

## An Analytical Study of The Law Relating to Triple Talaq in Islam

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### Abstract

*This research aims to explain and deal exclusively with the triple Divorce in one sitting. Islam with its practical and realistic outlook recognizes divorce but is disliked in Islam and considered a necessary evil which is inevitable only in certain circumstances. There are certain situations in which it becomes humanly impossible for the couple to carry on relation as husband and wife. Instead of dragging on with a forced relationship in a miserable and bitter way, it would be more conducive to the welfare of parties to part with grace and goodwill. I have tried to elaborate on the necessity and significance of triple Divorce. Then Islam introduced the reforms and put an end to the oppressive and limitless series of divorcing. Although, the husband's right to divorce was not revoked by Shariah however certain limits, terms and conditions in the exercise of this right were imposed by it. Women were also protected by granting them the right of maintenance and dower and were allowed the right of Khula if their husbands treated them badly.*

**Key Words:** Constitution, Pakistan, United States, Judicial Review

### Introduction

According to the Islamic views matrimonial alliance is a sort of social contract and a contract can be terminated when it ceases to serve its purpose. This does not mean that there is no sanctity and solemnity in Islam of this relationship. The analysis of marriage and *divorce* laws in Islam clearly shows that marital relationships are to be respected and continued as far as possible. The dissolution is provided in the very grievous circumstances otherwise no stone should be left unturned to save the relationship. Termination of marriage by husband is known as *Divorce*, whereas dissolution of marriage by wife is called Khula, and Mubarrat takes place by the consent of both parties to the contract of marriage.

But this research is conducted just to resolve the issue of triple *Divorce* i.e. dissolution of marriage at the instant of husband by way of irrevocable *Divorce*. In the introductory chapter (foregoing paragraphs) I have tried to elaborate on the necessity and significance of triple *Divorce*. Then Islam introduced the reforms and put an end to the oppressive and limitless series of divorcing. Although, the husband's right to *divorce* was not revoked by Shariah however certain limits, terms and conditions in the exercise of this right were imposed by it. Women were also protected by granting them the right of maintenance and dower and were allowed the right of Khula if their husbands treated them badly.

Although Islam dislikes the three *Divorce*s in one sitting disliking something does not mean that this thing does not exist at all. Brief views about the Muslim Laws Ordinance, 1961 would be that it ultra-vire, because the Constitution of the Islamic Republic of Pakistan clearly says that no law contrary to injunctions of Islam shall be promulgated. My humble view is that land law must be followed but just to the extent of registration of marriage which is for the purpose of administration of social affairs and to avoid other complications. Otherwise, *divorce* completes at the third pronouncement and to ignore this fact and to continue the relation would be Gunah-e-Kabira (adultery) in the light of Shariah.

There are various types of *divorce* in Islam, a few are initiated by the husband, whereas others by the wife. Major classical legal kinds are *Divorce*, Khula, and dissolution by the judiciary. However, it is also a considerable fact that means and methods of *divorce* don't remain unchanged both theoretically and practically. *Divorce* rules are governed by Shariah. Shariah depends upon schools of thought. Therefore, they differ from one school of thought to another. Moreover, it's also worth noticing that practices have not always been in accordance with theory. Furthermore, in the contemporary world of today, *divorce* norms have been shifted from classical jurists to the state.

Marriage is a contract, and like any other contract, it can be undone. The death of either party puts an end to this contract. Similarly, either husband or wife may dissolve this contract. The right of a husband

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to dissolve this contract can never be extinguished. However, it can be limited through Nikanama. Likewise, this right can also be entrusted to the wife in Nikahnama<sup>3</sup>

According to section 7 of the Muslim Family Law Ordinance as well as Muslim Personal Law, *Divorce* is pronounced (oral or by way of a Deed of *Divorce*) and written notice is sent by the husband through registered post to the Union Council, mentioning the address of his ex-wife. Subsequently, the wife is sent a copy of the notice and within the period of 30 days of the receipt of the notices an arbitration council is framed by the relevant union council. After the lapse of the iddat period (90 days from the date the union council receives the *Divorce* notice), the union council issues a certificate of *Divorce* being effective to the husband and wife.<sup>4</sup>

Therefore, *Divorce* though pronounced merely through words is not recognized by law. Failure on the part of the husband to send notices may make *Divorce* ineffective. No matter union council has issued a certificate, if notices are not served properly the *Divorce* may be challenged on the appropriate forum.

The philosophy behind this law is to protect the interests of women by organizing a record of *Divorce*. Prior to 1979, a woman, improperly *divorced* and remarried, might be convicted of bigamy. After the introduction of the Zina ordinance in 1979, bigamy was deemed a very severe offence punishable by death sentence. Therefore, it is a matter of great importance for a woman that prove her *divorce* properly through legally admissible evidence.

There are only four relations i.e. father, mother, adult brother or adult sister through which notice of *Divorce* may be served on a woman with the permission of the union council. However, if the whereabouts of a woman are unknown to her husband and her immediate relatives, the notice may be served to her through an approved newspaper by the union council.

The practice of refusing to accept the notice by the family of the wife is detrimental to the interests of women because notice may be served via approved paper and the woman may remain unaware of her status.

Either way, there is no need to knock at the door of the court. The *divorce* may become valid and effective through adopting some procedural steps. In this case, both husband and wife may sign a Mutual *Divorce* Deed and send a written notice under section 8 of the Muslim Family Law Ordinance to the concerned union council. The Union Council will adopt the same procedure as of ordinary notice of *Divorce*.

In case the right to *divorce* is not acknowledged in the Nikahnama, the woman may apply for Khula. Linguistically, Khulla means untying the knot. In a technical sense, it is the dissolution of marriage by a woman via court. A married woman may apply for Khula to a family court under the West Pakistan Family Court Ordinance. Her statement on oath that she can't live with her husband in accordance with the limits prescribed by Allah Almighty would be sufficient reason for her case. Moreover, if the wife is willing to abandon her financial rights, the court may grant Khula to the woman, known as judicial Khula, without the consent of the husband.

## Historical Background

To understand the nature, scope and concept of *divorce* under Islamic law, the knowledge about the historical background of *divorce* would be very helpful. The following lines deal with a brief historical perspective.

Among pre-Islamic Arabs, the power of *divorce* was only in the hands of the husband and that power was unrestricted and unlimited. The husband could *divorce* his wife or wives at any time, at any reason and even without any reason. They could also take back their wives by revoking their *divorce* without following any prescribed method or formality as many times as they prefer. They used to swear that they would not fulfill their marital obligation, and would have no intercourse though still living with their wives. They could in a very despotic manner accuse their wives of adultery and after degrading and destroying their respect and honour in society would dismiss them from their lives while they themselves would be exempted from any legal and formal responsibility of maintenance.

These social and moral injustices engaged the attention of the Holy Prophet (PBUH). He (PBUH) framed and enforced the laws of marriage and *divorce* according to the dictations of Allah Almighty to remove the evils flowing in society from *divorce*.

## Reforms Introduced by Islam

Reforms introduced by Islam put an end to the oppressive and limitless series of divorcing and introduced a new departure in the history of legislation. Islamic Law of *Divorce* is based on logic and there is a rationale behind the procedure of *divorce* prescribed. Marriage is like a civil contract, it confers on both the parties to contract the power to dissolve the marital tie under certain specified circumstances. Islamic law does not take away the right of a husband to *divorce* his wife unilaterally, but it imposes certain restrictions, terms and conditions in the exercise of this right. A Muslim husband cannot *divorce* his wife and take back her as he wishes. Similarly, the Muslim Law defines proper procedure and time of *divorce*. Islamic Law further imposes certain obligations on the husband to pay dower and maintenance to the wife on *divorce*.

Although *divorce* is permissible in Islam, it is not favoured, and it is permissible only in exceptional circumstances i.e. when it becomes impossible to carry on the marital tie. Al-Ghazali remarks that *divorce* in Islam is permissible only when its object is not to trouble the wife but only in case of extreme necessity and on just grounds.

The behest of the Quran regarding separation is:

“Virtues women are obedient and careful during the husband's absence because God hath of them been careful. But (as to) those for whose refractoriness you fear desertion, and admonish them, but if they are obedient, seek not a way against them, verily God is high and exalted. And if u fear a breach between husband and wife, refer the matter between two arbitrators one chosen from the family of each party, if they recommend reconciliation between them.”

The Holy Prophet (PBUH) also discouraged and disliked *divorce* except in extremely intolerable circumstances.

The Prophet (PBUH) warned his followers:

“Curse of God rests on him who repudiates his wife capriciously.”

“*Divorce* shakes the throne of God.”

The Muslim Law of *Divorce* raises two important questions for consideration which are confusing. One relates to the method of *divorce* i.e. the triple pronouncement of *divorce* in one sitting, and the other is inequality with respect to the right to *divorce* among two sexes. However, the latter is not related to our present study but sometimes it is said that the law of *divorce* among Muslims doesn't do justice to women that's why it is desirable to clarify the question of inequality. The people who criticize that man has unilateral power to *divorce* and has a monopoly in this case perhaps they are misguided or misinformed. Islam is based on the principles of natural justice and there is always equality among men and women. Not only women have been ensured the equal rights of men but we may say that in some spheres of life, women enjoy more rights and powers than men. The special right of *divorce* given to men is based on some physical and natural differences between the man and woman as briefly explained below.

Unilateral *divorce* is based on the concept that men are superior to women. Some Muslim scholars seek the authority for this view from this verse of the Holy Quran:

“Men are maintainers of women because Allah has made some of them to excel others and because they spend out of their property (i.e. on dower and maintenance)”.

Women are more sentimental psychologically and have less cool temperaments in comparison with men. Women are easily irritable and easily excitable may take dispassionate judgment and can easily choose the wrong path. So there is reason behind each and every commandment of Allah Almighty that women are not given the equal rights of *divorce* as to men just to restrain the number of *divorces*.

So the above discussion shows that men are given the right to *divorce* their wives. Although it is permitted but the most disliked act by Allah Almighty. There are two types of *divorce*, one of them is triple *Divorce* in one session. All terms and conditions of *divorces* have been prescribed in the divine law.

## **Lego-Religious Dimensions Divorce**

The literal meaning of *Divorce* is *divorce*. In the sight of classical Islamic law, it means the right of the husband to dissolve the marriage by announcing to his wife that he *has divorced* her. No justification or court order is required in this way. However, certain limits are imposed by classical jurists in this regard, e.g. declaration ought to be in clear terms; there must be no element of coercion, and the husband must not be insane. The exclusive right of a husband to announce *divorce* is usually rationalized with the

exclusive obligation of the husband to provide for maintenance and all other financial responsibilities. Besides, it is thought by classical jurists that female nature lacks rationality and self-control".

*Divorce* is not an irreprehensible means of *divorce* in Islamic jurisprudence. Marriage is not terminated by the first pronouncement, i.e. *Divorce-e-Rajah*. It can be undone by the husband any time before the end of three menstrual cycles. The purpose of providing this period is to provide an opportunity to reconsider the decision. Another purpose is to ensure that whether the wife is pregnant or not. The repudiation can be automatically undone by resuming the conjugal relations. All rights of the wife are intact during this period. However, once the waiting period is over *divorce* becomes final. After this *divorce*, the couple could remarry, and this type of *divorce* is known as minor *divorce*. Repudiation of the wife for the third time is known as a "major" *divorce* (*baynbaynunakubra*), and the couple can only remarry after an intervening consummated marriage (*nikahhalala*). In the views of some jurists, the pronouncement of *Divorce* thrice in one go amounts to major and irrevocable *Divorce*, whereas others deem it revocable and minor *Divorce*.

The wife is legally entitled to full payment of haq-e-Mehr if it has not been paid before. During the intervening period, to meet the financial responsibilities of a wife is the obligation of the husband. Besides, child support is also the right of the woman, and it is required by Islamic law to provide for her needs on a regular basis.

*Divorce* (Repudiation) or *divorce* is an Arabic word that implies "untying a knot". This word is used by Muslim jurists to express the release of a woman from the matrimonial relationship and means a *divorce*. The word *Divorce* is used as repudiation; It is derived from a root [*Divorce* a] which means "To release [an animal] from tether"; whence, to release the wife from marital tie or repudiate the wife. However it signifies the absolute power of men which the husband possesses of divorcing his wife at all times; for, "the matrimonial law of Muhammadan like that of every old society favours the stronger sex".

### The Triple Pronouncement of Divorce

This form of *Divorce* is also called *Divorce -e-Mughallazah*, *Divorce -e-Bida*, or *Divorce -e-Baina*. There is no disagreement among Muslim jurists when three pronouncements of *Divorce* are in three different *Tuhrs*. Jurists disagreed on the form of triple *Divorce*: first, when the *divorce* is pronounced thrice in one session within one sentence as "I *divorced* you thrice": secondly, when the *divorce* is pronounced thrice in one sitting in three phrases as "you are *divorced*, you are *divorced*, and you are *divorced*".

Such kind of *divorce* is lawful though disliked in *Hanafi* law, but *IthnaAshries* and *Zahirities*, *Ibn-e-Taimiya* and some of the *Ahl-e-Hadith* consider this kind of *divorce* an innovation and not permissible. This is called *Divorce-e-Bain*, which means an irrevocable *divorce*. The *divorce* may be pronounced thrice either on three different occasions or on two different occasions or at the same time and it is the last one that concerns the subject of the present discussion. The *Mughallazah divorce* shall become effective as soon as the third pronouncement of *divorce* is made.

The effect of a triple declaration of *divorce* is that the husband and wife become *Haram* for each other and cannot live together and cannot remarry with each other without an intermediary marriage (*Halala*). There is no need for intermediary marriage if there are only one or two pronouncements of *divorce*. The principle which in the classical sense is called *Halala* is also applicable to triple *Divorce* in one sitting.

The object of this rule is to keep the men away from making such decisions which are disliked by Allah Almighty. The passion of jealousy in a man will stop him from carelessly divorcing his wife or from repeating the pronouncements of *divorce* because he knows that after the third pronouncement, her wife will become *Haram* for him and he will be unable to remarry her unless she marries another man and he *divorces* her after consummation.

### Revocation of Divorce by the Husband

It is regularly noted by us that most families, particularly spouses work out their privilege of separation with a legitimate point of view and from that point approach different instructors and legal counselors for denial of *divorce*. The normal issue is that most legal counsellors or sketchers get ready for separation deeds without enabling the chance to deny the separation by making the spouse articulate triple separation. A separation can be denied by the spouse without mediating the marriage as long as the same is done in up to three professions! Along these lines a *Divorce* Deed ought to dependably be set up in the frame and way to propose that it might be dealt with as one single separation, if the separate deed is set up with a triple separation then the same can't be disavowed without interceding marriage

and thus the said demonstration ought to be practised with caution. In most cases the customer is not educated of his lawful privileges of triple separation and their separation deed is set up with triple separation. Constrained researchers adherent that full information of triple separation is dealt with as single separation, while a larger part is of the sentiment that obliviousness of essential Islamic Law is no pardon and subsequently declaration of triple separation is last and official until interceding marriage.

### **Position of Pakistani Law of Divorce (Muslim Family Laws Ordinance, 1961)**

Although Islam reached the sub-continent Indo-Pak much before the advent of Muhammad Bin Qasim, but Islamic legal system in this region was introduced by Muhammad Bin Qasim. In the era of the Sultanate of Delhi and after the Sultans, the Mughals also continued to enforce the Islamic system of law in the country. Muslim rulers adopted the Public Laws of Islam as the law of the land but personal laws of Muslims were only for the Muslims. That's why Muslim Personal Law was not the law of the land, it was a special law limited in application, scope and jurisdiction. Even the Islamic Public Laws were also not comprehensive and unexceptionable. Mughals of India also allowed various states to regard their local and regional customs to order their lives.

Later on, the East India Company was established and soon it got Royal Mughal Authority to administer law on all subjects. British soon started replacing the Islamic legal system with a hybrid system and established company courts. Now in the country general English legal principles and concepts of justice, equity, and good conscience were applicable instead of Islamic principles.

At the beginning of the 20<sup>th</sup> century, Ulema's attention went towards customary laws that have been given preference over Shariah. Then they demanded the enforcement of Shariah Laws in the country. The efforts of Ulema proved fruitful and many Islamic enactments were introduced in the hierarchy of Indian Laws and one of such enactments was the Shariah Application Act, 1937.

The bill of Shariah Application Act, of 1937 was introduced in the legislature for enforcement of Shariah in the Personal Laws. At the time of the final reading of the bill Quaid-e-Azam Muhammad Ali Jinnah gave a suggestion to amend the proposed enactment that Islamic Law should not be compulsorily enforced on all Muslims, rather they must be given a choice between Islamic law and the customary laws.

The bill was enacted on 16-6-1937 named the Muslim Personal Law (Shariah) Application Act, 1937 and came into force on 7-10-1937. Quaid-e-Azam's ahsan yalmaz, dynamic legal pluralism in the age of past modernity: the reconstruction of unofficial muslim laws in the uk, turkey, and pakistan, chap. 5 (london: so as ph.d thesis suggestion was also part of this enactment but with respect to few subjects, as ahsan yalmaz, dynamic legal pluralism in the age of past modernity: the reconstruction of unofficial muslim laws in the uk, turkey, and pakistan, chap. 5 (London: SO AS PhD Thesis adoption, will and legacies the Act gave the option to Indian Muslims either to opt the Muslim law or the customary laws. However in other matters of personal law as marriage, *divorce*, etc Muslim Personal Law is the only law that would be applicable to all Muslims compulsorily.

At the time of creation of Pakistan the Muslim Personal Law (Shariah) Application Act, 1937 was applicable law here. Section 2 clearly said, "In the family matters Shariah Law would be applicable law and sources of Shariah are Quran, Sunnah, Ijma and Qiyas."

However in 1962, the law was repealed by another Act "West Pakistan Muslim Personal Law (Shariah) Application Act, 1962, section 2 of this Act also gave the same principle as the 1937 Act. The thing different here was that Shariah would not be applicable to such matters where the legislature has enacted a law. The reason behind this is that the Muslim Family Laws Ordinance, 1961 is the law which governs the procedure, mode and way of *divorce*.

### **Promulgation of Muslim Family Laws Ordinance**

On 4-8-1955 a Commission named as Rasheed Commission was established to review the existing laws and to inquire whether a change in Family Laws (marriage & *divorce*) laws was necessary or not.

The Question of whether the *divorce* under Shariah Act 1937 was according to Islamic Legal Dictates or not, was also discussed in the supervision of this Commission. The Commission was comprised of three men, three women and one Aalim. The Commission published its report in June 1956 based on a unanimous decision of six members, whereas Moulana Ahtisham-ul-Haq (Thanvi) having different views published a dissenting report in August 1956.

Although there was a lot of criticism of Ulema upon this report in the era of Field Martial Ayub Khan, Chief Martial Law Administrator, under the cover of Martial Law, when the national assembly was dissolved, this report was given the form of an Ordinance and was enforced in the country as Muslim Family Laws Ordinance, 1961.

This promulgation was strongly supported by the All Pakistan Women's Association (APWA) which was then headed by Begum Rana Liaqat Ali Khan. However, the Ulema community declared the law contrary to the injunctions of Islam.

Muslim Family Laws Ordinance, 1961 has been given protection under the Constitution of the Islamic Republic of Pakistan and also has an overriding effect on other laws. It deals with matters of marriage, *divorce*, polygamy, maintenance, dower and succession.

This ordinance was given protection under all constitutions as the Constitution of 1962, the interim Constitution of 1972 and also under the Constitution of 1973. Protection to the ordinances promulgated during Martial Laws was given under Article 270-A of the Constitution of the Islamic Republic of Pakistan, 1973 and another protection that it is not contrary to fundamental rights under Article 8(1) (2) is given in 1<sup>st</sup> Schedule, Part II, Item III.

Pakistan is an Islamic country based on the ideology of Islam as articles 2 and 2-A of the constitution say so no law contrary to the spirit of Islam can be made or enforced here.

In a case titled Allah Rakha v. The Federation of Pakistan, the Federal Shariat Court in Pakistan had declared subsections (3) and (5) of section 7 repugnant to the injunctions of Islam. The federal government appealed against that decision to the Shariat Appellate Bench of the Supreme Court where the appeal is still pending.

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