TRIPLE TALAQ: PREDOMINATION OVER MUSLIM WOMEN

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ABSTRACT

Personal laws evolve from religious practices and custom which form a part of the legal system. These personal laws should be in consistence with the Constitution and most importantly the fundament rights. The practice which is followed in the name of religious practice should not be arbitrary, discriminately and should be within the principles of natural justice.

Muslim laws in India are not codified and are subjected to varied interpretations from Shariat. Due to these interpretations, the woman falls in the clutches of following certain practices in the name of religious practice which denies them their basic rights.

The practice of triple talaq has been in existence in the Muslim community since centuries. Muslim men divorce their wives in one sitting with or without the presence of the wife. This form of talaq is not approved by Quran and many eminent Islamic scholars have rejected triple talaq. The court has taken into notice of this practice and observed that this form of talaq is unilateral and discriminatory. The courts have held this form of talaq as invalid and laid down proper procedure of talaq by interpreting the verses of Quran. Triple talaq is violative of the provisions of Constitution pertaining to fundamental rights.

This paper explains the forms of talaq laid down under the holy Quran and the procedure for the same. This religious practice has become a custom and in this paper throws light on how it is not a good form of custom. The legislations are silent upon the practice of triple talaq. Judicial interpretations have also been looked into wherein the courts have laid the procedure of valid divorce by interpreting holy Quran. The paper further deals with the unconstitutionality of the practice of triple talaq as it violates Article 14, 15, 21 and 25 of the Constitution of India. Next portion of the paper suggests for the Uniform Civil Code to be implemented for curbing the atrocities which was being faced by a particular section of the

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society. The practice is against CEDAW to which India is a signatory and hence enact a special legislation to protect women.

India is a country where there is unity in diversity. There are diverse religion, culture, languages and practices. People follow different religions and faiths. These religions lay out different sets of personal law which govern marriage, divorce, succession, etc. The sources of the laws come from their religious books, customs, jurisprudence, digest and commentaries, etc. which are then codified into statutes. Personal laws play a vital role in the society as well as in the religious community. These laws have acquired special position in the present age.

In Islam, the teachings of Prophet Mohammed are written in their holy book which is known as Quran. Apart from Quran, they have various sources of Islam and the most legitimate one after Quran is the Sunnah. The personal laws are laid down in Quran which deals with marriage, divorce, succession, etc. Quran does not approve of divorce but lays down the forms of divorce which were approved by the Prophet.

Islamic law permits talaq when wife commits infidelity or has a bad character which results in unhappy married life. In absence of the above reason, if husband gives talaq, it is not considered as an appropriate talaq in the eyes of religion. In the event that he relinquishes his wife, he draws upon himself the divine anger, for the scourge of God, said the Prophet, lays on him who revoked his wife impulsively. The practice which was disapproved by Allah is still followed. Men use triple talaq as a right to abandon their wife who needs to be respected and supported.

According to holy book of Islam i.e. Quran, it provides for the procedure of giving divorce. A divorce is Talaq which means taking off any tie or restrain and signifies dissolution of marriage. In Hnafi law, no special form or expression is important to affirm talaq. In Ithna Ashari law, however, demand strict adherence to a structure, that is, it must be in the Arabic language expressed orally, in the presence of two male witnesses, who ought to be honest Muslim. Indeed, even the presence of the spouse is not required. The talaq would be regarded to have take impact on the date the spouse came to know of it. The oral form of Talaq can be given in three modes namely Talaq-e-Ahsan, Talaq-e-Hasan, Talaq-ul-Biddat or Talaq-e-Badai.

Talaq-e-Ahsan and Talaq-e-Hasan come under the head of Talaq-ul-Sunnat is the talaq which carries the approval of Prophet. Ahsan is most approved form of divorce where the husband disown his wife by a single pronouncement in a time of tuhr (purity, i.e., when the wife is free from her menstrual courses), amid which he has not engaged in sexual relations with her, and then leaves her to the observance of iddat. Hasan is approved form of talaq where the husband successively pronounces divorce three times during the time of tuhr. In other words it is a divorce upon divorce wherein the first two pronouncements are revocable and in the third pronouncement talaq becomes irrevocable.

Talaq-ul-Biddat is not the approved form of talaq as it does not consider the period of tuhr and also to the abstention from intercourse. Triple divorce is where the husband repudiates his wife by orally saying Talaq in one sentence thrice within the time of tuhr.

There are certain procedures which need to be followed in order to give talaq to the wife. Firstly, he has to make the wife aware about his intentions of giving talaq and reason for the same as well as time to change her behavior. If her behavior does not change, then husband can resort to the process of conciliation by informing the elders in the family of the wife. Two arbitrators are appointed one from the side of wife and other from the side of husband. It is duty of the arbiters to bring settlement between the parties so that their married life is back to normal. In spite of the efforts which are being put in and the damage to the married life is irreparable then there is no alternative but to separate. At this stage the husband has the right to give talaq to his wife. The conciliation stage with the intervention of arbiters is a compulsory condition for effecting talaq either in Ahsan or Hasan form of talaq.

The habit or custom of pronouncing talaq three times in one sitting is prevalent in the modern time especially by the Muslims in India. The holy book of the Muslims i.e., Quran, talks about divorce wherein it states that “Divorce is to be given two times and then must be retained in a good manner or released gracefully”\(^5\). The word Marrataan (two times) means to give talaq on the second time. However, it has been misinterpreted to mean that the word talaq has to be repeated or to give divorce with the specification of number. That is to say that if the word talaq is pronounced or uttered three times is considered as triple talaq. This according to the Quran is the sinful form of divorce. The meaning of the word Marrataan in Arabic language is ‘Marratan Baad Marrah’ which means “On another occasion after the first

\(^5\) Chapter II verse 229.
time” and not a mere verbal repetition of the word. Thus, the right to revert or retain the marriage will remain even after pronouncing talaq on two occasions but such right is lost when it is given for the third time. If the word talaq is uttered three times in a single sitting then the right to revert or retain the marriage is lost. This becomes an irrevocable divorce. Earlier, in the days of ignorance, the practice was such that talaq was given one at a time and also reverted again and again. It was not to give several talaq at once. Therefore the phrase “at talaq marrataan” means to give talaq with intervals and not several talaqs in one sitting. Further, it has been prescribed in surah talaq that a divorce when given should be given for an iddat i.e., period of waiting. It is necessary that a man must consider iddat for every talaq because it is the command given in the quran. Surah talaq states that “when you divorce your wife, divorce them for their iddat and reckon the iddat (Surah Talaq: verse 1). The quran not only commands for the consideration of iddat but also for reconciliation. “When you have divorced women, and they have reached their term (iddat), then retain them on equitable terms or release them on equitable terms” (Surah Baqarah: 231). By this phrase it is meant that the husband can retain the marriage before the end of iddat or release her with honor. Thus, it can be said that it is no where mentioned in any text of the holy Quran that to utter talaq three times at once or in one sitting will have the effect of a final divorce. To pronounce talaq three times is considered equivalent to only one talaq and therefore it does not amount to completion of divorce.

Custom is defined as a usage or practice of the people, which, by common adoption and acquiescence and by long and unvarying habit, has become compulsory, and acquired the force of law with respect to place or subject matter to which it relates.

Here, the mere fact that triple talaq has been practiced or used for a long period of time it is said to be a custom. Custom is one of the sources of law, where a common habit or practice has been used or followed form a long duration by the people, and then it gains the force of law. However, in spite of triple talaq being recognized as a custom has not gained the force of law. There are no statutes that provides for the same. In one’s opinion it can be said that this form of custom is void has it denies the basic right of a women. Several eminent jurists and intellects have stated that this system of practice is completely irrelevant and arbitrary as it is one-sided and does not give the women a cause or a chance for reconciliation and is left with nothing but to look after the children by her. According to Prof. Asaf A. A. Fyzee this system

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6 Available at http://mquran.org/content/view/239/4/ (last accessed on 31/07/2016).
7 Available at http://thelawdictionary.org/custom/ (last accessed on 31/07/2016).
of divorce is said be a one sided engine of oppression in the hands of the husband. It is further stated in the case of Mohamed Ahmed Khan v Shah Bano by Chief Justice Chandrachud stated that talaq confers upon the husband, “the privilege of being able to discard his wife whenever he chooses to do so for reasons that are good, bad or indifferent; indeed for no reason at all”. However, some of the Sunni clerics have mentioned that the practice of triple talaq gained recognition and was sanctioned during the reign of second Caliph Omar. The reason for this practice to be sanctioned by Caliph Omar in certain cases was to help women come out of a bad marriage where their husband were delaying to give divorce by misusing the lengthy procedure provided in the law. It was for the sake of women that this practice gained sanctity in the 7th century, which was later, misinterpreted by the mullas who used this to suit their anti-women and patriarchal goals. Hence the practice of triple talaq in one sitting is a sinful form of divorce that suppresses women’s rights and violates equity or equal justice in the society.

Personal laws in India are codified in forms of legislations. The Muslim law is codified and enacted which is called The Muslim Personal Law (Shariat) Application Act, 1937. Section 2 of the act provides that if both the parties are Muslim, in any matter relating to inheritance, special property to women, marriages, dissolution of marriage, maintenance, dower, guardianship, gift, trust and wakf, the court shall apply the Muslim Personal law. Any custom or usage, which is contrary to Muslim law, cannot be applied. The above act is silent on the application of triple talaq. The source of Muslim personal laws is Quran and Sunnah and further this form of talaq is not approved. Hence, this conveys that triple talaq is not recognized as a valid if form of divorce.

The court has intervened into the issue of triple talaq and has attempted to interpret the verses in the Quran. In Yusuf v. Sowramma, Justice Krishna Iyer observed that the Muslim male enjoys unconstrained authority to dissolve the marriage. The holy Quran states that the man is forbidden to divorce his wife as long as she is faithful and obedient. In the state of affairs in India, he observed that, the teaching of Prophet and the verses of holy Quran has taken a contrary course and a misconception prevails with dealing with the wife’s right of divorce.

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9 1985 AIR 945.
11 AIR 1971 Ker 261.
The court took the notice of gender discrimination and male authoritarianism which was the effects of triple talaq and thus the court observed that there is a need of codification of law on Muslim marriages and divorce which will be in pace with the Constitution of India\textsuperscript{12}.

In the landmark judgment of \textit{Shamim Ara v. State of U.P.}\textsuperscript{13}, the Supreme Court observed that a valid talaq obtained should be for a reasonable cause and further there should be attempts for reconciliation by the arbiters. If the above two conditions are not satisfied, the talaq is not valid and recognized.

In the case of \textit{Shahzad v. Anisa Bee and others}\textsuperscript{14}, the court cited Surah 4 Ayat 35\textsuperscript{15} while laying out the valid form of divorce in case of termination of Muslim marriage which is pronounced unilaterally by husband. This verse of Quran commands for reconciliation between both the parties and if such attempt fails then this shall be deemed as a reasonable cause for divorce. The same was followed in the case \textit{Kunhimohammed v. Ayishakutty}\textsuperscript{16}.

The Delhi High Court considered different forms of Talaq in Masroor Ahmed Vs State (NCT of Delhi) and Anr\textsuperscript{17}. It took the views of Sunni schools which were considered that triple talaq which is pronounced at one go is not regarded as three talaqs but only as one. The court took the notice of harsh abruptness of the practice of triple talaq which affects the divorced women as there is no chance left for reconciliation. The court observed that it is a development which may have filled a need at a specific purpose of time in history but it is found such a move would not be contrary to any essential precept of Islam or the Quran or any decision of the Prophet Muhammad. The court held that triple talaq will be regarded as one revocable talaq.

The judiciary has interpreted the verse of Quran and also taken note of the views of different schools of Islam while deciding the cases with respect to triple talaq. The above observation of courts indicate on how the Muslim community needs to be educated about the correct procedure of divorce and pronouncing talaq in one sitting is oppressive against women.

\textsuperscript{13} 2002 (7) SCC 518.
\textsuperscript{14} (2006) 1 MP LJ 555.
\textsuperscript{15} According to holy Quran, this verse states if you fear a breach of marriage between a man and his wife, appoint one arbiter from his family and another from hers; if they wish to reconcile, Allah will create a way of reconciliation between them. Allah is the Knowledgeable, Aware.
\textsuperscript{16} AIR 2012 Ker 60.
\textsuperscript{17} 2008 (103) DRJ 137 (Del.).
The practice of triple talaq which is irrevocable form of divorce is unilateral and provides absolute right to Muslim men right to divorce his wife without their consent. The women are deprived of their economic security, protection and social security and thus, the practice is highly discriminately in nature. Triple talaq takes away their right to equality and right to live a dignified life.

In the case of A.S. Parveen Akhtar v. Union of India\textsuperscript{18}, the Supreme Court held triple talaq valid, this inflicted great blow to the fundamental rights that is an integral part of Constitution and is a part of basic structure. There is clear violation of article 14, 15 and 21 of the constitution.

This form of talaq goes against equality which is enshrined under article 14 of the Constitution of India. Equality is one of the magnificent corner-stones of the Indian democracy.\textsuperscript{19} The doctrine of equality before law is an essential result of Rule of law which infests the Indian Constitution\textsuperscript{20}. The Supreme Court pronounces the privilege of equality as the essential component of the Constitution\textsuperscript{21}. Supreme Court has rightly pointed out that personal law conferring inferior status on women is considered as an anathema to equality. Article 14 embodies the principle of non-discrimination. The divorce given by husband unilaterally is against the principles of non-discrimination which is a significant provision of the Constitution of India. The practice of triple talaq is cruel, discriminatory and against Part III of the Constitution.

Article 15(1) of the Constitution prohibits the state from discriminating against any citizen on the ground of religion, race, sex, or any of them. Muslim women are subjected to discrimination and are facing cultural emotional abuse. Such form of talaq is against article 15 on the basis of religion and sex as well as it discriminates the women itself.

The wording of Article 21 of the Constitution clearly lays down right to life and liberty except by the procedure established by law. The right to life guaranteed under Article 21 includes right to livelihood. Derogating from the normal format of divorce, triple talaq damages the essence of Article 21. Triple talaq violates the spirit of natural justice which is

\textsuperscript{18} (2003) I LW 370.
\textsuperscript{19} THOMMEN, J., in Indra Sawhney v. Union of India, AIR 1993 SC 477.
embodied under the Constitution. Personal liberty is necessary for the development of the society and the practice of triple talaq is depriving the Muslim women of their personal liberty.

Muslim personal law practices are hampering the position of Muslim women in our society. It clearly reflects male dominance. The Apex Court\(^\text{22}\), considering this situation, has held that ‘a second marriage which has taken place under Muslim Law by a Hindu convert infringes the religious rites and personal freedom of Hindu wife. Freedom guaranteed under Art. 25 of the Constitution is such freedom which does not infringe upon a comparable opportunity of the other individual. Article 25 of the Indian constitution guarantees to all citizens the freedom to profess, practice and propagate religion. This right under article 25(1) like any other fundamental right is not absolute as it is subject to public order, health, morality and to the other provision of Part III of the Indian constitution\(^\text{23}\). A person can exercise his religious freedom so long as it does not come into conflict with the exercise of Fundamental Rights of others. In an earlier case,\(^\text{24}\) Supreme Court has observed that “no rights in a civilized society will be absolute. Enjoyment of one’s rights must be consistent with the enjoyment of rights by the others. Where in a free play of social constrains, it is not possible to bring about a voluntary harmony; the state needs to venture into set right the unevenness between contending interests”. The court further held that Fundamental right of one must exist together in congruity with activity of other Fundamental rights by others.

Taking this into consideration it can be said that the practice of triple talaq violates article 25 of the constitution. Triple talaq is gross injustice to the rights of Muslim women. It subjugates and suppresses the human rights of women. This form of divorce clearly shows us how the basic human rights of Muslim women are being deprived of. The right to equality enshrined in article 14 of the constitution is being grossly neglected and article 15 which proved for right against discrimination is been distorted and infested with the malady of inequality. Further the state provides for the protection of life and personal liberty of the citizen provided under article 21, however, due to this improper form of divorce, the interest of the women who have been discarded by their husband are not being protected and are just dumped without any source of justice. Thus triple talaq takes away the honorable position of the women in the society and leaves them in dark with no justice given to them.

\(^{22}\) Lily Thomas v. Union of India, AIR 2000 SC 1650.
Triple talaq which by Muslim men is arbitrary and discriminatory which is against the spirit of Constitution. This unilateral form of divorce is against the principles of gender justice. It does form a part of essential religious as the nature of religion does not change without that practice. There will be no fundamental change to the character of the religion if triple talaq is abolished as it not essential religious practice.

Triple talaq makes women extremely vulnerable and insecure about their marital status. Many cases has been reported wherein the women is being thrown out of the house and not given maintenance by husband after arbitrarily pronouncing divorce thrice in one sitting. Many Muslim women are being denied of rights due to ignorance of law. They are being subjected to discrimination on the basis of their religion and gender. It is necessary to review the status of women and ban the practice of triple talaq.

By bringing the uniform civil code, the atrocities which are being faced by Muslim women can come to an end. The main objective of article 44 is obligation of the state to ensure that the citizens are governed under the uniform code throughout the territory of India. This provision aims to promote unity and integrity which is mentioned in the preamble of our constitution. There has been a change brought about after the codification of the personal laws but the gender inequality has been prevailing and hence the solution is still pending. The implementation of uniform civil code has been avoided to protect the religious sentiments of the people and the minorities. The state has the duty to provide equal rights to both men and women and to take steps to bring the women’s position in the society same as the men. In order to bring socio-economic justice to the women the state should implement uniform civil code with best provisions giving equal status to women and also guaranteeing them basic rights in the personal laws. The directions given by the courts in their decisions should be seriously considered by the government in order to have uniform laws applicable for all the people and to eliminate gender inequality.

India is obliged under this convention to make special provisions in order to eliminate the discrimination of women under article 51. Under article 253 of the Indian Constitution, the parliament has the power to any law in order to give effect to international conventions and treaties. To make international covenants or conventions effective, all states parties agree to enact laws in accordance with the commitments under the convention. Many conventions incorporate a clause asking the state parties to do so. Thus, under the Constitution of India, the power is empowered by the Parliament to make such laws under Article 253 and putting
an obligation on the state to give effect to the convention under Article 51. Indian
Constitution empowers the state to adopt measures to uplift the status of women. India has
ratified several international conventions and instruments which commit to secure a
respectable position of women. One such convention is the Convention on Elimination of All
Forms of Discrimination Against Women (CEDAW) which India is signatory. Triple talaq is
violative of Convention on Elimination of All Forms of Discrimination Against Women
(CEDAW). Under CEDAW, India has the obligation to enact legislation to protect Muslim
women from the unilateral form of divorce and provide them equal status as men.

In this 21st century, this has had a great deal of advancement in technology, makes
communication a lot easier. This however, has become a disadvantage to Muslim women as
the men to divorce their wife have misused these technologies. There have been several
instances where triple talaq is pronounced through text message, whatsapp, skype and other
modes of social media. In a recent case a victim of triple talaq, sharia banu has challenge the
validity of this mode of divorce along with other practices such as polygamy, halala, etc. and
demanded for uniform civil code. Majority Muslim countries have amended their laws which
disallowed triple talaq in one sitting and have protected the right of the women from the
arbitrary divorce. This is not been inculcated in India. The most unfortunate fact is that this
sword hanging on the neck of married Muslim women inflicts severe blow to the morality
and spirit of womenhood.

Triple talaq is a sore issue that has been extensively practiced especially in the modern era.
There has not been any necessary or sufficient step taken to eradicate this issue that has
become a social evil. Married Muslim women have been living in fear since many decades
due to this unilateral form of divorce. In the progressive time of 21st century, we see such
discriminatory and inequality surrounding us in spite of where women right’s is placed as the
same footing as men’s. With the reforms in the personal laws within the Quranic laws the
concerns of Muslim women can be solved. Judiciary should look into this matter in order to
protect women’s interest and uphold constitutional principles. Courts can exercise judicial
activism to bring about gender justice and fairness regarding the treatment of Muslim women.
With the enactment of Uniform Civil Code it could bring an end to this form of injustice done
to Muslim women. If this form of talaq has been removed from the system it will open up
avenues to bring justice and equality to the entire community.