



## Tripale Talaq: A Critical Analysis

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### **Abstract**

*Triple Talaq is an inhuman practice that violates rights and dignity of women. The constitution of India under Article 25 confers Right to Freedom of conscience and free profession, practice and propagation of religion. The protection under Articles 25 and 26 extend guarantee to rituals, observances, ceremonies, mode of worship etc. which are integral to religion. But for such practices to be considered as a part of the religion, it is necessary that such practices be regarded by the said religion as an essential and an integral part. Suffice it to say, 'Triple Talaq' at the same instance is not an essential practice of Islam and hence must be done away with as much as haste as possible. Many women have undergone severe trauma after being thrown out of their homes. Gender justice is a central tenet of the Koran and gender inequality and triple talaq are in violation of the Koranic principles. In fact, in the Koran, the very conception of humankind is based on an equal footing between man and woman. But patriarchal misinterpretations and distortions rule their lives. Any talk of reform in personal law is brushed aside as interference in religious matters. There has been a legal discrimination of Muslim women in our country. Muslim women are still subject to the Muslim Personal Law (Shariat) Application Act, 1937 which is silent on triple talaq, nikah halala and polygamy. Muslim women are needed to be brought on a par with Hindu sisters and Christian sisters who have a legal recourse. We are a patriarchal society and it is not as though Hindu and Christian women have attained equality. But they do not face legal discrimination the way Muslim women do. It is the constitutional obligation of the government to enable Muslim women to obtain justice. All religions are different paths leading to one single end. Throughout the path all what matters is the well-being of all humans and their happiness. This era is an era of empowering the weaker, spreading literacy and providing freedom, so why not should we give Muslim women also their due. This paper analyses various forms of talaq under Muslim law by which divorce can be given. It also critically analyses the triple talaq and various aspects of it by which the women are left to destitution and the need to do away with such in discriminatory practice.*

We are a nation which proudly professes to be the world's largest democracy, guaranteeing the protection of equal rights to all our citizens while boldly holding the flag aloft of being a secular nation. However, underneath all the rosy claims, lies the cruel underbelly of discriminatory and tyrannical personal laws which tear apart the foundation of equality upon which our great nation was built.

The practice of Triple Talaq which is a part of Muslim Personal Laws and which gives Muslim men unilateral, absolute right to give irrevocable Talaq depriving women within minutes of all protection, economic security, marital status etc is a severe blow to our fundamental rights. The issue is why this greatest democracy of the world does while giving access to justice to every citizen hides behind the huge walls of article 25 and overlooks the destitute women and why does personal laws hegemonies the spirit of the constitution which promises justice to all.

The Constitution of India under Article 25 confers Right to freedom of conscience and free profession, practice and propagation of religion. The protection under Articles 25 and 26 extend guarantee to rituals, observances, ceremonies, modes of worship etc. which are integral to the religion.<sup>1</sup> But for such practices to be considered as a part of the religion, it is necessary that such practices be regarded by the said religion as an *essential* and *integral* part.<sup>2</sup> Suffice it to say, "triple talaq" at the same instance is not an essential practice of Islam and hence must be done away with as much haste as possible.

Triple Talaq is a weapon of victimisation of women in the hands of Muslim men. This practice destroys a woman emotionally, socially and economically. It symbolises the subordination, subjugation and suppression of human rights of women, which have already been made available to them by the Holy Quran. The lives of Muslim women cannot be governed by archaic practices like triple talaq. Muslim women should be governed by laws that treat them as equal citizens of democratic India.

The practice of pronouncing unilateral irrevocable Triple Talaq by Muslim husbands does not keep up with the Quran's progressive spirit, neither with the magnanimous ideals of equality and justice of the Indian Constitution.

Firm union of the husband and wife is a necessary condition for a happy family life. Every religion therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage should be avoided. In Islam also no marriage is contracted to be dissolved but in unfortunate circumstances the matrimonial contract is broken. One of the ways of such dissolution is by way of divorce. Under Muslim law the divorce may take place by the act of the parties themselves or by a decree of the court of law.

There are two categories of divorce under the Muslim law:

- I. Extra judicial divorce, and
- II. Judicial divorce

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<sup>1</sup> Shamim Ara v. State of Uttar Pradesh, (2002) 7 SCC 518.

<sup>2</sup> M P Jain, Indian Constitutional Law (LexisNexis, New Delhi, 2014), 7th ed., at p. 1248.

The category of extra judicial divorce can be further subdivided into three types, namely,

- a) By husband- talaq, ila, and zihar.
- b) By wife- talaq-i-tafweez, lian.
- c) By mutual agreement- khula and mubarat.

The second category is the right of the wife to give divorce under the Dissolution of Muslim Marriages Act 1939.

Talaq is an Arabic word which means "Undoing of or release a Knot". It is used to denote the release of a woman from the marriage tie. The express Talaq (by husband), falls into two categories:

- 1.) Talaq-ul-Sunnat
- 2.) Talaq-ul-biddat

Talaq-ul-Sunnat has been further sub-divided into-

- i. *Ahsan*, and
- ii. *Hasan*

The Arabic word '*Ahsan*' means best or very proper. This signifies that the Talaq pronounced in the *Ahsan* form is the very best kind of Talaq. There are conditions that must be satisfied-

1. The husband must pronounce the formula in one single sentence.
2. The pronouncement of divorce must be in a state of tuhr i.e. purity, when the woman is free from her menstrual course.
3. The husband must abstain from intercourse for the period of iddat.

The *Ahsan* form is considered to be the best is because of its revocable nature. The revocation may be either express or may be implied and can be done during the period of iddat. Cohabitation with the wife is an implied revocation of Talaq. After the expiration of the iddat period divorce becomes irrevocable.

The Arabic word '*Hasan*' means 'good'. the Talaq pronounced in *Hasan* form is lesser worth than one pronounced in *Ahsan* form. The following condition must be satisfied to constitute Talaq of *hasan* form:

1. There must be three successive pronouncements of the formula of divorce
2. In the case of menstruating wif, the first pronouncements should be made during a period of *tuhr*, the second during the next *tuhr* and the third during the succeeding *tuhr*.
3. In the case of non-menstruating wife the pronouncements should be made in the interval of 30 days.
4. No sexual intercourse should take place during the three periods of *tuhr*.

And such Talaq becomes irrevocable on the third pronouncements.

The most disapproved form of Talaq is the Talaq-ul-bidat, which is called Triple-Talaq and which is in controversies these days. Sunni law recognises Talaq-ul-biddat, though they think it to be sinful. Shias and Malikis do not recognise this form of divorce. In order to be included in this form of divorce the following requirements in necessary:

- i. Three pronouncements made during a single *tuhre* either in one sentence or in separate sentences.
- ii. A single pronouncement made during a *tuhr* clearly indicating and intention irrevocable to dissolve marriage.

Under triple-talaq, once a definite complete separation has taken place parties so separated cannot remarry without the formality of the woman marrying another man and being divorced from him.

Triple Talaq is a recognised but disapproved form of divorce and is considered by the Islamic jurists as an innovation within the fold of *shariat*. It commands neither the sanction of holy quran nor the approval of the holy prophet (PBUH). It was also not in practice during the life time of first Caliph Abu Bakr, and also for more than 2 years during the second Caliph Umar's time. Hazrat Umar permitted it on account of certain peculiar situation. When the Arabs conquered Syria, Egypt, Persia etc., they found women there much better in appearance as compared to Arabian woman and hence they wanted to marry them but the Egyptian and Syrian women insisted that in order to marry them they should divorce their existing wives instantly by pronouncing three divorces in one sitting. The condition was readily acceptable to the Arabs because they knew that in Islam, divorce is permissible only twice in two separate periods of *tuhr* and its repetition at one sitting is un-Islamic, void and shall not be effective. In this way they could not only marry these women but also retain their existing wives. This fact was reported to second Caliph Hazrat Umar. The Caliph Umar in order to prevent the misuse of religion by the unscrupulous husbands decreed that even repetition of the word Talaq, Talaq, Talaq at one sitting would dissolve the marriage irrevocably. It was however a mere administrative measure of Caliph Umar to meet an emergency situation and not to make it a law permanently. But unfortunately, the Hanafi Jurists later on at the strength of this instant administrative order of second Caliph declared this form of divorce valid and also paved religious sanction to it. At present much inconvenience is being felt by the Muslim community so far as this law of 'triple divorces' is applied in India.<sup>3</sup>

Triple Talaq is also Ultra Vires to the Indian Constitution. The practice of triple Talaq is grossly injurious to the human rights of the Muslim women. This form of Talaq is infested with the malady of inequality which goes against equality which is enshrined in Article 14 of the Indian Constitution. Talaq-ul-biddat distorts the fundamental right against any form of discrimination enshrined in Article 15 of the Indian Constitution. Lastly, turning aside, from normal format of divorce, Talaq-ul-biddat mars the essence of Article 21, the right to life and personal liberty. Apart from fundamental rights, various directives of the state policy are also there such as:

- Article 44 which guarantees continuous endeavours by the state to achieve a uniform civil code;

<sup>3</sup> Aqil Ahmad, Mohammedan Law 174-175 (Revised by Dr. I.A. Khan, 22<sup>nd</sup> ed 2006)

- Article 38 which promises that the state shall strive to secure social order and promote welfare of people;

Muslim Women hardly have any access to justice as law hides behind the elevated wall of Article 25 and 26 which hardly considers women grievances subjugated to their misinterpreted personal laws.

As regards practice of religion, the courts have ruled in many cases that only those practices of whichever religion, as are its essential parts must be legally protected. In other words, protection of non essential religious practices would be the discretion of the state and cannot be claimed to be protected as fundamental rights. Destitution, vagrancy, trafficking of neglected women does not vary with region, religion, caste or creed. The response to the basic right to life based on religion, with which the issue of maintenance of woman is linked, is unconstitutional and unethical.

The practice of triple Talaq is extremely gender discriminatory and is absolutely violative of Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) to which India is a signatory. The Constitution of India not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women. India has ratified various international conventions and human rights instruments committing to secure equal rights of women. Key among them is the ratification of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993.

Empathetically we have to understand that women must be an integral part of law making procedures as far as family law and personal laws are concerned. The harsh reality is that they are left behind to the mercy of those who are not well acquainted with the ideas of equal rights to women, and here is where discrimination slyly creeps in.

We have moved away from the clutches of orthodoxy and fanaticism. This era is an era of empowering the weaker, spreading literacy and providing freedom, so why not should we give women also their due.

I believe, all religions are different paths leading to one single end. Throughout the path all what matters is the well being of all humans and their happiness. We are the members of civilised and progressive society, and therefore we must work to ensure for all of our capable and in-capable, aware and un-aware fellow brothers and sisters the equal treatment, provide reasonable set of laws for their protection and also for the protection of their freedom and ensure their well being throughout there journey on the paths of their religion.

We must not act in the way that is discriminatory in any form to any of the member of our society, be it men or women, child or an adult, rich or poor, fair skinned or dark skinned because in every single of us resides the light of "Paramatma". And behind the happiness of every individual lies the essence of all our service towards our gods.