



# Reconciliation in Muslim Law on Divorce: Scrutinizing the Quranic Mandate and Its Role in Safeguarding the Welfare and Education of Children

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**Abstract:** The Muslim Law is often criticized and termed as archaic. It is often alleged to be violating constitutional provisions and conflicting with the constitutional guarantees, thus not suitable for the deeply revered, contemporary legal system. But a closer scrutiny of the law presents a rather confounding actuality. An in-depth study of the most admonished part of Muslim Law i.e., divorce will provide you with a realistic and rather modern law of divorce, which was much ahead of its time. One such notable aspect of the Muslim Law on divorce is the Quranic mandate of Reconciliation (Tahkim) in case the parties fear a breach in their marital tie. The primary and most significant source of Muslim Law mandates the parties to marriage to appoint two arbiters, one from each side and opt for reconciliation. The law not only discourages divorce but also warrants that the parties settle their dispute through Tahkim so that the marriage may continue peacefully, a mechanism which was later adopted by nearly all the legal systems. Through this instant academic venture, an effort has been made to delve into and comprehend the Quranic mandate of Tahkim and its intricacies. The article altogether discusses the topic's background and is divided into four main parts for ease: The first part exploring the importance attached to Tahkim, the second part analyzing its procedural aspects whereby who may be appointed as an arbiter, who can appoint, the arbiter's authority and role, the third part discussing the approach of the Indian judiciary towards it, the fourth part tries to understand the impact of the divorce on the welfare and education of the children and how tahkim is useful in preventing it and lastly, the fifth part elucidating how distant the Muslim society actually is from the pristine purity of their religious laws, along with suggestions deemed to strengthen the Quranic mandate in discussion.

**Keywords:** Reconciliation, Muslim Law, Divorce, Children, Welfare, Education, Quran.

## I. INTRODUCTION:

The Muslim Personal Law has ostensibly always been clashing with the constitutional values and it is believed by many to be archaic and outdated for the modern legal system. However, certain issues that are heavily censured are those pertaining to marriage, especially Polygyny and divorce. Both issues are perceived to be against the principle of Equality as enshrined under the Indian Constitution, since Muslim Law permits Polygyny as an exceptional rule but restricts Polyandry in totality. It also conceivably provides the husband with many more rights as compared to the wife in the matter of divorce.

In Islam, great emphasis is laid on the marital union and its strong footing is derived from the fact that a multitude of related traditions have been known to have come from the Prophet Muhammad. Unlike nearly all the religions in the world, which recognize Monks for its followers as one of the way of life, Islam denounces it and instructs its followers to lead a life that is participative in worldly affairs, dedicated towards striving for excellence in the religion and be as included in society as the fellow-beings are. In fact, as part of one of the Prophet's traditions, he has gone to the extent of stating that, "Marriage is my *Sunnah* and those who do not follow this way of life are not my followers". [1]

Adopting a practical outlook and being well versed with the nature and needs of man, despite being aware of the sacrosanct nature of marriage, Islam gave its followers the option of divorce. Indeed, it the most disapproved permitted activity, but divorce is still permitted under Muslim Law as a necessary social evil. [2] Not only did Islam provide the option of divorce, in sharp contrast with many other prevailing religious laws at the time, but it was much ahead of its time as observed by Krishna Iyer J. that "a deeper study of the subject (Muslim law) discloses a surprisingly rational, realistic and modern law of divorce". [3]

Upon conducting a closer examination of the Muslim Law on Divorce, one will observe all three theories of divorce i.e., the Fault Theory, Mutual Consent Theory, and the Irretrievable Breakdown of Marriage Theory, have their place in Muslim Law. The latter two theories mentioned have originated very recently and were recognized in India only in the last century but were innately a part of Muslim Law from the last 1400 years. Evidently, Muslim couples can dissolve their marriage by mutual consent through *Mubarat*. Also, the whole concepts of *Talaq* and *Khula* are also based on the irretrievable breakdown of marriage, as is apparent from the tradition of Prophet Muhammad, narrated by Amir bin Shuaib pertaining to the *Khula* obtained by Habibah bint Sahl from her husband Thabit bin Qais bin Shammas. [4]

Not only this, but the Muslim Law on Divorce was greatly advanced in certain other aspects as well and one of them is the Quranic mandate of Reconciliation in case the spouses fear disunion of their marital union. The proffered research paper deals with the above-mentioned pre-requisite of Reconciliation in the Muslim Law of Divorce. For that purpose, the paper has been divided into five parts. The first part will be dealing with the position of Reconciliation under the Muslim Law on Divorce. The researchers will be exploring the importance attached to the Reconciliation process by analyzing the verses of the most crucial source of Muslim Law i.e. The Quran and its commentaries. The second part will be dealing with the procedural aspects of the Reconciliation process and will be elaborating on who can be appointed as an arbiter, who has the right to appoint them and is the decision of the arbiters binding on the spouses or not. The third part will be focusing on the judicial approach to the Reconciliation process by analyzing various judgements of Indian Courts. The fourth part will be gauging the impact of the divorce on the children and how the process of Reconciliation can come to the rescue of children of the parties to marriage. The last part will be an attempt to propose certain recommendations in lieu of strengthening the Quranic mandate in discussion.

## II. RECONCILIATION IN MUSLIM LAW ON DIVORCE:

Alternative Dispute Resolution is often referred to the mechanism of solving disputes outside the courts or by involving non-judicial devices, but at times also involves judicial devices. [5] With the ever-increasing number of *lispenden* overburdening the courts, along with the massive amounts of money spent and undue delays in ordinary litigation, this mechanism is often favoured as it provides a speedy, collaborative and inexpensive solution to problems which were beyond the capacity of the courts of law. Notably, in matters relating to familial disputes, it has been hailed as a great recourse since it prevents the dragging of family disputes in front of the court's doors and thereby negatively impacting the relations and children. It incorporates within its ambit various models like Mediation, Arbitration, Conciliation, Lok Adalats and Negotiation.

Considering the prominence of this mechanism, it was incorporated in the Indian legislations and has considerable mention in the statutes dealing with civil matters in general, and family disputes specifically. Sec. 89 of the Civil Procedure Code provides that:

"Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for (a) arbitration; (b) conciliation (c) judicial settlement including settlement through Lok Adalat; or (d) mediation." [6]

If this provision is general in nature, there is a specific mention of endeavouring to bring about reconciliation in matters pertaining to divorce in the suits filed under the Hindu Marriage act, 1955. Sec. 23(2) of the Act mentions:

"Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties". [7]

And a similar kind of provision is also provided in Sec. 9 of the Family Courts Act, 1984. Clearly it can be seen that all the statutes mentioned above are of recent times, but mentions of the same are discoverable in the most important and primary source of Muslim Law, the Quran.

It is mentioned in the Quran:

“If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things.” [8]

This verse explicitly declares that the Reconciliation process is a pre-requisite for divorce, as it is very clearly established in Muslim Law that divorce must be used only and only as a last resort and the parties must try their best to be on amicable terms irrespective of the situation. Only when the parties feel that the marriage has fragmented with no chances of reconciliation i.e., irretrievably, they can opt for divorce, and in that case too, they must first attempt to settle the matter peaceably by appointing two arbiters, one each from both parties' sides. The appointed two arbiters from each side must unquestionably be well versed with the nuances of the relationship and other conditions. The verse also provides a spark to the darkening relationship by mentioning that Allah will cause their reconciliation. Imam Yusuf Ali very aptly stated in connection to this verse:

“An excellent plan for setting family disputes, without too much publicity or mud throwing or resort to the chicaneries of law.... the arbiters from each family would know the idiosyncrasies of both parties, and would be able, with Allah's help, to effect a real reconciliation”. [9]

This reconciliation process, which is required to be performed in the matters of Shiqaq (serious conflict between a couple), known as *Tahkim*, is derived from the word '*Hakama*' which means to stop, prevent, restrict, or forbid. [10] Thus, meaning preventing or restricting an individual from committing a harm to or disrupting social harmony or good relations. The *Tahkim* keeps the husband and wife on equal footing and requires the arbiters to be appointed as individual representation from each side. The process is not restricted only to the cases where there is a disagreement between the spouses to live together but also in the matters where the spouses fear disturbance of marital peace between them.

### III. PROCEDURAL ASPECTS OF RECONCILIATION IN MUSLIM LAW ON DIVORCE:

We have discussed that arbiters are required to be appointed from both the sides; however, the pertinent question remains that who will have the right to appoint these arbiters. On this point there is a difference in opinion between the religious scholars. A group supports the right of the *Qazi* to appoint arbiters [11] and the other supports the claim of the conflicting spouses or the elders of the family to do the same. [12] What can be summarized and acknowledged that when the matter is before the *Qazi* or the court of law, definitely the arbiters will be appointed by the court or *Qazi* but it has not reached to that extent then the two will be appointed by the spouses or their families. In case the parties are not agreeing to a particular arbiter than it can be left for the arbiter to decide. The whole process including the appointment of the arbiters have been summarized by Maulana Maududi in following words:

“Whenever the relationship between husband and wife starts to breakdown, an attempt should be made to resolve the dispute at the family level, before it is aggravated and leads to disruption of the matrimonial tie. The procedure to be followed is that two persons, one on behalf of each family should be nominated to look into the matter together and to devise means whereby the misunderstanding between the spouses may be brought to an end. Who should nominate these arbitrators? God has not specified this as to allow the people full freedom to choose the most convenient arrangements. The parties should be free for instance to decide that the arbitrators be nominated either by the spouses themselves or by the elders of their respective families. If the dispute is brought before the court, the later also has the right to nominate arbitrators, representing the families of both parties, before referring the matter for judicial verdict.” [13]

As to the question of who can be appointed as an arbiter, a vast majority of the scholars agree that the arbiters must be the family members of the parties, since they are well aware of the ongoing personal circumstances and the parties also have confidence in and trust their family members. In cases where it is not possible to appoint any arbiter from the family, then in such unavoidable circumstances the appointment can be made from outside the family as well. [14]

In *Tahkim* the duty of the arbiters is not to act as a judge and decide as to who was at fault, rather they are required to try and bring an effective resolution in the best possible manner. [15] They must exercise their abilities in such a manner that the opposing parties agree to the same terms and further lead a harmonious life. The Islam considers it as the noblest deed and promises a lot for those who resolve disputes for the conflicting parties. The Quran says:

“There is no good in most of their secret talks save (in) him who orders *Sadaqah* (charity in Allah’s Cause), or *Ma’roof* (Islamic Monotheism and all the good and righteous deeds which Allah has ordained), or conciliation between mankind; and he who does this, seeking the good Pleasure of Allah, We shall give him a great reward.” [16]

And Prophet Muhammad said:

“Shall I not tell you something that is better than the status of (voluntary) fasting, prayer and charity?” They said: “Yes.” He said: “Reconciling in a case of discord, for the evil of discord is the shaver (destroys religious commitment).” [17]

As to the extent of the authority of the arbiters, again the scholars have not arrived at a consensus. The scholars belonging to the *Hanifi* and *Shafii* schools of *Sunni* jurisprudence are of the opinion that after listening to the parties, the arbiters can only make recommendations and their words are no binding authority on the parties. However, both the schools agree that in the matter of *Talaq* or *Khula*, the appointed arbiters’ recommendations will be taken as the verdict. [18] Scholars like those of the stature of Hasan Basri and Qatada were of the opinion that the arbiters do have the authority to enforce reconciliation but not separation, and scholars like Ibn Abbas, Said bin Zubair, Ibrahim NakhiShaabi, Muhammad bin Sirin opined contrarily, saying that they can enforce their decision in both the cases. [19] There are instances available from the life of Caliph Uthman and Caliph Ali where they have appointed arbiters and authorized them to take the decision, which will be binding on the parties. A point worth noticing here is that both the appointing authorities were from the *Khulfa-e-Rashideen* (Rightly Guided Caliphs) and the arbiters were the companion of the Prophet Muhammad and in the modern times the arbiters must not be of the same standard. [20]

#### IV. JUDICIAL RESPONSE TO RECONCILIATION IN MUSLIM LAW ON DIVORCE:

The Indian courts, which have always been hailed as the modern representation of justice, were unfortunately ignorant towards this aspect of the Muslim Law on Divorce, both in the pre- and post-independence eras. The divorces pronounced by the husband in all his whims and caprice, without any reconciliation efforts, were considered valid for the vast majority of thought. A dynamic, path-breaking judgement came in the year 1981 when Baharul Islam J., while deciding on a matter pertaining to Muslim divorce, reaffirmed the view that the reconciliation efforts are a Quranic mandate and a pre-requisite of divorce. While recognizing the reconciliation efforts as an essential requisite of divorce, he observed that:

“...and if the relationship between the husband and the wife becomes strained, two persons-one from each of the parties should be chosen as arbiters who will attempt to effect reconciliation between the husband and the wife; and if that is not possible the *talaq* may be effected. In other words, an attempt at reconciliation by two relations-one each of the parties, is an essential condition precedent to ‘*talaq*’.” [21]

The same was reiterated by another judgement of the Gauhati High Court, where it was held that: “...it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure.” [22]

Even the apex court of the country speaking through R.C. Lahoti J. in Shamim Ara’s case confirmed the same and held that:

“the correct law of *talaq* as ordained by the holy Quran is.....that it must be preceded by an attempt of reconciliation between the husband and wife by two arbiters, one chosen by wife from her family and the other by the husband from his. If their attempts fail, *talaq* may be effected”. [23]

Since then various other High Courts of the country have followed the same and held it to be an essential requirement for divorce.

#### V. RECONCILIATION IN MUSLIM LAW ON DIVORCE AND CHILDREN:

The Muslim Law consider divorce as a social evil for many reasons. It not only brings a matrimonial tie to a halt but also effects the children. There are enough reports to suggest that the welfare of the children is very severely affected by the tussle in the house. Imagine a situation where the young mind has to witness the domestic issues, further escalating and even going to courts or resulting in the divorce of the parents. No matter how hard the courts of law try to secure the welfare of the child but that particular situation will leave it scars on the mind of the child.

Divorces do have a very harsh impact on the children. They psychological jolt it provides to the children cannot even be imagined. Not only they face a tough situation when their peer discusses about their family with them but also develops a hatred towards one of the parents. This lead them to a condition where they start withdrawing themselves from the society. [24]

The education of the children is not immune to it. There is a direct co-relation of the divorce of the parents and down falling of the children's learning abilities and educational achievements. A child undertaking elementary education is the worst effected of all and start performing really bad immediately after the divorce of the parents in comparison to the children of impact families and it continues for long. [25] There is no denying the fact that the overall growth of the children comes to a standstill in case of divorce of the parents.

In a country where the dropout rate of a community is higher than the national average and the dropout of the girl child remained almost 70 percent for the last 70 years [26], there is very remote chances to gamble the education of the children with broken homes. Divorce not only takes away the peace out of the house but also affect all the stake-holders very severely. In such a scenario, *tahkim* not only prevents the house from shattering into pieces but also take care of the welfare of the children, both psychologically and educationally. Children are also saved from going through the mental trauma which is attached with the court proceedings and also grow strong in the peaceful presence of the parents.

#### VI. CONCLUSION AND RECOMMENDATIONS:

To conclude it can be said that the Muslim Law at its inception provided such a mechanism which was felt required by the other legal systems at very later stage. The Muslim Law not only discouraged the divorce in words but also presented with the mechanism to tackle the necessary social evil of divorce in spirit. But the sad state of affair is that the Muslim community seems too distant from this Quranic mandate. The surging divorce rates are evident of the fact that the parties are not referring to the Reconciliation as mandated by the Quran and often act in haste when it comes to the divorce.

With the Indian judiciary acknowledging the importance and necessity of the Reconciliation process in the matters of divorce, it is high time that the Muslim community must make efforts to get benefitted by the pristine purity of their religion. The greater task remains with the Muslim religious scholars and the senior members of the community not only to make this mandate reach to every member of the community but also to make arrangements where the *tahkim* can be arranged for the conflicting spouses. The committees on the mosque level can be constituted to make it convenient for the members of the community to easily reach out easily. There must be a mechanism developed in such a manner that these committees are well connected with the religious heads and organs of the state. In case any dispute reaches to any one of them and it is possible that the parties can be made to settle amicably, the Reconciliation process must be performed. Not only the Quranic mandate will be followed but also the marriages will be saved. The children who are the worst effected of all will also be in a better position and will be well taken care of psychologically and educationally.

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