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## UNDERSTANDING THE EPISTEMOLOGY OF *TALAQ* UNDER THE *SHARIAT* LAW

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### Introduction

“*Talaq*” has turned out to be one of the most debated topic in the recent past in the contemporary India. Indian Muslim women living in the 21<sup>st</sup> century globalising world had to be the victims of the most arbitrary practice called “Triple *Talaq*” that legally prevailed in India until the historic judgement delivered by the constitutional Bench of Supreme court through *ShayaraBano and others vs Union of India*. This is a time to retrospect what made India, the largest democratic country to take such a long time to abolish this unislamic and unconstitutional practice, which has been abolished even by those countries where *Shariat* is the law of the land. This practice of triple *Talaq* was totally in contradiction with the law of divorce as held in the Quran. The sad reality is that divorce especially in the form of *Talaq* (divorce by husband) is the most misinterpreted incident leading to much suffering to the Muslim women. To quote Noel James Coulson, “without doubt it is the institution of *Talaq* which stands out in the whole range of the family law as occasioning the gravest prejudice to the status of Muslim women” (Quoted in Pearl and Meski 1988: 286).

To a vast extend during his lifetime; Prophet Mohammad (PBUH) through his intellectualism and divinity, brought systematisation and Islamicization in every aspect of human conduct and relations. Unfortunately after the death of Prophet, his followers could not take up the legacy with the time and space which led to havoc in various aspects of Islamic Jurisprudence. Today the Islamic legal thought is in intellectual impasse (Faruki 1988:100). One cannot witness logical interpretation of Islam anywhere. Kamali (2003: 463-480) aptly says that the orthodox *madhhabs* closed the doors of *ijtihad*(logical interpretation) and thereby limited the scope of *ikhtiyar*(choice). At this juncture this paper tries to trace out the realities and existing misnomer and

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intricacies on the nature of Islamic law, especially in Indian context, upon concept of divorce by men or *Talaq*. The study is a journey from *kalam* (theology) to *fiqh* (Islamic Jurisprudence) to *maslahah* (attainment of welfare to the creatures) by understanding the *maqasid al-sharia* (purpose or intend) imbibed in the subject of *Talaq*.

### **The Concept of Dissolution of Marriage under the *Sharia***

Islamic jurisprudence is founded on *Sharia*, which is the set of divine commands, transmitted by God through the foundational sources of Quran and *Sunna*, and *fiqh* is the human endeavour to identify and elucidate these divine injunctions (Bearman and Peters 2014:1). Marriages are considered to be sacred, apart from being religious, to the nature, and dissolution of nikah is a exception as per the Holy book of Quran. Islam disapproves of divorce to a great extent, and lays down proper modes and practices of dissolution, if at all necessary.

Although a sacred contractual agreement, marriage being can be dissolved by both the parties if they feel the companionship is not comfortable (An –Na'im 2014: 314). This freedom the religion given is equally shared by both the husband and wife. Maulana Mohamed Ali Thanavee compared to other religions such as Hinduism and Christianity to highlight the point that it was the religion of Islam which primarily gave the *right* to divorce as a concrete right for both the parties (Krishna Iyer 1972:26). Dissolution of marriage under Islam is always preferred to be a private affair which needs to be solved amongst each other (Mahmood and Mahmood 2013:158). But this concept of private affair should not be misunderstood that it cannot at be taken to court at all. The law aims at peaceful process of dissolution by trying all efforts to reunite.

In the pre-Islamic Arabia the situation was worse and distorted, where women were suffering at large in the hands of husbands. The husband could marry any number of times and they could dissolve these marital ties very easily without any reasons with nil obligations to compensate the innocent wives. This pathetic state of matrimonial relationship was reformed during the times of Prophet (PBUH), who ordained that marriage was an eternal union and divorce could only be done as the last unavoidable situation (Krishna Iyer 1972: 24). Prophet Muhammed acted according to the Quranic revelations and transformed the contractual nature of marital relationships and its consequences such as divorce in a logical and rational manner by bringing on restrictions to the prevalent practice of divorce by the husband.

### **Quranic Concept of Dissolution of Marriage**

The holy Quran pacts with *Talaq* subject to certain conditions (See Verse 1 below) and specific rules and ethical principles focusing significant factors leading to divorce which is mainly depicted in the seven verses contained in “*Surah Al-Talaq*”(Chapter 65 of Holy Quran). The Chapter mainly treats of divorce with which it opens by addressing the Noble Prophet by saying

*O Prophet! When you divorce women, divorce them at their prescribed periods [i.e. while not menstruating and not having sexual intercourse with their husbands] and count their periods. And fear Allah, your Lord. And turn them not out of your homes nor shall they leave, except in case they are guilty of some open illegal act. And those are the set limits of Allah and whosoever transgresses the limits set by Allah, he has wronged himself. You know not; it may be that Allah will afterward bring some new thing to pass(Quran 65: 1).*

The verse mentions about various strict conditions to be looked upon by the husband before divorcing his wife. The women can be divorced only at the prescribed period. The relevance of this prescribed period is that the period should be one which she is pure and not the menstruation period. This period is when according to Quranic injunction the husband and wife shall not have sex with each other and then counting of periods is also another important aspect. The period is very crucial as it cannot be too short or too long. If it is too short then it would be a problem to know the paternity and if too long the women will be arrested of all her rights leading to uncertainty. The most important and seminal theme of the whole verse can be derived from the wordings *fear Allah, your Lord. And turn them not out of your homes nor shall they leave, except in case they are guilty of some open illegal act*. The verse begins in a warning tone to the believers, so that they do not do any act to harass his wife like throwing out of his home, unless and until in extreme circumstances where there is a proof of extreme open illegal act.

The manners of matrimonial life and divorce are supposed to be approved by the religious law and reason. Resuming the discussion concerning divorce mentioned in the preceding Verse, Verse 2 of the *surah* also makes a reference to some other rulings and maintains that everything should be done fairly so as to safeguard the interests of all.

*Then, when they approach the end of the waiting period, either take them back in a good manner or part with them in a good manner [by paying their*

*bridal money and other due expenses]. And take as witness two just persons from amongst you [at the time of divorce]. And establish the testimony for Allah's Satisfaction. That will be an admonition given to anyone who believes in Allah and the Last Day. And whosoever fears Allah and keeps his duty to Him, He will make a way for him to get out from all hardships (Quran 65: 2).*

Yet again reflects the pro-women spirit of the Holy Quran. It has been narrated using the phrase *good manner* to ensure that the conduct is extremely benevolent to her while parting. Apart from that, Holy Quran sees to the fact that she is paid her bridal expenses and other needed expenses. Here one can see how Holy Quran has dived into the nuances to protect a divorced woman emotionally and financially.

The Quran also mandates respectability at the hands of men towards women. The Verses 229 to 233 contained in *Surah Al Baqarah* (Sura 2) and also 'verse' 237 contained in 'section' 31 are relevant on the issue of divorce. The Verse 229 of *Surah Al Baqarah* reads thus:

*Divorce (is permissible) only twice, then either maintain (them) in honor or let (them) go in kindness. And it is not lawful for you to take anything of what you have given them, unless both fear that they cannot keep (themselves) within Allah's bounds; and if you fear that they cannot keep (themselves) within Allah's bounds, it is no sin on either of them about what she gives up to get herself freed (from the wedlock). Those are Allah's limits; so do not transgress them. And, whoever transgresses Allah's limits -then these are they that are the (wilful) wrongdoers(Quran 2:229).*

The Almighty kept a strict check on the number of times one man can divorce a wife. The rationale behind this provision was to put an end to the unmanly deed of men in the Pre-Islamic period where they used to harass their wives with the weapon of divorce. The verse makes the usage *either maintain (them) in honour or let (them) go in kindness*. Here she is not just treated with kindness but with honour. The verse further deals with the very important aspect of financial security. Here the noble Quran again orders that the husband is not supposed to take back anything he gave her especially, the dower. Dower in fact is her absolute right. This clause shuts all the doors for the husband to harass her. This verse further keeps a very important exception to the return of received dower by wife. This circumstance is nothing but *Khula*, where the wife who

fears to maintain the marital obligations according to Allah's commandments, then she can free herself from the marital bond, giving up her right to dower.

These verses bring out the limitation Allah has set on men's right to divorce. His conjugal rights over wife are strictly looked upon. This verse takes to the fact that divorce is not a joke but a strict affair where the husband who has pronounced the *Talaq* for the third time he cannot take back his wife unless she has married to another man and then the second husband have to divorce her. *Talaq* thereby is made a complicated procedure so that men will not play with emotions of woman and checks whether he performs his conjugal obligations properly.

*When you divorce women, and they have reached their waiting-period, then either retain them in a fair manner or set them free in a fair manner; and do not retain them for injury, so that you transgress (the limits); and whoever does that he indeed is unjust to his (own) self: And do not take Allah's Signs in mockery, and remember Allah's blessing upon you and what He has sent down unto you of the Book and Wisdom to admonish you thereby, and be in awe of Allah and know that Allah is All-Knowing of all things (Quran 2:231).*

The lines of the verse are strong commandments to the men from the Almighty. Allah through this blessed verse puts forward to the paramount importance to fairness of treatment with wife. It talks about the liberation of wife in a fair manner. It showcases the magnificence of Almighty by expressly saying *do not retain them for injury*, these words are inscribed to make sure that man does express his vengeance to the wife by any means, if so limits of Allah has been transgressed without doubt. Almighty through this verse has punctiliously directed that it would be a mockery to Allah's laws if anybody plans to retain her for vengeance. At the end of the verse it is the reminder for all believers that Allah knows everything and he one cannot act blind.

*And those who are taken in death among you and leave wives behind - they, [the wives, shall] wait four months and ten [days]. And when they have fulfilled their term, then there is no blame upon you for what they do with themselves in an acceptable manner. And Allah is [fully] acquainted with what you do (Quran 2: 234).*

It speaks on how the *idda* has to be observed. Hedaya defines this concept as “the term of probation incumbent upon a woman in consequence of the dissolution of marriage

after carnal connection, in other words as the term by the completion of which a marriage is rendered lawful.” (Bhartiya2015:15). Literally “*idda*” means ‘a period that can be reckoned as a term’ (Fyzee 1969: 60). Through *idda* Islam aims at two things, namely:

- a. To receive complete *mahar* (dower);
- b. To maintain just and equitable expenses for the wife in a manner she accepts

### **Modes of Dissolution of Marriage**

Asaf (1993:149) reiterates that a Muslim marriage can be dissolved in ways:(1) by the death of either of the spouses, (2) by act of the parties and (3) by Judicial process (*Fasakh*). Other than *Fasakh*, which is the judicial method<sup>2</sup>, the first two are considered as extra-judicial methods of divorce as explained below. It is under the category ‘by the act of the parties’ *Talaq* (divorce by husband) appears as one amongst other two which are *Khula* (divorce by wife), and *Mubaraat* (divorce by mutual consent.) They are also explained a bit in the coming paragraphs.

#### *(1) By the death of either of the spouses*

Death of the spouses automatically repudiates the marital knot. Soon after the death of the wife the husband can re-marry where as in the case of the wife she has to observe *iddat* for a period of four months and ten days and if the wife is pregnant she has to observe till her delivery (Bhartiya 2015:106).

#### *(2) By act of the parties*

Under the Islamic law, divorce by act of parties or extra judicial modes of divorce is classified into three categories. (1) ‘*Talaq*’ understood simply, is a means of divorce, at the instance of the husband. (2) ‘*Khula*’, is another mode of divorce, this divorce is at the instance of the wife<sup>3</sup>. The third category of divorce is known as(3) ‘*mubaraat*’ – which is divorce by mutual consent<sup>4</sup>.

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<sup>2</sup>*Fasakh* means separation or annulment. It refers to power of a *Kazi* to annul a marriage on the application of wife. Section 2 of dissolution of Muslim marriage act. There are nine grounds.

<sup>3</sup>*Kula* is the redemption - literally means to lay down. A divorce by *Kula* is divorce with the consent and at the instance of wife in which she gives it agrees to give to consideration for her release from the marriage tie(Purohit 1998: 205).

<sup>4</sup>*Mubaraat* means an act of freeing one from another mutually. It's a mutual discharge from marriage tie (See Qureshi 2002: 83)

### **The *Talaq***

Quranic injunctions are very clear on how the husband can dissolve the marriage. The dissolution of marriage at the instance of husband is called *Talaq*. *Talaq*, the Arabic word means ‘undoing of a release from knot’ (Ahmad 1994:16). According to Hedaya *Talaq* connoted to *dismissal* (Verma 2014:184). Tahir Mahmood and Saif Mahmood (2013:150) quotes that the genesis of the word comes from the phrase ‘*Tallaqah*’ which means to release an animal from tether. *Talaq* literally connotes ‘to snap off’, in other words ‘separate’ or ‘repudiation’ (Rahman 1978:108). The genesis conveys a message relieving something which is under captivity to freedom. Tahir Mahmood (1983:53) says that *Talaq* under an authoritative *Sahih Hadith* points out to the fact that it is *abghad al- mubahat* (worst among permitted things).

### ***Classification of Talaq based on effect.***

The Concept of *Talaq* can be classified based on effect of revocability of the act of *Talaq* (Danyal 2015: 70).

#### ***(1) Talaq – Al Sunnat or Masnun***

*Sunnah* which refers to the traditions and doings of the great Prophet (PBUH) and in the context of *Talaq*, it refers to the mode of dissolution practiced according to the rules set by the traditions of Prophet. The *talaq al sunah* can be further classified into:

#### ***(1).i. Ahsan***

This is the most approved form of divorce by the Prophet as the nature of this *Talaq* is having a large scope of re-joining. The modus operandi is as follows. The husband will do a single pronouncement of revocable divorce in a marriage which is consummated. The pronouncement should be made when the wife is not in the period of menstruation or sexual purity and there has been no co-habitation for a period of three months approximately. In fact this is the *iddat* period which we have already discussed above. In case if the wife is pregnant then after the delivery one needs to observe *Iddat*. *Iddat* period is the most crucial period in this form of *Talaq* as the pronounced divorce can be revoked at any time expressly or impliedly through conduct making it an easily attachable state of union. The right of inheritance also remains making it the most approved and favoured form of *Talaq*. If the husband and wife resumes the sexual relationship or the conjugal relationship any time during the whole *idda* then the marriage is revived. This mode of *Talaq* is accepted in both the Hanafi school and the Ithna Ashari school.

Seen from this form of *Talaq* one can decipher that Islam never wants an easy breakdown theory of divorce as it is widely misconceived. The more the chances of reconciliation and rejoining, the more there is space and time for re-thinking the decisions, the more the law favours the same.

(1).ii. *Talaq –Al -Hasan*

Another approved form of divorce is this form of divorce where the husband in a consummated marriage pronounces three *Talaq* in three consecutive *Tuhr* (menstruation free period). On the third pronouncement the *Talaq* completes and the marriage is dissolved, making it irreversible. It should be noted that during the period of each pronouncement there should have been no intercourse between the spouses. Once commonly misinterpreted aspect of this form of *Talaq* is that, the three *talaq* pronounced must be in consecutive or successive *tuhrs*. In fact this is not what is prescribed in Quran.

(2) *Talaq –Al Bidah or Ghayr Masnun*

This form of *Talaq* has come in through innovation and mere practice through human conduct. The reality is that *Talaq al bidah*, the least approved form of divorce originated from the ill practices of the Arab Community during the period of Ommayid monarchs. They wanted a sanction to escape from the rigidity of divorce law professed by the Prophet (Zafer 1972:172). This form of divorce has not been derived from any Quranic injunctions and has no sanctity in the *Shariat* law. This form of divorce is acceptable in the Hanafi School, where as the IthnaAshari and the Fatimid laws do not permit this form of divorce (Fyzee 1993:154). It takes place in two forms:

*a. The triple declaration*

Here the husband has immense power to *Talaq* his wife uttering three times *Talaq* in one sentence in a single *Tuhr*. This form of *Talaq* which is irrevocable is termed in Arabic as *al-talaq al-bain*.

*b. The single irrevocable declaration or (Talaq al-bain)*

This form of *Talaq* permitted in the Hanafi School is yet another irrational form of divorce which makes a single pronouncement of *Talaq* irrespective of *Tuhr* a valid *Talaq* (Sheik FazlurRahmen Case 1929). A mere declaration in which can even be given in the written form as a 'bill of divorcement' ends the marital relationship in a single stroke. Asaf A.A. Fyzee (1969: 45) says that according to the

Fatimid law a declaration of *Talaq* pronounced three times or six times or thousand times during her menstruation or during the purity the husband had sexual intercourse or without atleast two witnesses made at one sitting is void and amounts to nullity. Most of the jurists have critically analysed and has rejected *Talaq al-bida*, one of the most striking quote on this unjust absurd form of *Talaq* is given by Abdur Raheem who said,

*Interpretation of the law of divorce by jurists of the Hanafi School is one flagrant instance where because of literal adherence to mere words and a certain tendency towards subtleties they have reached to direct antagonism to the admitted policy of the law on the subject*(Danyal 2013).

### **The Concept of Triple *Talaq* and Holy Quran**

In the Holy Quran there has been no mention on this strange form of *Talaq*, where three utterance of the word *Talaq* in single breath will take up the effect of uttering *Talaq* in three separate occasions. The Quranic verses make it amply clear on how the pronouncement works and it is effectuated.

*Divorce must be pronounced twice and then a (woman) may be retained in honour or released in kindness. And it is not lawful for you that ye take from women out of that which ye have given them, except (in the case) when both fear that they may not able to keep the limits of Allah, in that case it is not sin for either of them if the woman ransom herself. These are the limits impose by Allah. Transgress them not. For whoso transgresseth Allah's limits, such are wrong doers.*

Furqan Ahmad (1994: 43-45) makes a very interesting note of the word *marrataan* used in this verse which he says is where the whole controversy lies. The word in Arabic dictionary means 'one after another'. But many scholars understand the meaning of this word as 'repeating the word *Talaq*' instead of 'divorce in two separate occasions'. This needs profound understanding of the word which is used in several places of Quran and connotes the meaning in different occasion following one after another. There by the argument is such that if the Quran is clearly mentions *marrataan* where two divorces needs to given at a period subsequent to one another in different occasions, where each one of it is counted as only one in a single occasion, how can three *Talaq* pronounced in a single occasion can be taken as three valid *Talaq*.

Here one needs to ponder in gravity what really the Quranic injunctions refers to and it has always been rational in its construction of word giving much emphasise to its clear intention. The word *al- talaqmarrataan* can be based as the best principle to support the mechanism enshrined in the Holy Quran. This totally destroys the concept of *Talaqal-bidah* which never matches the Quranic injunction.

### ***The Concept of Talaq al –bidah and the Hadith***

There is no valid or authentic *Hadith* which expressly says that three divorces pronounced at a single occasion can be treated as a valid one. Furqan Ahmad (1994:48-52) brings out a very elaborate and erudite discussion on the *Hadith* about triple *Talaq*:

- a. The story of Aisha wife of RafaahQarzee spoken in *SaheehBukharee* can taken into account where the wife came up to the Prophet (PBUH) saying her husband gave conclusive divorce to her and she married another man whom she feels incompatible. At this juncture Prophet held that she can go back to the first husband only if she consummates with the second husband, i.e. by fulfilling the conditions of *nikahhalaala*. Here *Hadith* reiterates is that “He gave her the last of the three divorces”. Now from these words of the *SaheehBukharee* one can decipher that the pronouncement had happened not in a single stroke instead in subsequent occasions. Hence this *Hadith* cannot be relied upon to support *Triple Talaq* as such.
- b. The second *Hadith* the pro-Triple *Talaq* class relies is on the *lian* story held in UwaimirAjlaanee. Here the thread goes in a way where the husband and wife were in the procedure of swearing in *lian* and the husband goes to the Prophet saying he needs to end the relation. At this juncture he pronounces three divorces in the presence of the Prophet. This is another tip the pro-Triple *Talaq* class argues for its validity. This is totally a different context where the triple *Talaq* was pronounced. The spouse had already undergone the stage of *lian* and then comes for a final dissolution. This is the instances where the Islamic law is misconceived as the conceptualisation of the subject is not properly contextualised.
- c. The third *Hadith* that is relied to support triple *Talaq* is that of Faatimah Bint Qais and that of Abu Sahbaa and Ibn Abbas as mentioned in *Muslim*. In these two instances there were no mentions about the validity of the triple *Talaq*.
- d. The last *Hadith* to mention in this regard is that of Rakanaah as expiated by Imam Tirmidhee. Here Rakanaah goes to Prophet and utters that “O! Prophet of Allah, I divorced my wife with a final and decisive divorce”. But prophet on enquiring his intention to this utterance Rakanaah held that he just had

intention to give a single divorce. There by here stands the weakness of this *Hadith* in supporting Triple *Talaq*. Interestingly Imam Tirmidhee himself says that the source of this *Hadith* is not known except this.

Now it is clear that there is no single authentic *Hadith* which expressly speaks about the validity of the *Talaq al –bidah*. Thereby this arbitrary form of *Talaq* is not a part of *Shariat* principles, as the primary source has nowhere mentioned about it. Even the next source of Islamic law the *Ijma* is lacking any conclusive proof in this aspect (Ahmad 1994:53). Muhammad Munir (2013: 27) makes it clear that one can only find some *qiyas* (analogy) on this regard which is saying that divorce being the male's prerogative, he can exercise at a single occasion as he wish in a similar fashion as done in marriage contract.

### **Distorted State of Muslim Law of Divorce in India**

What is practiced in India and that what really the theology speaks on *Talaq* is contradictory to each other. The predominant reason why the concept of *Talaq* is polluted as held by Tahir Mahmood (1986:73) is as follows:

- a. The esteemed judges like Costello of Calcutta, Batchelor of Bombay, Munro of Madras and many White Men of British Indian courts who have hardly read the Quran or any authentic commentary spoiled the true concept of *Talaq* mentioned in the Koranic verses. Following ratio will bring into light the misinterpretation they did and made it a precedent for the legal system:
  - In *Ahmed Kasim Molla vs Khatoon Bibi*<sup>5</sup>, the court under the Lordship Costello held that “*Any Mohemedan may divorce his wife at his mere whim or caprice.*”
  - In *Sarabai vs Rasiabai* the illustrious judge pronounced that “*an arbitrary divorce by a Muslim husband was “good in law, though bad in theology.”*”
  - In *Asha Bibi vs Kadir Ibrahim* the court threw ratio in the words of Justice Munro, as follows distorting the entire concept of *Talaq* enshrined in Holy Quran “*The impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly affected by the husband.*”

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<sup>5</sup>See also Medak case (1970).

- b. Sir Dinshaw Fardunji Mulla, the most authoritative writer in Indian Personal law context, merely wrote the commentaries of these English judges. One example of his falsified writing is quoted herewith: “*Any Mohemedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause*”(Khan 2014: 389).
- c. Courts blindly followed the wrong precedents set by the British Indian judges. But the wisdom of judges like V.R. Krishna Iyer and Baharul Islam could not tolerate this and they rectified this mistake through their landmark judgements such as *Yusuf Rawther vs Sawramma*, *Ziauddin Ahmed vs Anwar Begum* and *Rukia Khatun vs Abdul Khaliq Laskar*. Unfortunately their views could not reach the masses as well as the State.
- d. Apart from the misguiding judicial pronouncements, the dictum given by the *Maulavis* in the village mosques and the *Ulemas* in India has totally corrupted the true *Sharia*. They could not distinguish the law prescribed from the innovative practice. From time to time these people kept pronouncing irrational *Fatwas* (judgments) on the Triple *Talaq* making it a valid *Talaq* irrespective of the mode and intention of divorce.

### The Journey from Shamim Ara to Shayara Bano

Indian judiciary took the baton to address the plight of millions of Muslim wives. The division bench comprised of Justice R C Lahoti and Justice P. Venkatarama Reddi, two non-Muslim judges eloquently quoted the Quran and *Hadith* to remove the existing impasse. They upheld the true spirits of *Sharia*, whereby *Shamim Ara* one among the million vulnerable could get a huge relief from the constantly threatening weapon of Triple *Talaq* used by the heartless husbands. Indian Supreme Court was open enough to criticize the most authoritative book on the *Principles of Mohammedan Law* by D.F. Mulla (*Shamim Ara Case* 2002) for misleading the very notion of *Talaq* for decades and over ruled plethora of cases.<sup>6</sup> The case is much important as it has laid down the technicalities and procedures to be followed while undertaking *Talaq* by the husband to

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<sup>6</sup>Overruled cases: Saiyid Rashid Ahmad and Anr. vs Mt. Anisa Khatun and Ors., MANU/PR/0074/1931, Syed Jamaluddin vs. Valian Be and Anr., MANU/AP/0226/1975, Ahmad Kasim Molla vs Khatun Bibi, MANU/WB/0267/1931, Ful Chand vs Nazab Ali Chowdhry, MANU/WB/0023/1908, M.M. Abdul Khader vs Azeza Bee, MANU/TN/0247/1943, Kathiyumma vs Urathel Marakkar, MANU/TN/0257/1931, Asha Bibi v Kadir Ibrahim Rowther (1909) ILR 33 Mad 22, Kaenther Ammal vs Ma Mi, MANU/RA/0059/1925 1924 2 Rang 400, Sarabai vs Rabiabai, ILR 1905 30 Bom 537, Zainab Bibi vs Wahid Khan, MANU/UP/0125/1914 ILR 1914 36 All 458, MA Mi vs Kallander Ammal, MANU/PR/0016/1926 AIR 1927 PC 15

repudiate marital ties. The facts of the case run in a similar manner as in most of the maintenance cases filed by the wife i.e. the written statement of the respondent turns to be the medium through which the wife comes to know that she has already been divorced.

The law on *Talaq* has been clearly held by the Apex courts as follows by relying on the classical case of *Yusuf Rawther*. It declared that *Talaq* to be effective it has to be 'pronounced'. The court has given more clarity for the term 'pronounce' by saying that it means to proclamation or utterance formally. In a robust manner court held that the plea of husband saying in the written statement that he has already divorced his wife in a date he says cannot be looked into to fix the status of the marriage.

In another noted case of Delhi High court, *Masroor Ahmad vs State NCT, Delhi* the honourable judge BadarDurrez Ahmad reiterated the salient features of dissolution of Muslim marriage in a very lucid manner. The court basically dealt with the following issues such as the legality and effect of triple *Talaq*; the effect of *Talaq* pronounced in anger and whether the *Talaq* not communicated to the wife is a valid *Talaq*. The first issue was addressed by the court very distinctly by referring the primary sources of *Sharia* and those cases<sup>7</sup> which had explicitly declared that triple *Talaq* is an invalid divorce. The court made the point that even the Hanafi School says it as a sinful act. With regard to second issue the court held that the effect of divorce would be nullity if the husband pronounces the *Talaq* in extreme anger. The third is the most crucial issue the court dealt was whether the communication of divorce to wife a pre-requisite to dissolution of marriage or not. The court very vividly explained that a wife has definite rights after post *Talaq* and pre-dissolution of marriage. These were enunciated in the judgement as follows:

- a. Right to *idda*, the period where there is all possibility to rethink the decision for the husband and chances for the reconciliation efforts by the close relatives of the spouses.
- b. Her right to residence during the post *Talaq* period. Quran specifically ordains it the husband's residence.
- c. Her right to maintenance during *idda*.

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<sup>7</sup>Here the court referred to Shamim Ara case (2002), RiazFathimaabd case (2006), Zohara Khatoon case (1981), Ziaudin case (1981) and Dislshad Begaum Ahmad Khan Pathan case (2007).

- d. Her right to *mahr*.
- e. Custody of children if any.
- f. Her right of pledging her husband's credit to obtain the means of subsistence.

These many rights are conferred to her in those periods which she will not be to exercise when she is not communicated of her changes status at all. This is totally a contradiction to the Quranic injunctions. Thereby the court held that the wife has to be communicated about the *Talaq* as soon as possible, if not it amounts to an invalid *Talaq*.

In *Ashiyabegum and Others vs Khayyumand Ors.*, the court in its modest and parental stand held that the husband if he feels his wife not in tune with his desires or if he feels she is not obedient or if he feels she does not love him, instead of taking an a hasty decision of ending up things at a stroke, try to know about her feelings too and try making an emotional conversation about his desires and wishes and change her behaviour. Even this does not work husband has to resort to the process of conciliation by informing her close kith and kin.

The wisdom of high court judges to unpack the true law of *Talaq* is highly commendable and the one such recent example was the judgment in *Nazeer vs Shameema*, where the Kerala High court has lucidly explained from the sources of *Sharia* to derive at a point that the practice of Triple *Talaq* currently used in India is totally unislamic. The entire picture turned when the honourable Supreme Court took a suo motto Public Interest Litigation (PIL) to stop the injustice and suffering faced by Muslim Women through an institutionalised harassment.<sup>8</sup> This PIL is what turned out in the name *ShayaraBano and others vs Union of India*.

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<sup>8</sup>This matter has found its way to a Constitution Bench of this Court because of certain newspaper articles which a Division Bench of this Court in *Prakash vs Phulavati*, (2016) 2 SCC 36, adverted to, and then stated:

28. An important issue of gender discrimination which though not directly involved in this appeal, has been raised by some of the learned counsel for the parties which concerns rights of Muslim women. Discussions on gender discrimination led to this issue also. It was pointed out that in spite of guarantee of the Constitution; Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during currency of the first marriage, resulting in denial of dignity and security to her. Although the issue was raised before this Court in *Ahmedabad Women Action Group (AWAG) vs Union of India* (1997) 3 SCC 573], where Supreme

### ***ShayaraBano vs Union of India: A milestone***

This historic judgment is indeed a milestone achieved in this secular democratic country. The judgment is the victory of the most vulnerable class of people whose emotions and existence is not accounted. There are various reasons to rejoice for this neglected class called “Muslim Women in India” through this judgment. The first and most foremost is that ,the changing governments remained blind and dumb ever since the independence to tackle her plights as this class was politically unimportant, in other words they were in minority within the Muslim Minority community. Secondly the positive judicial judgments and existing legal framework never made internalisation owing to her illiteracy and ignorance and access to justice was a far away dream.. Thirdly and the most challenging factor was the male-dominated Muslim community who always suppressed her voices for ages. In fact her fight was against this existing patriarchy and gender violence. The judgement reflects ultimate social justice by giving relief to millions of *ShayaraBano* who is trapped in the vicious cycle of institutional harassment. The facts of the case brings into light that the institution of marriage neither gave them financial, emotional or physical security which in fact is the rationale of the making of this sacred union. The facts narrate that *ShayaraBano* and others had to silently suffer for years owing to the stigma and fear of isolation from the community and society.

The five religiously diverse Constitutional Bench in a 3:5 ratio held in majority that triple *Talaq* is unislamic (Justice Kurian Joseph) and unconstitutional (Justice R.F. Nariman along with U.U. Lalit). The minority judgment was given by the then Chief Justice of India, J.SKhehar and Justice Abdul Nazeer. The judgment has in fact answered the following issue:When *Shariat* has been declared as the personal law in India, whether what is Quranically wrong can be legally right?

Justice Kurien through his *demos prudence* has vividly answered the issue through his majority judgment by stating that *ShaminAra vs Union of India* is the law in this matter (Article 141 of the Indian Constitution). Further the honourable judge emphasis that in India *Shariat* has been declared as Muslim Personal Law through the enactment of Muslim Personal Law (*Shariat*) Application Act, 1937.<sup>9</sup> The judgment then reveals the

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*Court did not go into the merits of the discrimination with the observation that the issue involved State policy to be dealt with by the legislature.*

<sup>9</sup>Muslim Personal Law through the enactment of Muslim Personal Law (Shariat) Application Act, 1937 was enacted to put an end to the unholy, oppressive and discriminatory customs and usages in the Muslim community. After the 1937 Act, in respect of the enumerated subjects under

various Quranic verses which speak on the procedure of *Talaq* and the judge comes to a conclusion in the following words (Shayara Bano Case 2017: 286):

*Verses do not require any interpretative exercise. They are clear and unambiguous as far as talaq is concerned. The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt for reconciliation and if it succeeds, then revocation are the Quranic essential steps before talaq attains finality. In triple talaq, this door is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat.*

Apart from the above analysis, the Justice R.F. Nariman in judgment also brings into light through the words of Hidayatullah, J., that (Shayara Bano Case 2017: 332-333) Islam divides all human action into five kinds. First degree is the *Fard*, which means whatever is commanded in the Koran, *Hadis* or *ijmaa* must be obeyed; second degree is the *Masnun*, *Mandub* and *Mustahab*, where these are recommended actions. Third degree: *Jaiz* or *Mubah* are permissible actions as to which religion is indifferent, Fourth degree: *Makruh*, that which is reprobated as unworthy and last is the fifth degree which is called *Haram* or That which is forbidden.

Justice Nariman through brings out clarity on the point of which degree of obedience does triple *Talaq* falls into in the following words:

*Obviously, Triple Talaq does not fall within the first degree, since even assuming that it forms part of the Koran, Hadis or Ijmaa, it is not something "commanded". Equally Talaq itself is not a recommended action and, therefore, Triple Talaq will not fall within the second degree. Triple Talaq at best falls within the third degree, but probably falls more squarely within the fourth degree. It will be remembered that under the third degree, Triple Talaq is a permissible action as to which religion is indifferent. Within the fourth degree, it is reprobated as unworthy. We have already seen that though permissible in Hanafi jurisprudence, yet, that very jurisprudence castigates Triple Talaq as being sinful. It is clear, therefore, that Triple Talaq forms no part of Article 25(1) of the Constitution.*

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Section 2 regarding "marriage, dissolution of marriage, including talaq", the law that is applicable to Muslims shall be only their personal law namely *Shariat*.

## Conclusion

From the above discussions it has been found that no other holy book in the world has touched upon every aspect of human conduct and relationship. In fact holy Quran enunciates the art of living. Islam thereby through the divine commandments and Prophetic tradition has always disseminated the message of social justice. The epistemology of Islamic principles is love and honour. This philosophy is what is seen flowing through the institution of marriage. Here both the partners are at equal standing and each should be ultimately dutiful to the Almighty who knows and sees everything. Unfortunately this message of Islam is not disseminated. The involvement of human endeavour and thereby choices and interest remoulded the entire *fiqh* (Islamic jurisprudence). This mutated law of religion was governed by the patriarchal norms. This turn in the law shattered the basic foundations of Islam in every concept. For past many centuries *Shariat* law is widely misinterpreted and misconceived and unfortunately this misinterpretation and misconception will continue unless the shut door of *ijtihad* (reasonable deduction) is opened to achieve *maqasid al sharia* (purpose of Islamic law). If these doors of *ijtihad* get opened, the intellectual minds can re-interpret and re-instate the corrupted *fiqh*. The hybridity of *Sharia* in terms of traditionalism, which is one of the primary source of *Sharia* can meet at a single point and remove the existing diplopia. Here comes the major challenge that who is eligible to do the *ijtihad*. This question needs to be addressed seriously by the global platform comprising of the Islamic Councils around the globe and the international Islamic universities. The truism is that Quran and *Sunna* (traditions of prophet) were never rigid norms instead they were flexible and accommodated the amending societal rhythms. This comes to a conclusion that *Sharia* will keep evolving in the due process of contextualisation. There by the re-examination of the Quran would definitely mark new phase of liberalism in the epistemology of Islamic jurisprudence. Fortunately this expedition of re-visiting the *Sharia* in the contemporary period has been begun from the scholarly world.

It is so unfortunate that the practice of Triple *Talaq* practice still prevails in this democratic constitutionally governed country. The irony is that triple *Talaq* has been abolished in most of the countries including the conservative countries like Saudi Arabia and Iran. In the journey of search of truth behind this illogical practice, the research led to the point that this practice of Triple *Talaq*, where the husband has uncontrolled unlimited power to divorce even in intoxicated or angry state has no legal backing from either the Holy Quran or the *Sunnaths* of Prophet (PBUH). Most of the countries following *Shariat* law banned it because of this lack of religious sanctity. Now fortunately through *ShayaraBano* and the *suo motto* attempt by Apex

court we have a judicial legislation banning Triple *Talaq*. But again the big question that revolves around in the Indian context is how far this judgment can reach towards the majority ignorant, illiterate and poor Muslim women who face oppression from the patriarchal Indian mindset. So the road towards social justice in terms of gender equality for Muslim women is only half-way and the rest of the way has to be led by a dedicated secular State running constitutionally and a rational Muslim community following the true principles of *Sharia*.

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