

## **THE CONCEPT OF DIVORCE IN MUSLIM PERSONAL LAW**

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### **1. INTRODUCTION**

Divorce means the end of marital tie. In Arabic the word Talaq is used for this. This concept gives meaning of 'to abandon'. But in matrimonial matters it means breakage of marital knot. In the Jewish religion there was no restriction upon divorce. The husband was permitted to make divorce only in writing but that never came into practice. In the initial stage the husband was free to divorce in whatever manner he wanted but subsequently the Jews put a lot of restrictions over this<sup>1</sup>.

In Christianity divorce is not only abominable but also it is treated as a great sin so it is and fully prohibited. Only the adulterous woman was to be given the divorce. The Mark<sup>2</sup> contains the wordings of Christ as - and he saith unto them, whosoever shall put away his wife, and marry another, committeth adultery against her (ii) And if a woman shall put away her husband and she married to another, she committeth adultery. Luke<sup>3</sup> contains - 'Whoever divorces his wife and marries another, commits adultery; and whoever marries her who is divorced from her husband commits adultery'. Polygamy was also allowed in Christianity. Consequently if there was mismatch in the relation, the life was full of misery and there was no solution. Later on the Pope allowed the divorce but the grounds were limited. The courts of churches were empowered to grant divorce but, ordinarily; the courts did not grant the same as it was in contravention of the rule of Bible<sup>4</sup>. After the renaissance the restrictions over the divorce was taken away. The duty of the church was limited and the power of divorce was conferred to the ordinary courts. At present both the parties are free to take divorce. Consequently the ratio of divorce in the western countries has increased.

In Hindu religion, divorce was prohibited. The marriage was treated as sacrament once the marital knot was tied it was permanent. Even after the death of the husband the wife was not allowed to marry with others. That is why, the tradition of sati started were the widows were forced to burn themselves on the funeral pyre of their husbands. The woman was considered ardhagini<sup>5</sup> and marriage was considered the union of flesh of flash and bone to bone<sup>6</sup>. But when the hardship was realised, the provision for divorce was developed with the help of religious heads. In Northern India, till 1955-60 the system of divorce was considered abominable except in few castes of backward classes<sup>7</sup>.

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<sup>1</sup> Fathul Muthim, vol. I, p. 130. cited by Darse Termizi P.459

<sup>2</sup> Holy Bible 'The New Testament' King James Version - Mark 10 : 11, 12

<sup>3</sup> Holy Bible New King James Version – (Secundrabad:GI) at Luke 16 : 18; 2009, p 1018

<sup>4</sup> Darse Tirmizi p. 459

<sup>5</sup> Other half of the man

<sup>6</sup> And also soul to soul

<sup>7</sup> Darse Tirmizi p. 461

Now in Hinduism, the law is enacted for divorce. The Act of 1955<sup>8</sup> had provided several grounds for divorce and a few others have been added by the amendment in the Act in 1976<sup>9</sup>.

## 2. DIVORCE IN ISLAM

Islam provides the system of divorce but with great care and caution. It is given in extreme circumstance. There are certain measures which can avoid it eg-

### 2(1). BETTER TREATMENT WITH WIFE

Islam dislikes the divorce. So it nips the evil in the buds. To avoid the evil of divorce Islam commands to treat the wife in a better way. It is said that Islamic system of divorce provides a scientific way to avoid it which is based on Qur'anic revelations by Almighty Allah. Qur'an says, **"O ye who believe Ye are forbidden to inherit Women against their will. Nor should ye treat them With harshness, that ye may Live with them. On a footing of kindness and equity"** Further, **"The parties should either hold Together on equitable terms Or separate with kindness."**<sup>10</sup> Again - **"Either take them back On equitable terms Or set them free On equitable terms : But do not take them back To injure them (or) to take Undue advantage,"**<sup>11</sup>

Thus the Almighty has commanded such things which would avoid the incident of divorce.

Similarly the interpretation of the Qur'an<sup>12</sup> i.e. Traditions say-

1- 'Follow my wordings in relations to the women who is made from crooked rib and if you try to bend it straight, it will break, therefore treat your wives kindly'<sup>13</sup>.

2- 'Muavia Qashiri (Raz) says that he asked the Prophet (SAW), " What are the rights of a woman over us, " He replied, "when you bring anything provide them also. When you dress yourself do not forget them. Don't slop them over their face and cheek. Don't abuse them. Don't leave them alone except at your homes'<sup>14</sup>.

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<sup>8</sup> S.13. Hindu Marriage Act, 1955

<sup>9</sup> Amendment in Hindu Marriage Act, 1976

<sup>10</sup> The Holy Quran S 4 A.19

<sup>11</sup> 5- Ibid S 2 A 231

<sup>12</sup> Once Ayesha (Raz) was asked about the life of the Prophet (SAW) she replied, 'have you not read the Quran "It means what is in the Holy Quran that is explained by the Prophet.

<sup>13</sup> Moammad Mohsin Khan, Translator, 'Sahah Al- Bukhari' (Riyadh:Darussalam) 9 volumes, July 1997; In Mohd. Ahmad Khan V Shah Bano Begum the S.C. has cited it negatively. But my humble submission is that it never be treated as negatively. If a person, introducing some persons says - These persons are urban persons, if they get angry they will shake the havens; so treat them equitably. It means there is guidance for special treatment. The word 'so treat them equitably, meant condition that where they are not equitably treated. Like this women are not crooked by nature except where they are ill treated.

<sup>14</sup> Masnad Ahmad

3- Abu Huraira (Raz) reports the sayings of the Prophet (SAW) that the believer husband will never have hatred with the believing wife....<sup>15</sup>

4- 'Ayesha (Raz ) reports the sayings of the Prophet that amongst believers the best is one who has the good behaviour and is kind over his family<sup>16</sup>.

5- 'Jabir (Raz) reports the sayings of the Prophet (SAW) that his directives about good treatment with wives be followed<sup>17</sup> and

6- 'Reports Abu Masood Ansari from the Prophet (SAW) that the expenditure made over the family is a good charity ...'. The best expenditure is that which is made over once own family.' Thus by good treatment the apprehension of divorce is fully erased.

## 2.2 ALTERNATIVE MEASURES TO AVOID DIVORCE

Where the good treatment is not effective to resolve the differences between the spouses, the alternative measures are provided instead of divorce. So where there is excess from wife's part, the Almighty Allah commands, **“As to those women On whose part ye fear Disloyalty and all-conduct Admonish them ( first ) , (Next), refuse to share their beds, (And last) beat them ( lightly )<sup>18</sup>; But if they return to obedience, Seek not against them Means of annoyance : For Allah is Most High Great ( above you all )<sup>19</sup>**. Where the excess is not from wife side the Holy Qur'an guides, **“If ye fear a breach Between them twain, Appoint ( two ) arbiters, One from his family. And another from hers; If they seek to set things aright, Allah will cause Their reconciliation: For Allah hath full knowledge, And is acquainted With all things”<sup>20</sup>**.

The above discussion shows that the Islamic way of divorce is not instant and must not be a result of provocation. The Islamic concept of carrying of marital knot with happiness is appreciable. But where there is no way of normal relation, then this rule may be considered golden rule. But in fact it is rule of necessity that is why the seeing of the girl with whom marriage is proposed and permitted so that there may not be any apparent disliking<sup>21</sup>. Where there is any disliking in the wife and the husband is said to think about the virtues of his wife instead of her weaknesses. Allah commands -

**"Live with them<sup>22</sup>**

**On a footing of kindness and equity**

**If ye take a dislike to them**

**It may be that ye dislike**

<sup>15</sup> Sahih Muslim Sharif Allama Wahiduzzaman, Translator (Urdu), 'Sahih Muslim' (NDelhi:AI) 2010, 3 vol.

<sup>16</sup> Tirmizi

<sup>17</sup> Shahih Muslim Sharif o p cit

<sup>18</sup> Beating does not mean that woman is made for being beaten like Tulsi's saying 'Dhol Ganwar Shudra Pashu Nari, Ye sab Taran ke Adhikari' here it means what Luqman the renowned scholar has said -

<sup>19</sup> The Holy Quran. S. 4 : A. 34

<sup>20</sup> The Holy Quran. S. 4 : A. 35

<sup>21</sup> Although it is not allowed for a righteous to see any woman other than the wife and prohibited degrees women.

<sup>22</sup> i.e., Wives

**A thing and Allah brings about  
Through it a great deal of good"<sup>23</sup>.**

And where the things are intolerable the husband should try to mold her steadily<sup>24</sup>.

**2(3). DIVORCE IS ABOMINABLE IN ISLAM**

It is reported from the Prophet that the most detestable things, before Allah, amongst all the permitted things is divorce<sup>25</sup>. It is also reported from the Prophet (SAW) that Iblis<sup>26</sup> sits, over his throne and the agents of devil forces approach with their achievements, who ever amongst them has prevented a student from his studies and one who has created the difference between the spouses; are rewarded by the throne. Such agents become nearer and dearer to the throne.

**2(4). PERMISSIBLE NUMBER OF DIVORCE (TALAQE RAJAYEE)**

In pre-Islamic Arabia the divorce was allowed but no procedure was there. The persons were allowed to make divorce at any time and the number was also not fixed. The taking back was also not restricted. Even after hundred divorce, one was allowed to take his wife back. So the persons were habitual of divorcing their wives.

But after advent of Islam, it is not allowed to divorce the wife more than twice in revocable divorces.

The Holy Qur'an says -

**"A divorce is only  
Permissible twice"<sup>27</sup>.**

And if after that there is divorce. The Qur'an guides -

**"So if a husband  
Divorce his wife (irrevocably)  
He can not, after that  
May Marry her"<sup>28</sup>.**

In this way Islam puts restrictions<sup>29</sup> in divorce as well as in taking back<sup>30</sup>.

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<sup>23</sup> Holy Quran S 4 A 19

<sup>24</sup> Holy Quran S 4 A 134

<sup>25</sup> 'Sunan Abu Daud' Abu Ammar translator Urdu, (Delhi: DI) 2008, Vol. 2 p

<sup>26</sup> The head of devil forces whose name is Azazil. In *Fatawaa Rahimia* it is said that (*shaitan*) devil puts his throne on the surface of the sea and then sends his armies to instead people devil applauds such of his soldiers who cause estrangement between husband and wife, embraces them and says : " Bravo! Well done!" Abdur Rahim 'Fatawae Rahimia'. Trans. Murtaza Husain F. Quraishi ( Delhi : Kutub Khana Azizia) 1978 II p. 120

<sup>27</sup> The Holy Quran S. 2 A. 229. *Rahimia* it is said that devil (*shaitan*) puts his throne on the surface of the sea and then sends his armies to instead people devil applauds such of his soldiers who cause estrangement between husband and wife, embraces them and says : " Bravo! Well done!" Abdur Rahim 'Fatawae Rahimia'. Trans. Murtaza Husain F. Quraishi ( Delhi : Kutub Khana Azizia) 1978 II p. 120

<sup>28</sup> The Holy Quran S. 2 A. 230.

### 3. CLASSIFICATION OF DIVORCE

There are three situations in which material tie may be broken

(1) **BY THE DEATH OF THE PARTIES**

(2) **BY THE ACT OF THE PARTIES**

(3) **BY THE JUDICIAL PROCESS (IT HAS BEEN DISCUSSED IN CHAPTERS 5& 6)**

**3(1). BY THE DEATH OF THE PARTIES :**

In the life time of the spouses the women is prohibited to marry with another man and a man is prohibited to marry more than four<sup>31</sup> women. But where the death occurs the woman is allowed to marry with another man after expiry of iddat<sup>32</sup>.

**3(2). BY THE ACT OF THE PARTIES :**

**3.2.1. BY HUSBAND**

**(I). DIVORCE (TALAQ)**

**i). TALAQUS SUNNAT (AHSAN & HASAN)**

**ii). TALAQUL BIDDAT**

**(II) ILA (IT PROVIDES THE OCCASION THE WIFETO DEMAND DIVORCE)**

**(III) ZIHAR (IT ALSO PROVIDES THE OCCASION THE WIFETO DEMAND DIVORCE)**

**(I). DIVORCE (TALAQ)**

When the husband divorces his wife, it is called talaq or divorce. In sunni law there is no form prescribed for divorce. The husband has full power to divorce his wife either by assigning reasons or without assigning it<sup>33</sup>. In Shia law the form provided by the Prophet is strictly followed. A part from this two muslim male witnesses are also necessary. The conditional or qualified divorce is permitted in the Hanafi law but not in Shia law<sup>34</sup>.

**i). TALAQUS SUNNAT :**

Talaqus sunnat means divorce made in accordance with the Traditions of the Prophet. It is divided in two forms : (i) Ahsan, (ii) Hasan.

**(a) TALAQUL AHSAN:**

Talaqul Ahsan<sup>35</sup> defining this divorce, Hedaya says<sup>36</sup> that talaqul ahsan, or the most laudable divorce is that divorce where the husband repudiates his wife by a single sentence

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<sup>29</sup> The Holy Quran S. 2 A. 229

<sup>30</sup> The Holy Quran S. 2 A 230

<sup>31</sup> It is not rule but exception

<sup>32</sup> Normally 4 months and 10 days but it may be after delivery where woman is pregnant which ever is longer.

<sup>33</sup> *Moonshi Bulzar Raheem V. Latifun Nisa* (1861) 8 MIA

<sup>34</sup> Tayabji 'Muslim Law' (1968) VII p.143 to 150.

<sup>35</sup> AIMPLB has proposed some measures to implement itFor detail see supra note chapter 3.

<sup>36</sup> Charles Hamilton 'The Hedya' book IV. Ch.1.

within a tohr<sup>37</sup>, during which he has not had carnal connection with her and then leaves her to the observance of waiting period (iddat) or prescribed term of probation. After the expiry of iddat the wife will be separated<sup>38</sup>. But the benefit of this divorce is that the parties may marry again.

#### (b). TALAQUL HASAN

It is also approved form of divorce. Mentioning this the Hedaya says that talake hasan or laudable divorce, is that where a husband repudiates his wife in three sentences of divorce, in three tohrs". Imam Sadi, the teacher of Sarkhusi, has mentioned two kinds of sunnah divorce. One is laudable and other is abominable. The laudable is what jurists say ahsan and abominable is that to which the jurists say hasan<sup>39</sup>. In this way, the traditions, which says the talaq-e-hasan as sunnah way, is only permissible thing.

#### ii). TALAQUL BIDDAT

A divorce given in contravention of the injunction of the Holy Qur'an and Prophet's Tradition is known as talaqul biddat. Hedaya says "Talaqul Biddat, or irregular divorce is that divorce where a husband repudiates his wife by three pronouncements at once, or where he repeats the sentence separately, thrice within one tohr<sup>40</sup>," Apart from this the divorce made within the menstrual courses is also considered bidai form of divorce.<sup>41</sup> The divorce made within the pregnancy period is also bidai<sup>42</sup>. Where divorce is made without witnesses, it is also bidai<sup>43</sup>. Almighty Allah has revealed-

**"Thus when they fulfil  
Their terms appointed  
Either take them back  
On equitable terms  
Or part with them  
On equalable terms;  
And take for witness  
Two persons from among you,  
Enduced with justice,  
And establish the evidence  
For the sake of Allah .Such  
Is the admonition given  
To him who believes  
In Allah & the last day<sup>44</sup>."**

<sup>37</sup> Period from one menstrual course to next course

<sup>38</sup> As the marriage becomes irrevocable

<sup>39</sup> Darse Termizi Vol.III p. 464

<sup>40</sup> Hemitton Hedaya' p. 73. AIMPLB has proposed some measures to avoid it. For detail see supra note chapter 3.

<sup>41</sup> But where unconsummated marriage is repudiated it is not *bidai*.

<sup>42</sup> Divorce is to be given in the tuhr period without having the carnal conjunction. When a woman becomes pregnant, no maustrial course comes, when husband is to divorce after maustrial course it means she is not pregnant other wise maustrial comes could not have come.

<sup>43</sup> But only Shia law recognises it. The shia law doest consider the divorce without witnesses. But in Sunni law divorce is effective without witnesswes. No school of Sunni law is exception. Although in sure XV : V.2 it is mentioned, it is interpreted by Sunni's in a different way.

<sup>44</sup> This is not rule for inception of repudiation. It is either for taking back after second divorce or make her away for the marital tie. So it is worth less to say things without witnesses divorce is bidai (mariful Quran ).



Where the divorce is made in hasan<sup>5A</sup> form<sup>45</sup> it is not good before any of the scholars of different schools Imam Malik considers this form as bidai. Thus it is clear that bidai form of divorce is not good. But the question is that if it is made what will be the after effect<sup>46</sup>.

As we know that Qur'an says for divorce -

**"A divorce is only  
Permissible twice;"**

When it will be minutely observed it will be seen that more than ones divorce can not be effective in a single sentence. It must be made one after another. Ibne Taimia says that Allah does not say that two divorce are in two times but in two prescribed times. So where a person says to his wife that he gives her two divorce or ten divorce or thousand divorce that will be considered as one<sup>47</sup>. Hafiz Ibnul Qayyim says that twice means one after another. It never meant the digit two in any language. It is also clear from the verses of the Holy Qur'an -

**"O ye who believe  
Let those whom your right hands  
Possess, and the (children) among you  
Who have not come of age  
Ask your permission (before  
They come to your presence)  
On three Occasions: before  
Morning prayer, the while  
Ye doth your clothes  
For the noon day heat;  
And after the late-night prayer<sup>48</sup>:"**

Further -

**"And decreed for  
The children of Israel  
In the book, that twice  
Would they do mischief  
On the earth and be elated  
With mighty arrogance  
(And twice would they be punished<sup>49</sup>)!."**

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<sup>5A</sup> Please see Supra note 36.

<sup>45</sup> Only Hanafi scholars consider this form as Hasan. (Hedaya )

<sup>46</sup> Even in the bidai form the most controversial question is that where man pronounces triple divorce in one and same setting what will happen or one sentence what will happen.

<sup>47</sup> Fatawa Ibne Taimiyah Vol. III p. 47.

<sup>48</sup> The Holy Quran S 27 A 4.

<sup>49</sup> Ibid S 17 A 4.

The above verses show the number of times where there is mention of twice and thrice. It is also clear that occasions are one after another.

This thing may be more clear from a tradition (Hadis) where it has been told that after Salat anyone who recites thirty three times 'Subhanallah' and in the similar way 'Alhamdolillah' and again 'Allaho-Akbar' he will be rewarded in such and such way<sup>50</sup>. Where A says Subhanallah thirty three Alhamdolillah thirty three and Allaho-Akbar thirty three it will never be counted as nintynine. In the light of above it can be said that so why 'divorce three' or 'divorce irrevocable would not be considered as three divorce.

The opinion that a woman becomes barred after thus pronouncement in the single. The question is where a person divorces his wife in separate sentence and three times in the same sitting, would it be considered as one. The answer is (Ahle Hadis) Yes, it would be considered as one, Because the second divorce is to be made in the separate action<sup>51</sup>. Moreover the Traditions of the Prophet clearly say that it will be considered as one.

The following traditions may be cited as example. Muslim reports," To me Abdullah S/o Abbas that in the time of the Prophet (SAW) and in the Caliphate of Abu-Baker (Raz) and first two years in the Caliphate of Umar (Raz) the tripple divorce was considered as one time divorce. But Caliph Umar (Raz) said that the persons are making haste in a matter which need delay. So it will be better to accept their haste<sup>52</sup>."

He further says," To me Taus, to him Sahba's father who asked Abdullah (Raz), the companions of the Prophet (SAW) and son of Abbas whether he knew the fact that in the time of the Prophet and in the Caliphate of Abu Bakar (Raz) and in the 1<sup>st</sup> three years of Caliphate of Umar (Raz) the tripple divorce was considered as one. Abdullah (Raz) affirmatively replied<sup>53</sup>.

Again," To me Taus to him sahba's father who asked the Abdullah S/o Abbas to teach him the Traditions which is known to him. He asked whether the triple dworce was considered as on in the time of the Prophet and in the Caliphate of Abu Bakr, Abdullah replied affirmatively and told that when persons started divorcing the wives in the hasty ways, the Caliph ordered for the effectiveness of the same<sup>54</sup>."

Further," Says Abdullah S/o Abbas that Rukana S/o Abde Yazid divorced his wife by way of tripple divorce and fill in sorrow. The Prophet (SAW) asked him how had he divorced his wife. He replied that he divorced her by way of tripple divorce. Prophet asked whether in the same gathering. He replied affirmatively then Prophet said that one divorce will be effective and he could take his wife back. So he took his wife back<sup>55</sup>."

Thus the bidai way of divorce is considered as wrong and void by the jurists and scholars of the four schools except Imam Shafeyee who considers it as a valid way of divorce<sup>56</sup>. How ever the effectiveness of three divorce in one sitting is recognized by the majority of the

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<sup>50</sup> As Holy Quran says (that unit of ten is complete unit)

<sup>51</sup> Tafsire Khazim; Al Kamal Quran Vol. 1 p. 380, Allama Sudi in Hasma Sunane Nisai Vol. II p. 29; Madakut Tanzeel Vol. II p. 177; Allama Asiruddin Bahri Muheet Vol. II p. 192, Tafseere Kebir Vol. II p. 273, Tafsire Mazhari Vol. 1 p. 235.

<sup>52</sup> Sahih Muslim Vol. 1 p. 477

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> Masnad Ahmad Vol. I p. 265

<sup>56</sup> Darse Tirmizi Vol. III p. 468; Fatawa Rahimia II p. 114



jurists except Ibne Taimiya, Ibnul Qayyim and Ahle Hadis, who say that in such cases only one divorce will be effective<sup>57</sup>.

#### **4. LEGISLATION**

There is threat from the ruling party that a legislation will be brought to check the misuse of instant triple divorce but the fearful thing is that it may be declared crime while matrimonial matters are not criminal one. The criminal aspect has already been covered up in the form of Prevention of Sati Act and Dowry Prohibition Act. Instant triple divorce is not only prohibited but its solution is also provided that is Salafi School is consulted to nullify it.

#### **5. CONCLUSION**

It is clear from the discussion that divorce is permitted but disliked. If a woman wants divorce and that not reasonable then she will not enter to paradise. It is allowed to save the bigger damage and in rare cases. The bidai form of talaq is not permissible as per Muslim law.

However any legislation in this direction must not criminalise it otherwise family will be broken and instead of solution punishment will be their fate which will be against constitutional right to lead dignified life.

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<sup>57</sup> Ibid p. 470