

Divorce among Muslims

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ABSTRACT: Marriage is one of the universal social institutions of mankind. In almost all the societies of the world, both uncivilised and civilised, majority of the people enter into marital relationship at an appropriate age in their own way. Though majority of the people enter into wedlock there is no guarantee that their marriage would ultimately end in success. Many marriages end in failures and wind up with divorce. Usually, those couples whose lives are torn by family tensions maintain their formal and legal solidarity for reasons of religious faith, prestige, family pressures, children etc. But when the rift in the family becomes unbearable and the marital bond is irretrievably broken, there is the desire to escape the burden and responsibility of marriage ties (Elliot and Merrill 1961:383). Then people opt for divorce as a last resort which indicates the legal dissolution of a marriage relationship. But divorce is more than a legal problem; it is often an acute personal experience.

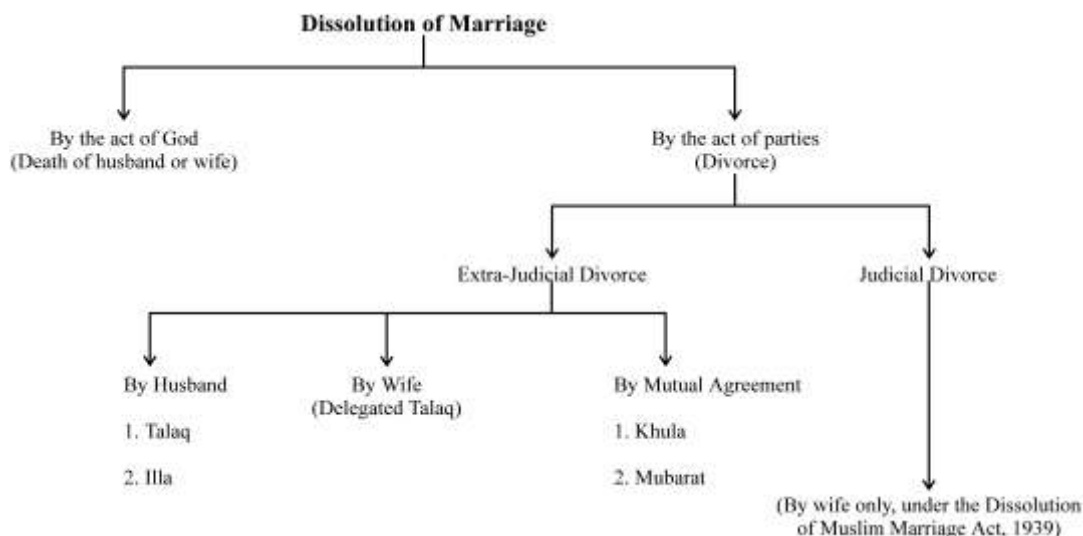
KEY WORDS:- Divorce, Talaq, Sunnat, Biddat, Ahsan, Hasan, Ila, Zihar, Khula, Mubarat, Mehr and Iddat.

Date of Submission: 23-04-2018

Date of acceptance: 08-05-2018

I DIVORCE AMONG MUSLIMS

The basis of the Islamic law of divorce is the inability of the spouses to live together rather than any specific cause on account of which the parties cannot live together. It is to be noted that with this idea behind a divorce, Muslim law recognizes several modes of divorce. A divorce may be either by act of the husband or by the act of the wife. The chart given below, presents a clear picture of the various kinds of Muslim marriage.

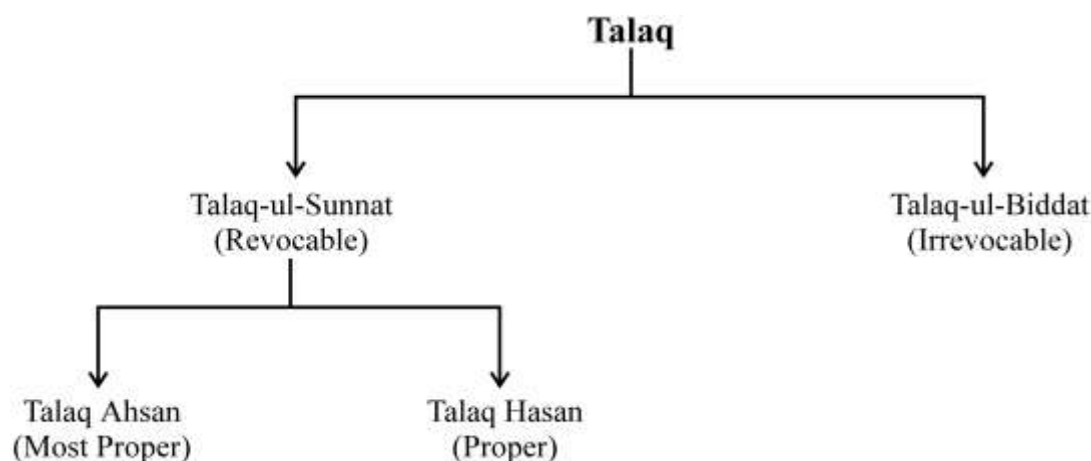


Source: Sinha 2010:82.

Talaq— *Talaq* is an Arabic word and its literal meaning is ‘to release’. Under Muslim Law, *talaq* means repudiation of marriage by the husband. When divorce proceeds from husband at his will it is known as divorce by *talaq*. As a mode of divorce, *talaq* as practised in India is peculiar because a Muslim husband has an unrestricted right to divorce his wife even without giving any reason. Muslim law does not require the existence of any fault or matrimonial offence as an excuse for *talaq*. The law gives to the husband an absolute authority to terminate the marriage by pronouncing *talaq*, because in a society dominated by males, the conjugal happiness primarily depends upon the efforts of the husbands. But this absolute authority of pronouncing *talaq* should not be misused by the husband. In Islam *talaq* is permitted only when the wife by her conduct or her words does injury to the husband or happens to be impious. A *Mahomedan* husband of sound mind who has attained the age of puberty may divorce his wife whenever he desires without assigning any cause (Ali 1997). There are two kinds of *talaq*:

- *Talaq-ul-Sunnat* or revocable *Talaq*, and
- *Talaq-ul-Biddat* or irrevocable *Talaq*.

The *Talaq-ul-Sunnat* or revocable *Talaq* may be pronounced either in the *Ahsan* form or in the *Hasan* form. That is to say, *Talaq-ul-Sunnat* may be further sub-divided into: (1) *Talaq Ahsan* (most proper) and (2) *Talaq Hasan* (proper). *Talaq-ul-Biddat* is irrevocable and becomes effective as soon as it is pronounced in any way, indicating husband's desire to dissolve the marriage. In brief, the classification of the different kinds of *talaq* is given below:



Source: Sinha 2010:87.

***Talaq-ul-Sunnat* (Revocable *talaq*):-** *Talaq-ul-Sunnat* is regarded to be the approved form of *talaq*. It is called as *Talaq-ul-Sunnat* because it is based on the prophet's tradition (*Sunna*). As a matter of fact, the Prophet always considered *talaq* as an evil. The Prophet recommended only revocable *talaq*, because in this form, the evil consequences of *talaq* do not become final at once. There is possibility of compromise and reconciliation between husband and wife. *Talaq-ul-Sunnat* is also called as *Talaq-ul-raje*. *Talaq-ul-Sunnat* may be pronounced either in *Ahsan* or in the *Hasan* form.

***Talaq Ahsan*,** or "the most laudable form of divorce". This is done by a single pronouncement of divorce during a *tuhr* (period between menstruation) followed by abstinence from sexual intercourse for the period of *iddat*. When the period of *iddat* expires and the husband does not revoke the *talaq* either expressly or through consummation, the *talaq* becomes irrevocable and final. It may be noted that the characteristic feature of the *Ahsan* form of *talaq* is a single pronouncement followed by no revocation during the period of three months' *Iddat*.

***Talaq Hasan*,** or "a laudable form of divorce". In *Talaq Hasan* divorce, the husband has to make a single declaration of *talaq* in a period of *tuhr* (period between menstruation). In the next *tuhr*, there is another single pronouncement for the second time. But if no revocation is made after the first or second declaration then lastly the husband is to make the third pronouncement in the third period of purity (*Tuhr*). As soon as this third declaration is made, the *talaq* becomes irrevocable and the marriage dissolves and the wife has to observe the required *Iddat*. It may be noted that the important feature of *Talaq Hasan* is its revocability before the third pronouncement and its irrevocability after the third. In order to make an effective *talaq*, the words must be uttered three times in three consecutive periods of purity (Sinha 1999:88).

***Talaq-ul-Biddat*,** or "an irregular form of divorce". This *talaq* is also known as *talaq-ul-Bain*. Three pronouncements at shorter intervals are given in immediate succession during *tuhr* or single pronouncement during a *tuhr* showing a clear intention that divorce shall immediately become irrevocable. It is disapproved mode of divorce. A peculiar feature of this *talaq* is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties.

***Ila*:**-In *Ila* the husband takes an oath not to have sexual intercourse with the wife. Followed by this oath, there is no consummation for a period of four months. After the expiry of the fourth month, the marriage dissolves irrevocably. But if the husband resumes cohabitation within the prescribed period of four months, the *Ila* is cancelled and the marriage does not dissolve (Ibid).

***Zihar*:**-*Zihar* is a form of inchoate divorce. In this form, the husband expresses his dissatisfaction with his wife by comparing her with his mother, or sister, or any other women within the degrees of prohibited relationship. In such a case the wife acquires a right to refuse cohabitation with her husband till he performs a penance, the wife gets a right of judicial divorce (Diwan 2007:87).

Divorce by the Wife:- Muslim wife has no independent right of divorce. She cannot divorce her husband whenever she likes, as her husband may do. Under Muslim law in India, divorce by wife is possible only in the following situations:-

- Where the husband delegates to the wife the right of *talaq* (*Talaq-e-tafweez*).
- Where she is a party to divorce by mutual consent (*Khula* and *Mubarat*).
- Where she wants to dissolve the marriage under *the Dissolution of Muslim Marriage Act, 1939*.

Delegated Divorce (Talaq-e-Tafweez):- A Muslim husband has unrestricted right to divorce his wife whenever he likes. This right is so absolute that he may exercise it either himself or may delegate his right to another person. In other words, instead of pronouncing the *talaq* himself he may give his right of divorce to anyone else, including his own wife. Divorce by such other person, who acts as an agent of the husband under his authority, is called *Talaq-e-tafweez* or delegated divorce (Diwan 2007:86).

This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India. Thus, when a wife is delegated the power of divorce, and in exercise of that power she pronounces the divorce, the power is exercised on behalf of the husband who had delegated it to her, and therefore, in law it is a *talaq* of the wife by the husband (Fyzee 2005:113).

By Mutual Agreement:- Under Muslim law, a divorce may take place also by mutual consent of the husband and wife. It may take place any time whenever the husband and wife feel that it is now impossible for them to live with mutual love and affection as is desired by God. There are two forms of divorce by mutual consent: (1) *Khula* and (2) *Mubarat*.

Khula (Redemption):- A *Khula* divorce is a divorce by consent 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. In such a case the terms of the bargain are a matter of arrangement between the husband and wife (Ali 1997:140).

A *khula* divorce is accomplished at once by (a) an offer from the wife and (b) its acceptance by the husband; and (c) with an *ewaz* or consideration passing from the wife to the husband for redemption.

The compensation paid by the wife to the husband is a means to an end, viz; the dissolution of the marriage tie by obtaining his consent. Consideration is not, however, an essential condition for a valid divorce when consent of the parties to dissolve is given (Tandon 1994).

Mubarat (Mutual Separation):- *Mubarat* is also a divorce by mutual consent of the husband and wife. In *Khula* the wife alone is desirous of separation and makes the offer, where as in *Mubarat* both parties are equally willing to dissolve the marriage. Therefore, in *Mubarat* the offer for separation may come either from husband or from wife to be accepted by the other. The essential feature of a divorce by *Mubarat* is the willingness of both the parties to get rid of each other; therefore, it is not very relevant as to who takes the initiative. Another significant point in the *Mubarat* form of divorce is that because both the parties are equally interested in the dissolution of marriage, no party is legally required to compensate the other by giving some consideration (Sinha 1999:97).

II JUDICIAL DIVORCE

By Judicial divorce we mean a divorce by the order of a court of law. Before the Indian Shariat Act, 1937, the wife could file a suit for divorce on the ground of (1) false charge of adultery by the husband against her (*Lian*), or (2) impotency of the husband, and on no other grounds. On the other hand, the husband need not go to the court at all as all the forms of divorce (*Talaq, Ila, Zihar, Khula or Mubarat*) depend solely upon his will. *The Dissolution of Muslim Marriages Act, 1939* was enacted by the Central Legislature and it came into force on the 17th March, 1939 in India. Under these Acts, a Muslim wife can also sue divorce from the Court. Divorced Muslim women can seek maintenance under *the Muslim Personal law, Section 125 of Criminal Procedure Code 1973* and, *The Muslim Women (Protection of Rights on Divorce) Act, 1986*.

Under *Muslim Personal Law*, a divorced wife can claim maintenance from the former husband only for that period during which she is observing her *iddat*. The duration of *iddat* on divorce is three menstruation periods or, if pregnant, till delivery of the child. The former husband's liability extends only upto the period of *iddat*: not beyond that.

Under *Muslim Personal Law*, the husband's liability to maintain his divorced wife terminates after the expiry of *iddat* even if she remains unmarried. But, under *the Criminal Procedure Code*, divorced wife is entitled to be maintained by her former husband beyond the period of *iddat* provided she remains unmarried. However, a divorced wife's claim to maintenance is subject to Section 127 (3) of the Act which provides that the order for the maintenance in favour of a divorced woman shall be cancelled, and such woman shall not be entitled to maintenance, under the following circumstances:-

- where the divorced woman has remarried,

- where such woman has received the whole sum due to her on divorce under any customary or personal law, and
- where the woman, after obtaining divorce from her husband, has voluntarily surrendered her right to maintenance (Ibid 1999:99).

Mohd. Ahamed Khan v. Shah Bano Begum:-

Despite the illuminous judgement of the Supreme Court setting the scope of maintenance claim of a Muslim divorce under Section 125 of the *Criminal Procedure*, the climate of uncertainty prevailed till Mohammad Ahmad Khan v. Shah Bano Begum, where in a five judge Bench (Chief Justice Y.V.Chanderachud, Justice D.A. Desai, O. Chinnapa Reddy, E.S. Venkatarmiah and R.N. Mishra) of the Supreme Court gave its judgement on the issue whether a divorced Muslim woman is entitled to be maintained by her former husband. The issue arose because it was contended before the Court that a divorced Muslim woman who could not maintain herself was entitled to a payment for her maintenance from the former husband and only till the period (*iddat*) prescribed under *Muslim Personal Law*. The Supreme Court held that *mehr* or dower can not under any circumstances be treated as a consideration for divorce or a payment made in lieu of loss of connubial relationship of a Muslim wife (Agnes 2006).

The Supreme Court in 1979 and 1980 had also stated that *mehr* was not a contemplated qualification of sum of money in lieu of maintenance upon divorce, since *mehr* focuses on marital happiness and not on the distant and unpleasant divorce. The payment of money contemplated under Section 127(3) (b) of Criminal Procedure Code by the man to the divorced woman should be so linked with the divorce so as to become payable only in the event of divorce. Therefore, a review was sought on behalf of the husband of both these judgements. The Judges observed that the religion professed by a spouse or the spouses had no place in the scheme of these provisions. “Whether the spouses are Hindus or Muslims, Christians or Parsis is wholly irrelevant in the application of these provisions”. Stating that Section 125 of the code is “truly secular in character and overrides the Personal law if there is any conflict between the two”, the Court further observed:

There is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband’s obligation to provide maintenance for a divorced wife who is unable to maintain herself. If the divorced wife was able to maintain herself only then the husband’s liability to provide maintenance for her ceased with the expiration of the period of iddat.

The Judges rejected the contention of the husband that *mehr* was the amount payable by the husband to the wife. Since *mehr* is an amount which wife was entitled to receive from the husband in consideration of the marriage, it could not possibly be described as an amount payable in consideration of divorce. The alternative premise that *mehr* is an obligation imposed upon the husband as a mark of respect for the wife is wholly detrimental to the stance that it is an amount payable to the wife on divorce. A man may marry a woman for love, looks, learning or nothing at all. And, he may settle sum upon her as a mark of respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect can not be a sum payable on divorce, they observed. The Supreme Court recognized the supremacy of the maintenance provisions of new *Criminal Procedure Code* applicable to Muslim over traditional Islamic law on the basis of general principles of a secular welfare state and other principles enshrined in the Indian Constitution. It, therefore, again reiterated that a divorced Muslim wife was entitled to maintenance from her husband under Section 125 of the *Criminal Procedure Code* (Ganai 1985:117).

The Muslim Women (Protection of Rights on Divorce) Act, 1986, provides maintenance to divorced wife during *iddat* and also entitled maintenance from her such relatives who would inherit her properties upon her death after *iddat* to those woman who are not able to maintain herself. In the absence of any of such relatives or, where they have no sufficient means, then, ultimately the liability to maintain her is cast upon the Waqf Board of the State in which she resides. The divorced woman is entitled to get her unpaid *mehr*. Besides *mehr* she is also entitled to all such properties which were given to her before or after the marriage by husband, his relatives, friends or her relatives or friends (Diwan 2007:171).

The Muslim Women (Protection of Rights on Marriage) Bill, 2017 has been drafted in the outcome of the Supreme Court judgment in the case of *Shayara Bano v. Union of India and Ors.*, wherein the Court affirmed the tradition of instant triple talaq as unconstitutional. On 22 August 2017, a five – judge constitution bench of the Supreme Court termed practice of *instant triple talaq* as unconstitutional. After reading separate judgements, the 5-judge bench of the Supreme Court ruled in 3:2 majority that triple *talaq* is void and illegal. Justice CJI J S Khehar and Nazeer said triple talaq is a fundamental right while 3 other judges- Justices Kurian Joseph, R F Nariman and U U Lalit said it is not a fundamental right. The Supreme Court bench referred to abolition of *instat triple talaq* in Islamic countries and asked why independent India can’t get rid of it. The Supreme Court said that the *instant triple talaq* irrevocably ends marriage and thus violates the fundamental rights of Muslim women. Again the Supreme Court also declared that *instant triple talaq* is unconstitutional.

The All India Muslim Personal Law Board (AIMPLB) demanded the withdrawal of the triple talaq Bill by saying that it went against the Constitution and shariat and violated the rights of women. Despite of objections by AIMPLB, the Bill was passed in the Loksabha on 28th Dec. 2017 with its objective to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands. Under the bill, the declaration of talaq by a person upon his wife, by words, either spoken or written or in electronic form or in any other form is void and illegal but the Bill is still pending in the Rajyasabha to become the shape of the Act and protest against the Bill in different States of the country is also continuous.

Thus it can be concluded that laws are made for the empowerment of Muslim women but actually the Muslim male members have more rights for divorce. They can divorce her wife at any time without assigning any reason. It is also found that Muslims did not approach the court for divorce. But the women who are not able to maintain themselves approached the Court under *Section 125 Cr. P.C.*, because under *Muslim Personal law*, they do not have right to divorce and no maintenance is given for more than the period of *iddat* or if she is pregnant, till her delivery.

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Rajni Devi. " Divorce among Muslims." *International Journal of Humanities and Social Science Invention (IJHSSI)* 7.05 (2018): 06-10.