been recognised since Adam and will also be continued after death in heaven is marriage and faith.”¹⁶ This means that on the Day of judgement a man will be judged not only on the basis of his good and bad deeds but also on how he has regulated his married life and his behaviour towards his wife.

Marriage is considered as a civil contract because in it there is “ijab” proposal by one party and “qubul” acceptance by the other party i.e there is a sacred partnership between the spouses and the Quran calls such partnership a “sacred covenant” (mithaq-e-ghaliz) and a “protective fortress”.¹⁷

Although, marriage is a religious rite but, it is also considered a civil contract for its easy dissolution i.e. divorce. The sacramental aspect of divorce makes the marriage tie indissoluble¹⁸ and harmful for both the parties.¹⁹

Islam preaches that the relationship between the husband and wife should be based on the principle of mutual consultation and not on dictatorship.²⁰ In Quran Allah has described the faithful believers as the ones who “conduct their affairs by mutual consultation” (42:38).²¹ The Holy Quran has also stated that the relationship between the husband and wife should be just and

¹² AL- HAJ MAHOMED ULLAH IBN S. JUNG, A DISSERTATION ON THE MUSLIM LAW OF MARRIAGE 18 (1926).

¹³*Id.*, 19.

¹⁴*Id.*, 18.

¹⁵*Id.*

¹⁶*Id.*

¹⁷ NANDINI CHAVAN AND QUTUB JEHAN KIDWAI, PERSONAL LAW REFORMS AND GENDER EMPOWERMENT: A DEBATE ON UNIFORM CIVIL CODE 209, (2006).

¹⁸ Jung, *supra* note 12, 19.

¹⁹Chavan and Kidwai, *supra* note 17, 209.

²⁰Naseef, *supra* note 1, 201.

²¹ See The Quran.

fair and clearly states that “.....and let each of you accept the advice of the other in a just way”(65:6).²² Mutual consultation will also help to reduce the gap or conflict which result in termination of marital ties, as consultation helps to sort out differences and issues and thereby makes the relationship more transparent.

It has been described in the Quran that marriage is intended to last long, without any specific time frame and is suggested to have a firm bondage between man and woman, governed by mutual love and understanding.²³ But sometimes it is found that due to temperamental incompatibility or passage of time or failure on the part of one or both spouses to take appropriate care of each other²⁴ harmony and peace do not prevail among the spouses and in such situations it becomes essential to end the marriage and to provide opportunity to both the men and women to lead a new and happy life.²⁵ Nonetheless, the Quran does not permits divorce for small trifling matters.²⁶

RULE OF DIVORCE UNDER ISLAMIC LAW

The Quran has laid down specific rules and regulations which need to be adhered with, for giving talak. Divorce in the Islamic Shariah is the absolute right given to the husband to separate from his wife against the payment of mahr, provided he is not unjust and aggressive in the use of his rights.²⁷ The Holy Prophet set the example by never divorcing any of his wives and declared divorce to be abghad al-mubahat i.e.(the most hateful of all the lawful things in the sight of Allah).²⁸ He also said, “ Marry and do no divorce for Allah does not like men who change bed partners for sexual pleasures.”²⁹ The concept of divorce in Islamic Law is based on “ the breakdown theory of divorce”.³⁰ This clearly states that divorce is the last thing which a married man can use to end his marital relationship with his wife i.e. when all the reconciliations have failed and it becomes absolutely impossible for both the partners to live together. Hence divorce

²² See, The Quran.

²³ENCYCLOPAEDIA OF THE QURAN [III] 278, (2003).

²⁴COMPENDIUM OF ISLAMIC LAWS, ALL INDIA PERSONAL LAW BOARD 87, (2002).

²⁵ENCYCLOPAEDIA OF THE QURAN [III] 279, (2003).

²⁶*Id.*, 279.

²⁷NASSEFF, *supra* note 9, 57.

²⁸ Rakshanda Mubeen, Women Empowerment through Legislations in the Area of Personal Law, (2012) (published Ph.D. thesis, Aligarh Muslim University).

²⁹NASSEFF, *supra* note 9, 57.

³⁰Mubeen, *supra* note 28, 225.

is allowed in extreme situations. No verse of the Quran encourages divorce, cruelty and physical abuse to the wives.³¹

In Quran Allah has stated in Sura An- Nisa that “O ye who believe! It is not lawful for you to forcibly inherit the women nor ye should put constraint upon them that ye may take away a part of that which ye have given them, unless they be guilty of flagrant lewdness. But consort with them in kindness, for if ye hate them it may happen that ye hate a thing wherein Allah hath placed much good”. (4:19).³² As aforementioned marriage is considered to be an ibadat. The husband is asked to be good and kind to their wives even if he hates them for their misdeeds, with a promise that Allah might put some good over his such kindness.

Period of abstention before pronouncing divorce:

Allah has stated in Sura- Al- Bakarah that “Those who forswear their wives must wait four months; then if they change their minds, lo! Allah is Forgiving, Merciful” (2:226).³³ It was during this period that it was suggested to have reconciliation between both the parties. “And if ye fear a breach between them twain (the man and the wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind, Lo! Allah is ever Knower, Aware” (4:35). The Quran clearly states that “And if they decide upon divorce (let them remember that) Allah is Hearer, Knower”(2:227).

This condition ordained by Allah that if a man forswears to divorce his wife, he must wait for four months and suspend his conjugal life during this period with his wife, was to discourage him from taking any hasty decision. Such a condition has been totally overlooked in practice of Triple Talak. The importance of such a condition was to prevent the man from taking the decision in the heat of the moment and to prevent him from acting in an impulsive way.³⁴

If after the lapse of these four months, he is firm on his decision of divorcing his wife he can do so by pronouncing the divorce to her on three successive months, during the period when she is

³¹ Jamal A. Badawi, *Gender Equity in Islam*, available at - <http://www.islamicweb.com/begin/gender.pdf>. (Last visited 2 February 2018.)

³²See, The Quran.

³³See, The Quran.

³⁴DR. N. K SINGH AND A.R. AGWAN, ENCYCLOPAEDIA OF THE HOLY QURAN VOL. 1 298, 2000.

not menstruating.³⁵ Further, the arbiters' can allow divorce if they find that the reconciliation between the husband and the wife is not possible due to persistence of disputes.

Reason for the Period of Waiting:

Allah has again stated in Sura- Al- Bakarah that “ Women who are divorced shall wait, keeping themselves apart, three (monthly) courses. And it is not lawful for them that they should conceal that which Allah hath created in their wombs if they are believers in Allah and the Last Day. And their husbands would do better to take them back in that case, if they desire reconciliation. And they (women) have rights similar to those (of men)over them in kindness, and men are a degree above them, Allah is Mighty, Wise.” (2: 228)³⁶ The verse clarifies that iddat or waiting period was actually prescribed to fulfill a dual purpose. First to determine whether the woman is pregnant or not. Second to allow the wife to stay in the house of the husband and thereby increase the scope of reconciliation. The period of three months of iddat is quite a long time, during which the husband and wife might sort out their differences and might have cohabitation, which will hence, prevent a family to be disrupted.

In Surah At-Talaq Allah has stated that “ O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except, in case they are guilty of some open lewdness, those are limits set by Allah:and nay who transgress the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter, some new situtaion.³⁷(65:1) The waiting period has been given excessive importance by Allah. Men who divorce their wives have been asked to count properly the waiting period and to keep their wives in their house during such period on the hope that God might bring some chance of reconciliation between the spouses.

Thus when they fulfill their appointed term, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence for the sake of Allah. Such is the admonition given to him who

³⁵*Id.*, 299-300.

³⁶*See*, The Quran.

³⁷*See*, The Quran.

believes in Allah and the Last Day. And for those who fear Allah, He (ever) prepares a way out.³⁸(65:2)

“Such of your women as have passed the age of monthly courses, for them the prescribed period. If ye have nay doubts, is three months, and for those who have no courses (it is the same) : for those who are pregnant, their period is until they deliver their burdens: and for those who fear Allah, He will make things easy for them?³⁹(65:4). This verse of the Quran make provision for the waiting period required to be observed after divorce. It states that if a woman has become old and it is not clear whether she is undergoing her menstrual cycle or not, then the waiting period is three months. For pregnant women the iddat period is until they deliver the child. And for those who fear Allah and are obedient, Allah will make the affair easy for them.⁴⁰ At the end of the three monthly courses the iddat for divorce becomes complete .

Quran remarks that “ Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness. Allah had made this Quranic injunction to come over the social evil prevalent among the early Arabs.⁴¹At pre-Islamic times the Arabs used to pronounce divorce to their wives whenever their relations where strained and again reunite with them whenever he desired to do so, as there was no limitation to such practice. Such a practice created hardship for the wives as they were neither able to have conjugal relations with their husbands nor were they free to marry another man. But this Quranic injunction puts a restriction on the power of the husbands to divorce as and when they want and get seperated with their wives permanently on the third pronouncement.⁴²

³⁸See, The Quran

³⁹See, The Quran.

⁴⁰ This is the command of Allah, which He has sent down to you: And if any one fears Allah, He will remove his evil deeds from him, and will enlarge his reward.(65:5). It has been stated that anyone who capriciously repudiates his wife God curse them and the throne of God is shaken. Therefore, the husbands are commanded not to treat their wives harshly or badly as they have taken her on the security of Allah. If they find some bad qualities in the wife, then they should please themselves by looking over some good qualities in her. No human being on this earth is perfect. We all, both men and women have some bad as well as some good qualities. God wants men to make all possible attempts to continue their marriage, in so that bad qualities of their wives should be overlooked, and he should please himself with her good qualities. This will help to reduce the possibilities of conflicts between the spouses.

⁴¹NASSEFF, *supra* note 9, 58.

⁴²NASSEFF, *supra* note 9, 57.

The Holy Quran not only discourages divorce but has also described the ways in which a reconciliation can be made between the married couples under his divine blessings⁴³. The Holy Prophet became very angry at one incident when he heard that Abdullah Ibn Umar had divorced his wife while she was in the state of menstruation. Prophet Muhammad asked him to take back his wife and keep her till the menstrual cycle. If the husband still wants to divorce his wife, he can do so without having any sexual intercourse with her and when she is free from the menstrual cycle. This is the waiting period ordained by Allah for divorce of the women.⁴⁴

Denouncement of Triple Talak during the time of Prophet – Instances

Abdullah Ibn Umar or Ibn Umar asked Prophet Muhammad whether he had the right to take back his wife after pronouncing divorce thrice at one and the same sitting? Ibn Umar was not allowed to take back his wife as the pronouncement of the divorce for the third time had finally separated them. But it was considered as a sin because it is against the commandment of the limits ordained by Allah and the Law of the Shariah to pronounce three divorces together. The believers are commanded to obey and respect the orders of Allah.⁴⁵

Another incident also shows that pronouncing triple talak at one and the same meeting was strictly considered a disobedience of the Book of Allah and disliked by Prophet Muhammad.⁴⁶ He was informed by a man who divorced his wife by uttering triple talak at one session, he got angry and said that he had played with the Book of Allah, when the Prophet was still present.⁴⁷ All these goes without saying that pronouncing divorce thrice at one session has been strongly disapproved by Allah and Prophet Muhammad.

Permitting Triple Talak for resolving Crisis during Calip Umar's reign -

Triple talak was practiced before the advent of Islam (during the period of ignorance) but was disallowed during the Prophet's lifetime, during the reign of the first Caliph Abu Bakr and until two years during the second Caliph Umar's reign. When the Arabs conquered Syria, Egypt etc, they were attracted by the beautiful women there and wanted to marry them. The women ignorant of the fact that triple talak had been abolished agreed to marry them on the condition

⁴³NASSEFF, *supra* note 9, 58.

⁴⁴ SAHIH MUSLIM, THE BOOK OF DIVORCE (KITAB-AL-TALAQ), BOOK.9.

⁴⁵NASSEFF, *supra* note 9, 58.

⁴⁶ V. R AND L. BEVAN JONES, WOMEN IN ISLAM 1941, 147.

⁴⁷*Id.*, 147.

that they pronounce divorce thrice to their existing wives. The Arabs agreed to do so, as in such a way they were able to marry them as well as keep their earlier wives also. On being cheated, the Egyptian and Syrian women complained to Caliph Umar regarding this. Hence, Caliph Umar enforced triple talak in order to meet an emergent situation and to prevent its misuse by the Arabians and not to enforce it permanently.⁴⁸ Caliph Umar declared triple talak as an irrevocable divorce, in order to put a check against the husband's power to dissolve the marriage unilaterally. It was used as a means of punishing the men, who adopted a practice which is prohibited by the Quran and Hadith.⁴⁹ But after such incident the later Hanafi jurists declared triple talak as valid and made it enforceable.⁵⁰

O Prophet, when you Muslims divorce women, divorce them for the commencement of their waiting period and keep count of the waiting period, and fear Allah, your Lord. Do not turn them out of their husband houses, nor should they themselves leave during that period unless they are committing a clear immorality. And those are the limits set by Allah. And whoever transgresses the limits of Allah has certainly wronged himself. You know not; perhaps Allah will bring about after that a different matter. (65:1)⁵¹ This verse has been taken from Surah At-Talaq. It states that when a Muslim man intends to divorce his wives he should divorce them at the end of the waiting period and should count the waiting period or iddat period accurately. Be conscious of Allah, the sustainer. During the waiting period the husband is asked not to turn the wife out of the house nor should the wife leave her matrimonial house during the iddat period, unless she is committing immorality. God has made this rule and it needs to be abided by all.

The Supreme Court on Triple Talak referring to the case of Shayara Bano Vs. Union of India and Ors. W.P No. 118/16.

Fact of the case:

- 1) The Petitioner Shayara Bano left her matrimonial home on 09/04/2015 with her father and maternal uncle to stay with her parents at Uttarakhand to enjoy the summer holidays with her children and to have a change in the environment as stated in the petition.

⁴⁸ SYED KHALID RASHID, MUSLIM LAW, 140-141 (V. P. Bhartiya, 5th ed., 2009).

⁴⁹ KHAN NOOR EPHROZ, WOMEN AND LAW: MUSLIM PERSONAL LAW PERSPECTIVE, 281.

⁵⁰ RASHID, *supra* note 54, 140-141.

⁵¹ See, The Quran.

- 2) It has been contended by Rizwan Ahmed (Shayara Bano's husband) that he used to visit his in-law's place to enquire about his wife and children's wellbeing and gave maintenance. If we refer the case of Shayara Bano in the petition only the word maintenance is used without any elaboration so even I am unable to explain as to what specifically he meant by maintenance. During his visit in the month of May and June, the Respondent asked his wife to accompany him but she refused to do so.
- 3) Rizwan Ahmed asked his father-in-law on 03/07/2015 to send back his wife Shayara Bano, but he refused to do so stating that she was unwilling to stay with him.
- 4) The two children Mohammad Irfan (13 years old) and Umaira Naaz (11 years old) were brought back to Allahabad by Shayara Bano's father on 07.07.2015. Shayara Bano's father gave the two children on the care and custody of Rizwan Ahmed as he believed that it would incline Shayara Bano also to come and stay with her husband as her two minor children were staying with him. The belief that it would incline the petitioner to return back to the respondent as her two minor children were in the care and custody of the respondent. The initiative of sending back the two children back to their father was taken by Shayara Bano's father on the pretext that due to passage of time Shayara Bano might start missing her children. This might remove all difference between the couples and she might be inclined to return back to her husband.
- 5) On 09/08/2015 (i.e. after the lapse of one month of the children staying under the care and custody of Rizwan Ahmed) also Shayara Bano refused to accompany her husband. It should be noted that a mother cannot be mentally prepared at any stage however difficult her married life might be to separate herself from her children, especially, when they are minor and need the care of their mother more compared to their father. Further it goes to prove her mental state and her adamancy not to continue her married life even when the children were under the care and custody of her husband.
- 6) Finding no way out Rizwan Ahmed filed a suit for restitution of conjugal right on the family Court at Allahabad. Shayara Bano requested to transfer the said suit to Kashipur. She further contended in the petition that she was regularly tortured, beaten and was kept without food for and in connection with the demand for dowry. That she was also administered medicines to cause loss of memory to kill her.

- 7) Rizwan Ahmed on realizing that Shayara Bano was unwilling to continue her matrimonial life, withdrew the suit for restitution and divorced her by serving upon her a talaknama on 10/10/2015. It was stated in the talaknama that Shayara Bano took away all the gold jewelry given to her by Rizwan Ahmed (weighing approx. 4 tolas) and cash of Rs. 15,000/-.

In Surah-al-Baqarah verse 2:230 it has been provided that divorce is allowed due to mutual incompatibility. But it forbids men to exercise right to dissolve the marriage in the heat of the moment and to be cautious. But in the case of Shayara Bano we find that the spouses were leaving apart for the past six month before talak-e-biddat was given by Rizwan Ahmed, hence, it was a thoughtful decision.

As discussed earlier the Quranic verse 2:228 also clarifies that iddat or waiting period was actually prescribed to fulfill dual purpose. First to check whether woman is pregnant or not. Secondly to give an opportunity to the husband to analyse his acts, to determine that divorce is not pronounced deliberately in the heat of a moment. Further in the Surah-al-Talaq verse 65:1 it has been provided that during the period of iddat it is obligatory on the part of the husband not to turn his wife out of his house and forbids the wife to leave her husband's house. The purpose of asking both the spouses to stay under the same roof during the period of iddat is actually to make reconciliation possible between them. But in the instant case it is found that Shayara Bano was unwilling to stay with her husband. Various attempts were made and a suit for restitution was also filed by the respondent to bring her back. But all the attempts failed. Even when the children were staying under the custody of their father, it did not incline her to go back to her husband. Reconciliation is only possible when two people stay under the same roof, with a hope that one day all the differences might reduce, and that love will sustain between them.

The Supreme Court in the case of Shayara Bano Vs. Rizwan Ahmed by a majority of 3:2 has contended that talaq-e-biddat violates the fundamental rights guaranteed under Art. 14, 15 and 21. The majority of the judges were of the view that what is held to be bad in the Holy Quran cannot be hold to be good in the Shariat and as such what is bad in theology is bad in law also. It was further contended by the majority of the judges that the Holy Quran has allowed divorce to be adopted as a last measure where no reconciliation is possible between the spouses as divorce not only shakes the very foundation of marriage but, also causes psychological problems to children.

As such since triple talak provides no scope for reconciliation, it is against the tenets of Quran and should be invalidated.⁵²

On the other hand, Chief Justice Khehar and Justice Abdul Nazeer dissented from the opinion of the majority. CJ Khehar stated that triple talaq has to be considered integral to the religious denomination in question and that the same is part of their personal law and hence it has a status equal to the fundamental rights, conferred in Part III of the Constitution. He further contended that such practice cannot be set aside through judicial intervention, as being violative of constitutional morality. Reforms in personal laws can be made by legislative intervention.⁵³

Islam recognizes Equality of Woman in giving Divorce

The Supreme Court has contended that talaq-e-biddat is unconstitutional u/a 14 of the constitution. According to the author the present practice and form of triple talak is not in consonance with Quran and the teachings of Prophet. The present concept of triple talak resembles pre-islamic form. Hence, the present form of triple talak can be called unconstitutional as it is arbitrary whereas, the form of triple talak which is permissible by Quran and prophet will not be unconstitutional as it has waiting period whereas the present one has no waiting period. But in situations and circumstances like in the Shayaro Bano case, where the spouses were already staying apart, the waiting period was adhered to and hence the practice of triple talak in Shayaro Bano case can be claimed to be permissible by Quran and prophet.

The concept of 'iddat' which is mandatory and needs to be abided in all forms of divorce under Muslim law, (the only exception being talak-i-biddat) has close resemblance to the provision of judicial restitution. The main purpose of both the provisions is to take initiatives to make reconciliation between the spouses. To try and reduce the differences and to respect the institution of marriage, by not dissolving it one-sidedly without giving the aggrieved party a chance to re-unite. The common perception that pronouncing talak thrice at one sitting dissolves the marriage is a sin. But when the spouses are already staying apart due to temperamental or other differences, then it cannot be said to be unconstitutional.

⁵² <https://thewire.in/170058/supreme-court-instant-triple-talaq-judgment/> (Last visited on November 23, 2017).

⁵³ Id.

In the Quran there are numerous verses which speak about the equality of men and women. As Islam provides equal right to both men and women, hence, the Muslim women like men, also have the right to separate from her husband and it is termed as 'khula'. Darrul Mukhtar defined Khula as "the removal of matrimonial bonds". Khula is a right granted to a woman by Allah to match with the man's right to divorce.⁵⁴

The actual principle about khula was implemented by Prophet Muhammad in the famous case of Thabit B. Qais. In the instant case the two wives of Thabit came to meet Prophet and asked him to dissolve his marriage as Thabit was very dark, short and ugly looking. They said that they might not be able to keep within the limits ordained by Allah if they are compelled to continue the marriage. Then the Prophet asked her if she would return the orchard given to her by Thabit and even more if he wants. Since the wife was ready to give back the orchard, the Prophet asked Thabit to take back the orchard and not more and divorce her.⁵⁵ So we see that Prophet also recognized that marriage should be continued out of sheer love and affection and it's better to end up the relationship rather than carrying it out forcefully. The Quran explains it "Then if you fear that they cannot keep within the limits of Allah, there is no blame on them for what she gives up becoming free thereby" (2:229).⁵⁶ The women were allowed to approach the court if the husband refused to give the freedom from the marital tie in lieu of the payment of dower or some property.⁵⁷ It should be noted that the pronoun 'you' in the verse does not refer to the spouses but to the persons who have the authority to decide cases in the situation when it is not possible for the spouses to amicably settle their disputes.⁵⁸ The interpretation of this verse has found relevance in the cases of Thabit B. Qais, who approached Prophet to settle their dispute.⁵⁹ The women also used to approach the Caliphs to decide the case of Khula as discussed below:

A woman came to Caliph Omar praying for Khula. In spite of best efforts by Caliph Omar to patch up their differences, the woman was adamant to separate from her husband and hence Omar ordered that the women should be locked up alone in a cell for three days. On the fourth day when the woman was produced before him, she declared on oath that those were the three

⁵⁴MAULANA ABUL ALA MAUDOUDI, THE LAW OF MARRIAGE AND DIVORCE IN ISLAM 46 (1983).

⁵⁵*Id.*, 44.

⁵⁶ See, The Quran.

⁵⁷Maudoodi, *supra* note 60, 44.

⁵⁸Maudoodi, *supra* note 60, 52.

⁵⁹*Id.*

nights of peace she had known in years. Omar understood her sufferings in the marital life and granted her separation in return of her earrings.⁶⁰

Rukayyah sought separation from her husband, in return for all her property. The husband refused to get separated. When the case was brought before Caliph Osman, he ordered the husband to release his wife from the marital ties in lieu of all her property.⁶¹

Hence if the wife has no say in talak, similarly a husband has no say in Khula and the wife is entitled to get separated from her husband even without any specific cause on payment of compensation. The mandate that it violates the provision of Art. 15 and discriminates against women is not true. The right to khula granted to women is to match with the mens' right to divorce. During the time of Prophet Muhammad as discussed above, we find that women were entitled to separate from their husband due to incompatibility and without the consent of the husband on payment of compensation or the return of the dower amount. Sec.2 of the Dissolution of Muslim Marriage Act, 1939 provides nine grounds under which a woman can obtain divorce, but there is no provision for dissolution due to incompatibility. Further, it is mandatory to obtain the consent of the husband. But if we go through the hadith it is found that the women were allowed to separate from their husband on the bare reason of incompatibility and on payment of compensation and the consent of the husband was not given much importance. On refusal of the husband to give khula, the woman was allowed to approach the court in which case the husband was ordered to release his wife.

Reforms in Divorce Laws of Muslim States

In the beginning of twentieth century, the views and opinion of Ibn Taimiyah have sought to bring major reformation and changes in the personal laws of the majority of the Muslim states. Egypt was the first Muslim country to deviate from the law relating to triple talak. It made the divorce revocable irrespective of the number of times it is pronounced at one time either expressly or impliedly, except, when three talaqs are given each in one time. In Sudan and Syria all the divorces by the husbands were revocable except for the third pronouncement, be it before consummation of marriage or divorce for consideration. Similar laws relating to triple talak have

⁶⁰Maudoodi, *supra* note 60, 46.

⁶¹*Id.*

been adopted by Morocco, Yemen, Iran, Jordan, Libya, Afghanistan, Kuwait and off late by Saudi Arabia, Bahrain and Qatar.⁶²

Under Art. 30 of The Tunisian Code of Personal Status, 1956, a valid divorce can be pronounced only in a court of law. According to Art. 32 of the Code, the court will pass a decree only after an enquiry has been made to determine the real cause of dispute and divorce is granted only if no reconciliation is possible between the spouses. In Algerian law a decree of divorce is granted by the court if efforts fail to bring about reconciliation and shall not exceed a period of three months. In Sri Lanka a husband who intends to divorce his wife must first give a notice of his intention to the Qazi, who shall attempt reconciliation between the spouses within thirty days of giving notice, with the help of relatives of the parties and elders. But if all the attempts of reconciliation fail then the husband can divorce his wife in the presence of Qazi and two witnesses.⁶³

Sec 7 of the Muslim Family Law Ordinance, 1961 deals with the law relating to divorce in Pakistan. It states that any man who wishes to divorce his wife must give a notice of his having pronounced divorce to his wife in whatever form, to the Chairman of Arbitration Council and his wife. The arbitration council will try to make reconciliation between the spouses. Talak becomes effective only after the expiration of ninety days from the day on which notice was served. Any person who contravenes such provision is punished either with simple imprisonment or with fine or with both.

From the above discussion we find that almost all Muslim countries have taken measures to curb the evil act of terminating marriage in one session. Countries like Egypt, Libya, Sudan etc. have invalidated the concept of triple talak by making it revocable irrespective of the number of times it is pronounced at one time either expressly or impliedly except the third divorce. But a Muslim is not bound to follow as to what the other Muslim countries do but, it is obligatory for them to follow the Quran and the teachings of Prophet Muhammad. In this sense in India rigorous penal imprisonment should be imposed on the husband practicing talak-i-biddat, if they fail to show

⁶² Muhammad Munir, Reforms in triple talak in the personal laws of Muslim States and the Pakistani legal system: Conitnuity versus change, (2013) (published International Review of Law, Vol. 2013 1, 2).

⁶³ Id.

cause as to why it was essential to terminate the marriage in one session. This will not only dissuade them from practicing it, but will also set examples to the other wrongdoers.

Conclusion

Quran is a book which states in detail the ways through which Muslims should lead their lives. Hence, it would be beneficial for all the Muslims to read and understand the Quran themselves, instead of relying on the Ulemas or Muftis for resolving their problems. The lack of knowledge on their part has led to various discrepancies in resolving the personal issues relating to marriage, inheritance and particularly triple talak.⁶⁴ A Muslim men can terminate his marriage by pronouncing talak only once and thereby, leaving some room for revocation or reconciliation during the period of iddat as ordained in the Quran through which several families can be saved from disruption, instead of committing a sin by pronouncing triple talak at once without adhering to iddat.⁶⁵

The Quran describes the spouses to be each other garments (libas) (2: 187)⁶⁶. Islam does not recognizes the wife to be a “better half” or “half part” of the husband, but, to be the equal partners in a sacred agreement.⁶⁷ Even after marriage the women is legally entitled to retain her maiden name, her independent legal status, her property and even her school of law.⁶⁸

The essential purpose of marriage according to Quran is sukun (satisfaction or comfort or peace of mind), muaddat (love) and rahmat (kindness or compassion).⁶⁹ The Quranic verse explains this: “And one of His signs is that He created mates for you from yourselves that you may find quiet of mind in them, and He put between you love and compassion most surely there are signs in this for people who reflect”.⁷⁰

The Muslim Law has divided talaq into two categories: i) Talaq Al-Sunnat or Masnun (according to the rules laid down in the traditions of the Prophet) ii) Talaq Al-biddat or ‘GhayrMasnun’ (not

⁶⁴Chavan and Kidwai, *supra* note 17, 215.

⁶⁵ Id.

⁶⁶ See, The Quran.

⁶⁷Chavan and Kidwai, *supra* note 17, 210.

⁶⁸Id.

⁶⁹ R. B SETHI, MUSLIM MARRIAGE AND ITS DISSOLUTION, 3 (2ND ed., 1961).

⁷⁰ See, The Quran.

as per the rules laid down in the traditions of the Prophet).⁷¹ The problem which is arising is due to the later form of divorce i.e. Talaq-Al-biddat, biddat means innovation in religious matter.⁷² This form of divorce is novel or dissident and hence, although, it is lawful, but, it is not religious.⁷³ A Muslim man who divorces his wife following Talaq- al – biddat is treated to be an offender against law.⁷⁴ Hence, anything which is a biddat should not be encouraged. On the other hand, initiative should be taken from discouraging people from taking such steps, especially, when it is not for the betterment of the families, but rather leads to disruption. Marriage is a sacred covenant and time and again it has been stated in the Quran that one of the most beautiful of all the worship is to be kind and polite to the fellow human being and decision taken hastily should be discouraged. Quran does not makes any provision for termination of marriage at one and the same sitting and it has considered termination of the marriage at one session a sin.

Instances above show that Prophet Muhammad denounced the practice of triple talak, cannot stay together as husband and wife as pronouncement of the divorce for the third time had finally separated them. Prophet Muhammad considered such acts to be against the Book of Allah and to be the most sinful thing. Now Muslim men have started using triple talak as a weapon to unilaterally terminate the marriage without giving scope for reconciliation which is against the commandment of Allah. During the time of Prophet Muhammad, we have found that Hazrat Umar whipped the husband who used to pronounce divorce thrice at one and the same sitting. Another incident also shows that pronouncing triple talak at one at the same meeting was strictly considered a disobedience of the Book of Allah and was disliked by Prophet Muhammad.⁷⁵

In order to discourage the practice of triple talak and to make it mandatory to abide by the principles of divorce laid down in the Holy Quran it has become very essential to make penal provisions for punishment of the wrongdoer. Imprisonment should be provided to Muslim men practicing Talaq-Al-Biddat, without any justification. Imprisonment will not only punish the person who goes against the limits ordained by Allah but will also set examples for others and thereby, refrain them from taking such hastily decisions. According to Quran, performance of

⁷¹DR. KAHKASHAN Y. DANYAL, MUSLIM LAW OF MARRIAGE, DOWER, DIVORCE AND MAINTANENCE 70 (2015).

⁷² *Id.*

⁷³T. P. HUGHES, DICTIONARY OF ISLAM 87 (1988).

⁷⁴*Id.*, 88.

⁷⁵ V. R and Jones, *supra* note 50, 147.

Iddat is mandatory for a woman undergoing divorce. The reason behind declaring triple talak as a sinful act is certainly because it goes against the limits ordained by Allah but also because the period of iddat which accords the time for reconciliation is also lost. But when the parties are already staying apart, and steps taken to mitigate the issues and differences have failed, unnecessary exaggeration to subsist the marriage might lead to complications. It should be remembered that although divorce is an evil, but it is still necessary for the proper functioning of the society. Hence talak-al-biddat should not be declared outright to be invalid and unconstitutional, but proper regard should be given to the situations prevailing prior to it.

In order to provide the right to equality to women under Art. 14, to prohibit discrimination under Art.15 and to protect the life and personal liberty under Art. 21 the need is to reform the law relating to khula i.e. to make provision to provide women a unilateral right to divorce men. The decision of the Supreme Court by referring to Shayara Bano case and declaring the right to triple talak as unconstitutional does not seem to be very convincing as the spouses were staying apart for the past six months. Even if the marriage would have been dissolved by pronouncing talak-e-hasan or talak-e-ahsan then, also it would not have made much difference, as both the parties were already staying apart for the past six months. Shayara Bano was anyhow unwilling to stay with her husband. Hence, if the talaq was given by referring to any other mode than following talaq-e-biddat, the only difference would have been that the marriage would not have been dissolved on 10.10.2015 but on 10.01.2016. But the main motive behind iddat is not to exaggerate the divorce and make it sustain for more three months but to make reconciliation possible. Reconciliation is possible only if the spouses are staying together, otherwise the main motive of iddat fails.