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# Divorce under Muslim Law

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## ABSTRACT

*We will discuss the forms of divorce (talaq) under muslim law. In the muslim law there are various forms of talaq under shia law or judicial divorce at suit of wife. Some time wife has right to divorce her husband or husband has right to divorce his wife. In the muslim law divorce is a kind of uninhibited thing and under the muslim law divorce is the category of permissible thing or divorce should also considered under the most despicable of the permissible thing. Divorce by talaq means that when the husband is sound mind and he attain the age of puberty then he divorce his wife without any reason. Supreme court announced the judgment on the triple talaq and court says that triple talaq is a illegal practice in india and now it is a illegal practice and muslim marriage should dissolve under triple talaq than marriage can not be dissolved. If the marriage should dissolve under the triple talaq than husband should be punished by the court and the punishment is upto 3 years of imprisonment. This is a innovative step taken by the Indian court of justice and legislative assemble. Talaknama means that talaq should be effected in the way of orally or by a written documents this is called talak by oral or in writing (talaknama). Talak ahsan or talaq hasan also the forms of talaq under the muslim law. Talaq in the case of ahsan mode talaq become irrevocable.*

**Keywords:** *Uninhibited, Despicable, Abundance.*

## I. INTRODUCTION

Under the mahomedan law which marriage is a contract can be dissolved under the following ways:

1. Divorce can be made by the will of the husband without the intervention of the court.
2. Divorce can be made by the mutual consent of the husband and the wife without the intervention of the court.
3. Divorce can be made by filing a case in the court.

These are the three steps by which husband and wife dissolve their marriage. Under the hindu law there is no provision regarding the dissolution of the marriage but marriage can be dissolve under hindu law by the dissolution of marriage act but dissolution of marriage can not be done

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by the custom under hindu law. In the muslim law marriage can be dissolve by the custom or by the law. Under this law wife can not divorce her muslim husband without the consent of the husband. She can divorce her husband only in the case if any contract has been made before or after the marriage or in some cases divorce can be done by the judicial decree. If the divorce proceeding proceed by the husband this is called talaq. If the marriage should be dissolve by the mutual consent of the both parties than this is called khula. Marriage should be dissolve by the according to the terms of the contact than this is called mubara. If the husband dies than wife can not be re marry at that time when the idda period is not over. There are some reliefs are available:

1. Dissolution of marriage
2. Restitution of conjugal rights
3. Declaratory suits and annulment of marriage

## **II. DISSOLUTION OF MARRIAGE**

In the muslim law divorce is a kind of uninhibited thing and under the muslim law divorce is the category of permissible thing or divorce should also considered under the most despicable of the permissible thing. Today divorce is the largest aspect of the muslim matrimonial law. In the muslim law dissolution of marriage can be done by the death of the one party or the death of the both the parties. Under the muslim law divorce can be studies under 3 parts:

1. Unilateral divorce
2. Divorce by mutual consent
3. Judicial divorce

In the case of first two parts of the divorce parties proceed the divorce proceeding without the interfere of the court or any third person. Divorce can be done by the parties under these two parts by the personal law.

### **(A) Unilateral divorce**

Unilateral divorce are also divided into two parts:

1. At the instance of the husband
2. At the instance of the wife

#### **1. At the instance of the husband: talaq**

Under the muslim law husband has absolute power to divorce his wife unilaterally without any reason or without intervention of the court or this divorce can be done under the absence of the wife also. This type of divorce is recognized in modern india. If the husband pronounce the

word talaq: how he does it, when he does it, or in what manner he does it these things are not very important in the muslim law. Abdul rahim says that with a view to regulating the matrimonial relations muslim law allows predominant position to the husband because generally speaking he is mentally and physically superior of the two and some theorists would treat the dower payable to the wife as consideration for the alienation of her matrimonial freedom.

When the husband exercise her power and say the word talaq and pronounce the word technically this is known as talaq under the muslim law. The most remarkable features of the talaq under muslim law is that all the schools of the sunnis and shias recognize it they differ only in some details. Under the sunnis talaq should be in express, implied, contingent, constructive or in the delegated form. But under the shias law talaq should be done in the form of express or delegated form of talaq.

## **2. Express divorce and its forms**

Express form of talaq should be divided into 2 parts:

1. Talaq- ul- sunna (approved)
2. Talaq-ul-bidaat (unapproved)

Talaq-ul-sunna is also divided into 2 parts:

1. Ashan (most approved)
2. Hasan (approved)

The another name of Talaq-ul-bidaat is talaq-ul-badai, talaq-ul-bida. This form of talaq is divided into 2 parts:

1. Triple divorce
2. One irrevocable declaration

The basic difference between the talaq-ul-sunna or talaq-ul-bidaat is that in the former case if he pronounced the word talaq than it is a revocable and while in the later is a irrevocable. This is the reason why talaq-ul-sunna is approved talaq or talaq-ul-bidaat is unapproved.

### **i. Ashan talaq**

Ashan talaq means that the single pronouncement of the of the word and you will gave the divorce to his wife and this divorce is made in the period of the tuhr (tuhr means that purity that is the period between the menstruation) or this should be done at any time. If wife is free from the menstruation and followed the abstinence from sexual intercourse during period of the iddat. So in this case the requirement is that pronouncement of talaq is apply on the periods

of the tuhr and only oral pronouncement is applicable and if you gave talak in writing than this type of talaq not applicable. This type of divorce is not applicable when the wife passed the age of the menstruation and the husband and wife can not live together or marriage has not been consummated.

Advantages of this type of divorce is that this type of divorce can be revoked at any time when the period of idda is not completed and the revocation of divorce can be done either by express way or by implied way. If the period of idda is not completed and husband want to live again with his wife then he says to his wife I have retained thee than the divorce should be revoked. In this form of marriage husband and wife are free to remarry with each other at any time. This type of talaq is most approved talaq.

#### **ii. Hasan talaq**

Hasan talaq is the another form of talaq and this type of talaq is approved form of talaq. It means that pronouncement of the talaq three times during the period of the successive tuhrs and no sexual intercourse take place during the period of the any tuhr. This is called hasan talaq. if the wife has been crossed the age of the menstruation and the pronouncement of the talaq should be applicable after the passing of the one month and thirty days after the successive pronouncement. When the last pronouncement is made by the husband then the divorce should be final or irrevocable. Most important thing is that each of the three pronouncement is made when the no sexual relationship is established during the period of the tuhr.

Significance of this form of marriage is that or you can understand this form of talak in the pre Islamic period in this form of marriage when the husband pronounced the word first time during the period of the tuhr followed by its revocation when the husband pronounced the second time word then the marriage should go on endless which is followed by its revocation and after that women will face the situation of the harassment and humiliation. For the end of this practice prophet said that marriage should be dissolve or irrevocable when the husband pronounced the third time word talaq and also says that parties could not marry with the another person when the wife could not marry with other person if the husband want marry with his divorced wife firstly his former wife could marry with the other person and after that wife should allow to marry again with his former husband.

#### **iii. Talak-ul-bidda**

The another form of talaq is talak-ul-bidda. The another name of this type of divorce is that Talaq-ul-bidaat is talaq-ul-bada'i. This type of divorce should started in the period of the second century of the islam. Talaq-ul-bidda is divided into 2 parts:

First one is talk about the triple talaq which is made during the period of the purity and husband says thrice I divorced you in single sentence at this stage marriage should be dissolve and the divorce is irrevocable. Second form of divorce is talaq-ul-bidda in this talaq husband pronounced divorce in a single irrevocable in the period of the purity due to this is the result of the dissolution of the marriage which is irrevocable. In the case of the *saiye v anisa* in this case court held that this type of dissolution of marriage is a irrevocable type of divorce.

The triple pronouncement of the talaq word is not the important part of the talak-ul-bidda if the intention is clear than divorce will be proceed. If the husband says I had divorce three times in a single sentence then and it is in the form of talak-ul-bidda or talak-ul-bain form this is sufficient and it is the result of the irrevocable divorce and talak-ul-bidda forms is not recognized by the shias. In this form wife can go for a remarriage if the wife undergoes on intermediate marriage in the case of the hasan talak. Talak-ul-bidda is good in law but this is bad in theology because husband divorced his wife at any time without any reason this is very bad for the muslim womens. It is the most common divorce which is prevalent in Indian country.

In the case of the *khlemnissa v state of UP* in this case honble tilhari justice says that triple talak is a unconstitutional and it is a male dominated divorce and they can divorced his wife at any time without any reason which is very bad for the women life and it is violated the article 14, 15 and 21 of the Indian constitution and this type of divorce is void.

### **(B) Implied and contingent divorce**

Now we discuss the implied and contingent form of divorce this type of divorce also take place in the muslims. Sometimes when husband used the word talaq is not clear when he pronounced the talaq instant when husband says to his wife I broke up all relations with you and we have no connection with each other and I released from you as my wife rights in some divorce should be implied when the intention is clear and intention should also be proved. When express words used by the husband and no question will take palace what was the meaning of this word but in the case of the allusive words require the construction. When the husband pronounced the word talak it should effect on the future life of the both parties and any thing which is happening in the future this thing also be effected this talak is called as contingent and this should effect on the present situation also. This shias law not recognized the implied or contingent divorce.

In the case of the *hamad ali v imtiazan* in this case describe the both divorce case implied or contingent divorce. In the case when wife insist going to her father house against the will the

husband then husband says to his wife you are my cousin and if he said not these sentence he will say like that you are my paternal uncle daughter. If she thou goest despite this wife left for her father house in this case words which are used by the husband look like a implied divorced if the wife goes to the father house it is look like a contingent divorce.

In the case of the bashchoo v bismillah in this case husband gave a undertaking to his wife in writing he would pay the amount of the maintenance within the specified time period and if the husband failed to pay the amount of the maintenance on time than wife file the case of the talaq against her husband and in this case husband could not pay the amount of the maintenance on the specified time period and wife file a case of the divorce against her husband and court held that the written statement is valid and lawful and divorce should proceed between the both parties.

### **(C) Delegated divorce (talak-i-tafweez)**

This type of divorce is recognized by the both law that is shias law and sunnis law. In this divorce case husband is free and use his power to divorce his wife freely and gave divorce his wife or any person husband use his power of pronouncing talaq is permanent, temporarily. This power is used by the husband is absolutely or conditionally. When the husband used his power as a permanent form of delegated divorce this is revocable but in the case of the temporary form of delegated divorce it is not revocable the decision of the divorce in this case would be in the hand of the that person who have delegated power and the purpose of the delegation should must be clear. According to the ameer ali if the husband says to his wife choose thyself or choose a repudiation and the wife says I choose or I have chosen myself or I have chosen a talaq then it would be sufficient for any husband to gave a divorce to his wife but if the husband says to his wife choose and the answer of the wife is I have chosen then in this case this is not sufficient for giving a talaq to his wife and this is not consider as talaq.

The power of talaq may be delegated in the hand of the wife and fyzee observes that this form of divorce is most helpful weapon in the hands of the muslim wife to obtain freedom and without the intervention of the court and this very comman in india now these days. This form of divorce commonly used in the pre-nuptial agreements. In the case of the md. Khan v shahmai in this case under the pre-nuptial agreement husband who is khana damand to pay some amount of marriage expenses incurred by the father in law when she leaving the house but husband without paying any amount he left the house and wife used the power of delegated divorce and divorced herself in this case court held that the exercised of delegated power used by the wife is valid and divorce is also valid. Delegation of power in the case of the divorce should be made

in the event of the post marriage agreement between the husband and the wife. Under the agreement it is stipulated in the event of the when husband failed to pay the maintenance or taking a second wife in this case wife have the power of the delegated divorce and gave divorce herself and this type of agreement is valid agreement and the conditions are reasonable or this should not against the public policy. The power of delegated in the hand of the wife under the agreement of the pre or post marriage and this power is not recovable by the husband. Husband of the wife use this power when husband filed suit for the restitution of the conjugal rights and wife use this power then the result should be divorce. In the talak-i-tafweez is exercised by the that person who have the power of this talaq but in the eyes of the law divorce should be made by the husband. When wife use this power and pronounced the word talaq and this power this used by the wife on the behalf of the husband because husband gave this power to his wife and in the law it is a talaq of the wife by the husband.

Now I discuss the famous case of the triple talaq which is very important in the eyes of the muslim divorce law after this case muslim women is protected from the triple talaq. The name of the case is Shah Banoo case.

### **III. FACTS OF THE CASE**

The petitioner shayara bano approach the court for assailing divorce pronounce by her husband rizwan ahmad on the date of 10-10-2015 he will says these words in the presence of the witnesses saying that i gave talak, talak, talak and hence like this i divorce from you from my wife from this date there is no relation of husband and wife between these parties. From today i am haraam and become naamharam and in future you are free for using your life. The aforesaid divorce was pronounced in the front of the mohammed yaseen is the son of abdul majeed and ayaaz ahmad is the son of ityaz hussain these are the two witnesses. The petitioner shayara bano sought a declared that the talaq-e-biddat pronounced by her husband on the date of 10-10-2015 should be declared as void ab initio. It was also her contention that such divorce which is abruptly unilaterally and irrevocably terminates the ties of matrimony purportedly under section 2 of the muslim personal law shariat application act, 1937 should be declared unconstitutional and during the course of hearing she submitted that the talaq-e-biddat which is known as in muslim law is triple talaq were pronounced by her husband is not valid and as it is not a part of shariat that is muslim personal law and in the said petition the supreme court passed several orders including on the date of 28-03-2016 asking the central government to furnish a copy of 2015 high level committee report recommending ban on triple talak and polygamy in muslim personal law or the government of india has filed its affidavit in the



aforesaid case in which it has stated that muslim personal law is a law within the meaning of article 13 of the constitution of India and as it is violated of right to equality between men and women guaranteed by Part III of the constitution of india or the muslim personal law in so far it recognize the triple talak is void. It has also invoked the UN Charter of 1945 and has stated that since the said charter reaffirms the faith in the equal rights of men and women such as to achieve the said objective of the triple talak has to be declared invalid and It has also sought reconsideration of 1952 judgment of the bombay high court which has held that personal law is not a law with the meaning of Article 13 of the constitution of india and as such cannot be assailed on the ground of its repugnancy with the fundamental rights. The law commission has also in the meanwhile stepped in and has asked for response for implementing a common civil code.

#### **IV. JUDGMENT**

In a 3:2 decision of the supreme court of India declared triple talaq is unconstitutional and gave India parliament six months to consider legislation for handling triple talaq or in its opinion the court cited global advance in islamic family law in India is called Muslim personal law or in even theocratic Islamic state as evidence of the need for reform. The court also noted that the muslim personal law Shariyat application act of 1937 which protects the religious freedom of Muslims in India does not constitutionally protect practices deemed anti Quranic asserting that triple talaq is such a practice the court held that it could not be protected under the Indian constitution or this judgment consisting of 264 pages were divided into seven parts in which were considered by the five judge bunch of Indian Supreme Court.

#### **V. CONSTRUCTIVE DIVORCE: ILA AND ZIHAR**

In the muslim law there are two forms constructive divorce the name of the these divorce is ila and zihar according to the abdul rahim in some cases when the husband do any thing which effect on the evacuation in this case he did not use the word divorce and do any thing in these thing the intention of the husband is to dissolve the marriage. Husband will not do any thing with his wife and in the presence of the oath abstain from her society for four months. The legal effect of this case is single irrevocable talaq and this form of divorce is ila. Under the shias and shafis law this is not the result of the talaq but it gives the right of judicial divorce to wife. According to the ithana asharis this form of divorce is only take place when the marriage has been consummation between the parties if the husband resume the intercourse with the wife and retracted before the expiry of the period of four months then in these case ila divorce is will not take place and is should be cancelled. If the husband gave the permission of the ila

after the period of the four months then in this case cancellation is valid only in that if the wife gave the permission also. This is all about the *ila* divorce.

The second form of constructive divorce is *zihar* divorce. This divorce is an inchoate divorce. In this divorce wife of the husband clearly express his dissatisfaction with his wife and he compare his wife with the back of his mother, sister, or any other women. This reason for the dissatisfaction is that for the dissolution of the relationship between husband and wife. In some cases wife should acquires the right to refuse to live with her husband till the husband could not perform the penance its means that if the husband do any thing wrong and he gave punishment himself or showing I am the sorry for that wrong if the husband could not perform this thing and refuse to perform these things then the wife has right to take a action against that person that is judicial divorce.

## **VI. KHULA DIVORCE**

Meaning of the word *khula* is that to put off. Marriage should not only by the *talaq* it is an arbitrary act of the husband and it is an agreement between the parties also. If the marriage has been dissolved by the agreement this is called *khula*. In this divorce it is the consent of the parties and wife gives or agree to give a consideration her husband to release from the marriage ties. In the case of the agreement of the bargain on the matters arrangement between the husband and the wife and the consideration of the wife and gave dower to her husband which she is received from her husband or any other agreement for the benefits of the husband if the wife fails to pay the benefits to the husband then the *khula* divorce is not valid and in this case husband file a case against his wife. *Khula* divorce is offer by the wife to his husband and to compensate her husband if her husband released his wife from the marital ties and if the *khula* divorce is accepted by the husband if the offer is accepted then it is a single irrevocable divorce which is called *talaq-i-bain* and this offer is not postpone until the execution of the deed of the *khula*.

## **VII. JUDICIAL DIVORCE**

Husband and the wife create a relationship of divorce without the intervention of the court or any other authority and the muslim law persons provided the dissolution of marriage by the decree of the court this is also called *turkaf* which means separation. In india the court should follow the hanafi doctrines and in this doctrines women has no right to divorce to her husband. When the dissolution of muslim marriage act 1939 is not passed by the parliament then women have only two grounds to divorce her husband which is *lian* and *apostasy*. But after the commencement of the dissolution of the marriage act 1939 the two grounds were introduced

for the divorce. First ground is related to the fault of the divorce.

### **(A) Fault grounds**

Now I discuss the fault grounds for the dissolution of the marriage in the year of 1939 dissolution of marriage act has been introduced and in the year of 1959 there should some amendment has been done in the act which is applicable in the whole of india and this act should not applicable in the state of jammu and Kashmir. Section 2 of this act talk about the fault grounds of the divorce and in this section there are 8 grounds for the divorce and in the section 4 of the act talk about the apostasy. Due to this act women has power to go in the lower civil court for filing a decree of the divorce against her husband these 8 grounds are as follows:

1. Husband should not known for a period of the 4 year.
2. Husband failed to maintain his wife for a period of 2 year or more.
3. Court announced the imprisonment to the husband for a period of the 7 year or more.
4. Husband failed to perform the martial obligation without any reasonable cause.
5. Impotency, leprosy, venereal disease of husband.
6. Repudiation of marriage conducted by the wife.
7. Insanity of the husband.
8. Cruelty

#### **1. Husband should not known for a period of the 4 year:**

in this case when husband is not known for the period of the 4 year or more then wife has right to file a case of the divorce against her husband but in the hindu law the period of the not known husband is 7 year. Decree can be passed by the court and this decree could not effect the period of the 6 months form that date when the decree pass by the court. If the husband appeared or appeared by the agent with in the that time period then he satisfied the court when he could not present and not perform any conjugal rights then court will be satisfied then the court should set aside the decree of the divorce in such suit it incumbent upon wife to state in plaint there should be mention name and address of the heir of the husband under the muslim law if the husband is died on the date of the filing of then suit the other thing is that notice should be served to that person who is husband or who is the heir of the husband and that person should appear in the court and heard the all proceeding of the court. Every suit filed by the wife of the husband on this ground then in this case if any paternal uncle and brother of the husband this should be cited as a party but these are not the heir of the husband.

#### **2. Husband failed to maintain his wife for a period of 2 year or more**

If the husband is not able to maintain his wife or neglect to maintain his wife then in this wife

should divorce her husband and the period is 2 year and more which means husband should not maintain his wife for the period of 2 year and more. It is the inability of the husband to maintain his wife or failure to maintain his wife because of poverty, poor health, loss in the work or imprisonment and any other cause is no base for refuse the wife decree for divorce. When the wife is living separately from her husband the ground is that husband is fail to pay the dower to his wife and the husband should not pay the maintenance to his wife for the period of the continue 2 year and wife have right to file suit of the divorce on the other hand wife is living separately with her husband because his husband taking a second wife and maintenance should not provided by the husband to his first wife for the period of the 2 year then in this case wife entitled to file a divorce case against her husband or if the wife is rich than husband can not take use this thing as a defence. When we talk about the maintenance it means that we include all the necessary thing which is very important for the daily life that is food, shelter, clothes etc.

### **3. Court announced the imprisonment to the husband for a period of the 7 year or more**

Wife has entitled to file a suit of the divorce against her husband that is when the court announced the punishment of the imprisonment of 7 year or more then wife file a suit of the decree of the divorce wife file this suit only this case only when the imprisonment of the 7 year is final.

### **4. Husband failed to perform the martial obligation without any reasonable cause**

When the husband is failed to perform the obligation of the martial duties without any reasonable cause then the wife have right to file a suit of the decree of the divorce and husband can not perform his martial duties for the period of the 3 year or more. This martial obligation is basic obligation which is not perform by the husband.

### **5. Impotency of husband**

Impotency is also the ground of the divorce in the muslim law before commencement of the dissolution of the marriage act 1939 under the old law of the muslim law says that when the wife has to prove before the marriage her husband is Impotency and wife has power to file a suit against her husband and the wife should not aware of the Impotency of the husband but the old law has been changed now days wife have power to file divorce case if her husband is Impotency at the time of the marriage and continued to be so till the filing of the suit but before passing the order of the decree of the divorce court gave one chance to the husband to prove his point in the period of the 1 year if the husband should not satisfied the court in the period of the 1 year he is Impotency or not then court pass the decree of the divorce if he satisfied the

court then court should not pass the order of the divorce. In this case burden of the proof should lie on the husband because he should prove that he Impotency not. If the husband examined himself by the medical expert and in that case court have no jurisdiction and can not say to the husband to get examined in the medical board afresh.

### **6. Leprosy, venereal and Insanity disease of husband**

According to the old law Insanity of the husband with or without the lucid interval pre or post marriage arising before or after the consummation of marriage are the ground of the divorce. Under this act husband should suffer from the Insanity for the period of the 2 year or more or this act does not inform the provision related to the Insanity of the pre or post marriage and this act does not specified that Insanity should continue or not. Meaning of the Insanity in this act is similar to the meaning of that Insanity word which is used before the commencement of the dissolution of the marriage act. Due to the Leprosy wife can file a suit of the divorce against her husband and there is no qualification of the Leprosy and the duration of the Leprosy is not stated. This Leprosy disease appear at any time of the after marriage period and its any type of the Leprosy disease. Wife can file a suit of the divorce if the husband suffers from the venereal disease. This disease is not a communicable form of disease and it is submitted that the court is free form to import the doctrine on the general principle of the equity.

### **7. Repudiation of marriage conducted by the wife**

Wife has file a suit for the divorce against her husband on the ground that she was in married by her father or grandfather or any guardian when she has not attain the age of the majority and her marriage has been done when she attain the age of the fifteen year old and the marriage has not been consummated and she had Repudiation the marriage before the age of the 18 year old.

### **8. Cruelty**

Under the old law as well as under the dissolution of the marriage act 1939 Cruelty is the ground when the wife have right to file a suit of the divorce against her husband. In the case of the siddique v amina in this case husband treated his gave some drug and he tortured his wife by physically mode it was the clearly the case of the Cruelty. In this case court says that the physical tortured also include in the definition of the cruelty and mental Cruelty of the modern matrimonial law. If the husband forced his wife to live a immoral life that should be considered as Cruelty. Countries where Cruelty has been the ground of the matrimonial relief it should considered as constitute Cruelty.

Itawari v. Asghari in this case court observed that a Muslim has the legal right to take a second wife even during the subsistence of the first marriage but if he does so and then seeks the

assistance of the civil court to compel the wife live with him against her wishes on pain of severe penalties including attachment of properties she is entitled to ask whether the court as a court of equity ought to compel her to submit to cohabitation with such a husband. In that case the circumstances in which his second marriage took place are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first..

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