

TRIPLE TALAQ: LEGALITY AND THE NEED FOR JUDICIAL MANOEUVRE

India is a land where principles like secularism, equality and respect for all are intertwined across all religious and linguistic boundaries throughout its mainland. Such variegated cultural and ethnic diversities often upshot a clash with the legal jurisprudence of the principles enshrined in the legal vertebra. The impediments constructed in light of such principles have always been met with embrace by the nation. Traversing through the rites and rituals and scrutinizing the draconian practices predominant in the religious groups, the state has always kept them on a scale and balanced them at par with their religious sanctity and basic principles enshrined in the Constitution. Be it practice of sati or child marriage state has always been keen to enforce and protect the basic principles elucidated in the Constitution.

Triple Talaq is another such instance where the States' subjects have resorted to the court process for relief. Triple Talaq as a matter of right, is a remedy given to the men by Islam to divorce his wife in case where the wedlock gets stuck in an impasse. The notion of Triple Talaq has evolved into the practice of saying 'Talaq' three times and ending the matrimonial ties abruptly. Whereas the text of Quran contains the waiting period of three months and during such period if the issues and concerns are resolved mutually the wedlock can be continued.

“At-talaaqu marrataan: fa-imsaakum-bima`-ruufin `aw tasriihum-bi-ihsaan. Wa la yahillu lakum `an-ta`khuzuu mimmaa`aatay-tumuuhunna shay-`an `illaaa. Surah Al Baqr, 226. Clear instructions have been elucidated in the Quran that Talaq shall firstly be pronounced twice in the time interval of two months. The intervening period has been provided to reconsider, rethink and reconcile. Post second intervening period if the husband still wishes to continue his stand the third intervening period commences and after its end the decision becomes final. Furthermore if any arduous problem comes again after conciliation then Quran says that the husband shall either keep her in an acceptable manner or release her with good treatment. (The Quran, 2:229) After

the third Talaq has been pronounced the three chances stand exhausted and he shall let her go without taking anything back from the women which the husband might have given. Quran also says that the women who are divorced shall be treated with 'suluk' and 'ihsaan' (grace and kindness).

It is permissible in Quran only if there has been irretrievable breakdown of marriage and it has become impossible to continue the wedlock any further. Such parting shall always be graceful and maximum care shall be adhered that there is no injury inflicted upon the women. The prevalent practice of uttering Talaq thrice out of impulsion or messaging via internet or postcard is anti-Islamic in nature.

Another question posed upon the Court apart from the Constitutional validity of Triple Talaq is that if Triple Talaq is declared unconstitutional what are the other remedies available to the males under Muslim Law, because Muslim women have been provided with the option to divorce under Section 2, Dissolution of Muslim Marriage Act, 1939.

Also, Muslim personal law prescribes that whenever a wife initiates the divorce it converges to be known as Talaq-i-tafwjd or Khula. Each muslim wife is entitled to the right of Khula.

*“The wife’s right to Khula is parallel to men’s right of Talaq like the latter the former too is unconditional”.*¹

If the subject matter in a case is Khula then the court is not duty bound to check whether she wants to dissolve the marriage owing to some genuine reason or merely to marry another person. For Khula if the wife thinks that it is impossible for the marriage to continue then she can easily tell the husband that she needs divorce. If the husband does not agree then the wife can directly approach the court and get the decree of Khula.

Also, under Muslim law when the marriage is dissolved by virtue of mutual consent of the parties to a marriage then it can be termed as Mubara'at. In Islamic system the

¹ A. A. Maududi, Haquq al-Zawjayan 10 (4th ed., 1964).

spouses can walk out of the marital status extra-judicially by mutually agreeing upon the terms and thus dissolve their marriage.

Under Shia law the word Mubara'at must be followed by Talaq or else it would not result in divorce. There must be clear expression of the intention to dissolve the marriage. Mubara'at is considered as irrevocable under both the Shia and Sunni law. Wife needs to undergo the period of iddat and in both the Mubara'at as well as in Khula the court's intervention is not required.

The Apex Court's contention holds right that in case Triple Talaq is declared unconstitutional; a vacuum may result leaving Muslim males no forum to go for divorce. At present they can get divorce instantly unlike females who shall approach the Court and plead under Section 2, Dissolution of Muslim Marriages Act, 1939.

Triple Talaq surely in its present form does raise concerns regarding denial of equal rights to the Muslim Women, but is it so intertwined with the religious sanctity and Islamic notions that it is quintessential to the Islam? The prevailing notions however essential or fundamental in essence to the religion shall be restricted to the aorta of rationality and equal treatment. The Court's conduct further gives rise to the notion that it is restricting itself from stepping into the shoes of legislature. Court's approach is well appreciated but waiting for the Parliament to pass a law entitling Muslim males to undergo and initiate the process of Court of Divorce would again be irksome, subject to majority at both the houses of Parliament. Provisional remedy during this interim period, will be to grant Muslim males similar right to obtain a divorce via court decree under Section 2 of the Dissolution of Muslim Marriage Act, 1939. If adopted it would bring Muslim men under the purview of statutory law and make the Dissolution of Muslim Marriage Act, 1939 gender neutral.

Religion shall not be a reason to deny equal rights, dignity and status to the women enshrined in the Constitution. In 1950, Bombay High Court while dealing with the case of *Narasu Appa Mali*² held that the personal laws are not 'law' under Article 13.

² A.I.R. 1952 Bom. 84.

Court restricted itself by leaving the personal laws in the hands of legislature. It is now the Court's duty to overrule such a decision and extend its powers to the personal laws for the enforcement of fundamental rights. Because the case of *Narasu Appa Mali*³ still stands forth as a precedent for the interpretation of term 'laws' under Article 13 and as a result of the evolution and interpretation accompanied by the social response of these personal laws by the masses, they have proven detrimental to the interests of the women in the society.

Contemporary India needs gender neutral laws and if any law contravenes with the fundamental rights and principles enshrined under the Constitution then such a law shall be subjected to judicial scrutiny. The burden now rests upon the Courts to test and traverse such laws in light of their social acceptability and legal grounding and adopt a gender neutral approach towards the prevailing laws throughout the country.

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³ *Id.*