

## **CONSTITUTIONAL TENNETS AND TRIPPLE TALAQ: AN ANALYTICAL VIEW**

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### **ABSTRACT:**

In the pre-Islamic Arabian society, the position of women was very bad. In those days, the customary laws of Arabia were all in favour of the males. The females were treated as properties and not as human beings. The only object of a marriage was the enjoyment of sex and procreation of children. When Islam came into being, the females were given due social status and they regarded as dignified members of the society. Islam prohibits limitless polygamy and no Muslim is now allowed to marry with more than four wives at a time. So for a happy family life firm union of the husband and wife is a necessary condition. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided.

Under this Article an attempt has been made to understand the loopholes of triple talaq and its impact on human rights of Muslim women. Various types of divorce has also been discussed under this Article as provided under Muslim law. Role played by judiciary with respect to interpretation of triple talaq in the light of constitutional provisions has also been discussed.

Under the present Article it has also been discussed that the practice of irrevocable talaq is violated the fundamental rights of Muslim women. This article has also puts a great stress on the need of Uniform Civil Code. Latest landmark judgments related to triple talaq has also been discussed. Key features of Muslim Women (Protection of Rights on Marriage) Bill, 2018 has also been described under this Article. In the Concluding part of this article various suggestions have also been given.

**Key words: Talaq, irrevocable, divorce, constitution, Muslim women, Islam**

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**\* INTRODUCTION:**

For a happy family life the firm union of the husband and wife is a necessary condition. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially 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. However in whatever manner the divorce is effected it has not been regarded as a rule of life.<sup>1</sup> In Islam, divorce is considered as an exception to the status of marriage.

The Prophet declared that among the things which have been permitted by law, divorce is the worst. Divorce being an evil, it must be avoided as far as possible. But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. Under the following we will discuss the concept of triple talaq under muslim law.

**CONCEPT OF TRIPPLE TALAQ UNDER MUSLIM LAW**

Talaq is an Arabic word and its literal meaning is ‘to release’. Under Muslim Law, Talaq means repudiation of marriage by the husband. In Islam “Talaq is permitted only when the wife by her conduct or her words does injury to the husband or happens to be impious”.<sup>2</sup> The basis of divorce in Islamic law is the inability of the spouses to live together rather than any specific cause or guilt of a party on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are various kinds of talaq under Muslim law, which will be discussed hereafter.

**Kinds of Talaq:** We will discuss the various categories of divorce under Muslim law under the following.

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<sup>1</sup> Dr. R. K. Sinha Muslim Law, p. 81.

<sup>2</sup> Ameer Ali: Muhammadan Law, Vol II., III, p.512.

## 1. Extra Judicial Divorce

### a. By husband

- (i) Talaq
- (ii) Ila
- (iii) Zihar

### b. By wife (delegated talaq)

### c. By mutual agreement (i) Khula and (ii) Mubarat

## 2. Judicial divorce under the Dissolution of Muslim Marriage Act, 1939.

### 1. Extra Judicial Divorce

#### (i) Talaq:

Talaq in its primitive sense means dismissal. In its literal meaning, it means “setting free”, “letting loose”, or taking off any “ties or restraint”. In Muslim Law it means freedom from the bondage of marriage and not from any other bondage. In legal sense it means dissolution of marriage by husband using appropriate words. In other words talaq is repudiation of marriage by the husband in accordance with the procedure laid down by the law. Talaq is also of two kinds:

**1. Talaq-ul-sunnat or revocable talaq:** It is regarded to be the approved form of talaq. It is based on Prophets’s tradition (Sunna). As a matter of fact, the Prophet always considered Talaq as an evil. With this idea in mind, the Prophet recommended only revocable talaq, because in this form, the evil consequences of Talaq do not become final at once. There is possibility of compromise and reconciliation between husband and wife.<sup>3</sup>

#### Talaq-ul-sunnat has two forms:

**a. Talaq Ahsan (Most proper) :** It consists of a single pronouncement of divorce made in the period of tuhr of wife. Tuhr is the period of wife’s purity, i.e. a period between two menstruations, or at any time, if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period of iddat. The requirement that the pronouncement be made during a period of tuhr applies only to oral divorce and does not apply to talaq in writing. Similarly, this requirement is not applicable when the wife has passed the age of menstruation or

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<sup>3</sup> Dr. R. K. Sinha Muslim Law, p. 86.

the parties have been away from each other for a long time, or when the marriage has not been consummated. The advantage of this form is that divorce can be revoked at any time before the completion of the period of iddat, thus hasty, thoughtless divorce can be prevented. The revocation may be effected expressly or impliedly

**b. Talaq Hasan (proper) :** This Talaq is also regarded to be proper and approved form of Talaq. In this form too, there is a provision for revocation. But it is not the best mode because evil words of Talaq are to be pronounced three times in successive tuhrs. The formalities required under this form are as under:

(a) The husband has to make a single declaration of Talaq in a period of tuhr.

(b) In the next tuhr, there is another single pronouncement for the second time.

(c) But, if no revocation is made after the first or second declaration then lastly the husband is to make the third pronouncement in the third purity. As soon as this third declaration is made, the talaq becomes irrevocable, and the marriage dissolves and the wife has to observe the required iddat.

**2. Talaq-ul-biddat or irrevocable talaq:** This talaq is also known as Talaq-ul-Bain. It is disapproved mode of divorce. A peculiar feature of this talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. The prophet never approved a talaq in which there was no opportunity for reconciliation. It came into existence during the second century of Islam. This mode of talaq was introduced by the Omayyad Kings because they found the checks in the Prophet's formula of Talaq inconvenient to them.<sup>4</sup> It has two forms: (i) the triple declaration of talaq made in a period of purity, either in one sentence or in three, (ii) the other form constitutes a single irrevocable pronouncement of divorce made in a period of tuhr or even otherwise. This type of talaq is not recognized by the Shias. This form of divorce is condemned. It is considered heretical, because of its irrevocability. There are also two other modes of talaq *i.e.* ila and zihar which can be exercised by muslim husband against his wife.

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<sup>4</sup> Ameer Ali: Mohammedan Law, Part 11, Ed. 111. P.514.

**b. Divorce by wife (delegated talaq)**

**Delegated Divorce( Talaq-e-Tafweez):** A Muslim husband has unrestricted right to divorce his wife whenever he likes. This right is so absolute that he may exercise it either himself or may delegate his right to another person. In other words, instead of pronouncing the Talaq himself he may give his right of divorce to anyone else, including his own wife. Divorce by such other person, who acts as agent of the husband under his authority, is called Talaq-e-Tafweez or delegated divorce. In the delegated divorce the Talaq pronounced by that other person is as effective as if it was made by the husband himself and the marriage dissolves. The husband may delegate his right of divorce to his own wife and authorise her to pronounce Talaq. According to Fyzee,<sup>5</sup> this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court and is now beginning to be fairly common in India. The authority is given to the wife under an agreement at the time of the marriage or any time after it. The delegation of the power of divorce to the wife may either be permanent or temporary i.e. only for a specified duration. A temporary delegation of power is irrevocable but a permanent delegation may be revoked by the husband. Where a wife is given the option to divorce herself under a Tafweez, she cannot be compelled to exercise her right. She may or may not exercise the right. Mere happening of the event under which the wife is authorised to divorce herself, is not sufficient to dissolve the marriage; the wife must also exercise her right expressly.<sup>6</sup> It is to be noted that after delegating his authority the husband himself is not debarred from pronouncing Talaq.<sup>7</sup>

**c. By mutual consent:** Under Muslim Law, divorce may take place also by mutual consent of the husband and wife. There are two forms of divorce by mutual consent:

(i) Khula and (ii) Mubarat:

(i) **Khula :** The word khula, in its original sense means “to draw” or “dig up” or “to take off” such as taking off one’s clothes or garments.<sup>8</sup> It is said that the spouses are like clothes to each other and when they take khula each takes off his or her clothes, i.e., they get rid of each other. It

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<sup>5</sup> Fyzee: Outlines of Muhammadan Law, Ed. IV, p. 159.

<sup>6</sup> Aziz v. Mst. Naro, AIR (1955) HP 32.

<sup>7</sup> Dr. R. K. Sinha Muslim Law, p. 94.

<sup>8</sup> Dr. R. K. Sinha Muslim Law, p. 94.

is an agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property. Although consideration for Khula is essential, the actual release of the dower or delivery of property constituting the consideration is not a condition precedent for the validity of the khula.<sup>9</sup> Once the husband gives his consent, it results in an irrevocable divorce. The husband has no power of cancelling the 'khul' on the ground that the consideration has not been paid. The consideration can be anything, usually it is mahr, the whole or part of it. But it may be any property though not illusory.

**(ii) Mubarat:** In mubarat, both the parties are equally willing to dissolve the marriage. Thus, the proposal may emanate from either side. In mubarat both, the husband and the wife are happy to get rid of each other. Among the Sunnis when the parties to marriage enter into a mubarat all mutual rights and obligations come to an end. Among the Sunnis no specific form is laid down, but the Shias insist on a proper form. According to Shia Law the word mubarat should be followed by the word talaq, otherwise no divorce would result. They also insist that the pronouncement must be in Arabic unless the parties are incapable of pronouncing the Arabic words. Intention to dissolve the marriage should be clearly expressed. Among both, Shias and Sunnis, mubarat is irrevocable. Other requirements are the same as in khula and the wife must undergo the period of iddat.

**2. JUDICIAL DIVORCE:** By judicial divorce we mean a divorce by the order of a court of law.

#### **Dissolution of Muslim Marriages Act 1939:**

This Act may be regarded as a landmark in respect of matrimonial relief to a Muslim wife. The wife's right of divorce, which was denied to her due to misinterpretation and misconception of Islamic law by the courts, was restored to her under the Act. This Act contains certain grounds on the basis of any one of which a wife married under Muslim law, may file a petition for divorce.<sup>10</sup> A woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution of her marriage on any one or more of the following grounds, namely:-

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<sup>9</sup> Quran: Sura II, Ayat 229.

<sup>10</sup> Section 2 of the Dissolution of Muslim Marriages Act, 1939.

• *The Husband is missing for four years*<sup>11</sup>: If the husband is missing for a period of four years the wife may file a petition for the dissolution of her marriage. The husband is deemed to be missing if the wife or any such person, who is expected to have knowledge of the husband, is unable to locate the husband. Section 3 provides that where a wife files petition for divorce under this ground, she is required to give the names and addresses of all such persons who would have been the legal heirs of the husband upon his death. The court issues notices to all such persons appear before it and to state if they have any knowledge about the missing husband. If nobody knows then the court passes a decree to this effect which becomes effective only after the expiry of six months. If before the expiry, the husband reappears, the court shall set aside the decree and the marriage is not dissolved

• *Husband's failure to maintain the wife for two years*<sup>12</sup>: It is a legal obligation of every husband to maintain his wife, and if he fails to do so, the wife may seek divorce on this ground. A husband may not maintain his wife either because he neglects her or because he has no means to provide her maintenance. In both the cases the result would be the same. The husband's obligation to maintain his wife is subject to wife's own performance of matrimonial obligations. Therefore, if the wife lives separately without any reasonable excuse, she is not entitled to get a Judicial divorce on the ground of husband's failure to maintain her because her own conduct disentitles her from maintenance under Muslim Law.<sup>13</sup>

• *Imprisonment of the husband for seven years or upwards*:<sup>14</sup> The wife's right of judicial divorce on this ground begins from the date on which the sentence becomes final. Therefore, the decree can be passed in her favour only after the expiry of the date for appeal by the husband or after the appeal by the husband has been dismissed by the final court.

• *Husband's failure to perform, without reasonable cause, his marital obligations for a period of three years*:<sup>15</sup> The Act does not define 'marital obligations of the husband'. There are several marital obligations of the husband under Muslim law. But for the purpose of this clause husband's failure to perform only those conjugal obligations may be taken into account which

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<sup>11</sup> Section 2 (i) of the Dissolution of Muslim Marriages Act, 1939.

<sup>12</sup> Section 2 (ii) of the Dissolution of Muslim Marriages Act, 1939.

<sup>13</sup> Rabia Khatoon v Mukhtar Ahmad, AIR (1966)

<sup>14</sup> Section 2(iii) of the Dissolution of Muslim Marriages Act 1939

<sup>15</sup> Section 2(iv) of the Dissolution of Muslim Marriages Act 1939

are not included in any of the clauses of Section 2 of this Act.

- *Husband's impotency:*<sup>16</sup> For getting a decree of divorce on this ground, the wife has to prove that the husband was impotent at the time of the marriage and continues to be impotent till the filing of the suit. Before passing a decree of divorce on this ground, the court is bound to give to the husband one year to improve his potency provided he makes an application for it. If the husband does not give such application, the court shall pass the decree without delay. In *Gul Mohd. Khan v. Hasina*<sup>17</sup> the wife filed a suit for dissolution of marriage on the ground of impotency. The husband made an application before the court seeking an order for proving his potency. The court allowed him to prove his potency.

- *If the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease:*<sup>18</sup> The husband's insanity must be for two or more years immediately preceding the presentation of the suit. But this act does not specify that the unsoundness of mind must be curable or incurable. Leprosy may be white or black or cause the skin to wither away. It may be curable or incurable. Venereal disease is a disease of the sex organs. The Act provides that this disease must be of incurable nature. It may be of any duration. Moreover even if this disease has been infected to the husband by the wife herself, she is entitled to get divorce on this ground.

- *Option of Puberty by wife:*<sup>19</sup> This ground for the dissolution of marriage is not based on any 'fault' of the husband. It is an independent provision under which a marriage is voidable at the option of the wife. This clause gives a Muslim wife a option to repudiate the marriage before attaining the age of eighteen years, provided the marriage has not been consummated.

- *Cruelty by the husband:*<sup>20</sup>

In *Syed Ziauddin v. Parvez Sultana*,<sup>21</sup> Parvez Sultana was a science graduate and she wanted to take admission in a college for medical studies. She needed money for her studies. Syed

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<sup>16</sup> Section 2(v) of the Dissolution of Muslim Marriages Act 1939

<sup>17</sup> AIR (1988) J & k. 6.

<sup>18</sup> Section 2(vi) of the Dissolution of Muslim Marriages Act 1939

<sup>19</sup> Section Section 2(vii) of the Dissolution of Muslim Marriages Act 1939

<sup>20</sup> Section 2(viii) of the Dissolution of Muslim Marriages Act 1939

Ziauddin promised to give her money provided she married him. She did. Later she filed for divorce for non-fulfillment of promise on the part of the husband. The court granted her divorce on the ground of cruelty. Thus we see the court's attitude of attributing a wider meaning to the expression cruelty. In *Zubaida Begum v. Sardar Shah*,<sup>22</sup> a case from Lahore High Court, the husband sold the ornaments of the wife with her consent. It was submitted that the husband's conduct does not amount to cruelty. In *Itwari v. Asghari*,<sup>23</sup> the Allahabad High Court observed that Indian Law does not recognize various types of cruelty such as 'Muslim cruelty', 'Hindu cruelty' and so on, and that the test of cruelty is based on universal and humanitarian standards; that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health.

• *Any other ground which is recognized as valid for the dissolution of marriage under Muslim law*<sup>24</sup>: Section 2 (ix) a residuary clause under which a wife may seek dissolution of her marriage on any ground which could not be included in this section, but is recognized under the Muslim personal law. According to this clause if the husband charges the wife with adultery and the charge is false, the wife is entitled for the dissolution of her marriage.

**Legal effects of divorce:** Whatever be the mode, a divorce operates as a complete severance of the matrimonial relationship between husband and wife. After completion of divorce, the marriage is dissolved and the parties cease to be husband and wife. Cohabitation between the husband and wife becomes unlawful after completion of the divorce. The wife is required to observe an iddat of three lunar months after the divorce or, if pregnant, till the delivery of the child. Both the parties are free to contract another marriage with other persons. The unpaid dower becomes immediately payable to the divorced wife.

**CONSTITUTIONALITY OF TRIPLE TALAQ:** India is a secular country and has number of religious communities living within it. By the nature of laws in India, personal laws are highly regarded and given supreme importance. But if any such personal law violates the fundamental principles of our constitution, it can be struck down by the Apex court. The Constitution of India

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<sup>21</sup> (1979) II Andh. LT 79.

<sup>22</sup> (1943) 210 IC 587

<sup>23</sup> AIR 1960 All. 684.

<sup>24</sup> Section 2(ix) of the Dissolution of Muslim Marriages Act 1939

passed in 1950 is unique in itself as it gives constitutional status to the fundamental rights of human beings such as right to equality and right to life. The active role played by the judiciary in the form of judicial activism in the recent past in handling Public Interest Litigation cases brought before various High Courts and Supreme Court of India by public spirited citizens pertaining to various aspects of triple talaq as it violated the basic human rights of Muslim women. Indian judiciary both (High Courts and Supreme Court) is taking active interest on issues pertaining to violation of basic rights of Muslim women through misuse of triple Talaq by Muslim Men. Recently Bombay High Court in Shakil Ahmad Jalaluddin Shaikh vs. Vahida Shakil Shaikh<sup>25</sup> has held that, mere existence of a document like talaqnama, is not sufficient to render a valid Talaq. Justice M.S. Sonak held that, for a valid Talaq, it is not sufficient that the prescribed expressions are pronounced thrice but the stages it is preceded by, are required to be pleaded and proved before the Court, if disputed by wife.

The following constitutional provisions challenge the validity of Triple Talaq practiced by Muslim Men against Muslim women:

#### **RIGHT TO EQUALITY AND TRIPLE TALAQ:**

Article 14 deals with right to equality as well as equality before law. It is provided that the state shall not deny to any person equality before the law or the equal protection of laws within the territory of India. Article 15 deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. It is provided that the state shall not discriminate against any citizen on grounds only of religion, race, sex, place of birth or any of them.

On the other hand according to Muslim personal law a husband may divorce his wife by repudiating the marriage without giving any specific cause or reason. Pronouncement of such words which signify his intention to divorce the wife is sufficient. The Islamic personal law gives to the husband an absolute authority to terminate the marriage by pronouncing Talaq because in a society dominated by males, the conjugal happiness primarily depends upon the efforts of the husbands. Whenever a husband finds that the marriage cannot be continued happily he is empowered to dissolve the marriage. So there is always a danger or threat regarding misuse of this absolute authority of talaq by the husband. There is no legal control over the unfettered right of a Muslim husband to dissolve the marriage by uttering few words. So the practice triple

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<sup>25</sup> <http://www.livelaw.in> Writ petition no.2207 of 2007, the said Judgement was pronounced on 20 January 2016.

Talaq is absolutely injurious to the human rights of the Muslim women. This form of talaq is manifested with the malady of inequality which violates the right to equality of Muslim women enshrined under Article 14 of the Indian Constitution. In *A.S Parveen Aaktar v. Union of India*,<sup>26</sup> It was held that Triple Talaq is Ultra Vires to the Indian Constitution. Talaq-ul-biddat (irrevocable talaq) 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.<sup>27</sup> Is it right to believe that a marriage which is entered by the will of both can be unilaterally destroyed. In fact, in the instant case of *Praveen Akhtar*<sup>28</sup>, the inequality and arbitrariness clearly reflects in the fact that the woman was not even told directly by the husband about the talaq but was informed by her father. Thus how can this form of talaq be in line with the Right to Equality? Even commercial contracts cannot be broken in this manner; are human relationships so fragile and cheap? In *Rahmat Ullah v. State of U.P.*<sup>29</sup>, the Allahabad High Court, has observed that an irrevocable talaq is unlawful because this kind of talaq is against the dictates of the Holy Quran and is also against the provisions of the Constitution of India. In *Shamim Ara vs State of UP*<sup>30</sup> the Supreme Court invalidated arbitrary triple talaq and held that in order to be valid, talaq has to be pronounced as per the Quranic injunction. The term “pronounce” was explained as “to proclaim, to utter formally, to declare, to articulate”. The Supreme Court said, “None of the ancient holy books or scriptures mention such form of divorce. No such text has been brought to our notice which provides that a recital in any document, incorporating a statement by the husband that he has divorced his wife could be an effective divorce on the date on which the wife learns of such a statement contained in an affidavit or pleading served on her.” Recently on 8<sup>th</sup> December 2016<sup>31</sup> Allahabad High Court termed the triple talaq as unconstitutional and it violates the basic rights of Muslim women. Allahabad High Court reportedly said that no Personal Law Board is above the Constitution. So from the above it can be said that the practice of triple talaq

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<sup>26</sup> *A.S Parveen Aaktar v. U.O.I*, 2003-1-LW (Crl) 115

<sup>27</sup> *Ibid*

<sup>28</sup> *Ibid*

<sup>29</sup> *U.P. Civil and Rev. Cases Reporter* 1994 (1) pp.530, 611 and 612.

<sup>30</sup> *JT* 2002 (7) SC 520.

<sup>31</sup> [http://www.dnaindia.com/india/report-triple-talaq\\_visited\\_on\\_28/12/2016](http://www.dnaindia.com/india/report-triple-talaq_visited_on_28/12/2016) at 09.50AM

among Muslims is violative of fundamental rights like gender equality and the ethos of secularism,<sup>32</sup> a key part of the basic structure of the Indian Constitution.

### **RIGHT TO LIFE AND TRIPLE TALAQ:**

Article 21 deals with right to life. It is provided that no person shall be deprived of his life or personal liberty except according to procedure established by law. The Indian judiciary has included various rights under the umbrella of Right to life and liberty such as right to free and fair trial, right to privacy, right to clean environment, right to food, sleep and even electricity. The Supreme Court as well as High Courts of India in a number of cases,<sup>33</sup> from time to time, has held that the right to life conferred under Article 21 of the Constitution of India includes the right to live with dignity and therefore arbitrary practice of Triple talaq by Muslim husband's against Muslim wife's violated the article 21 as well as fundamental duties provided under Indian Constitution because it is the mode of divorce which amounts to 'practice derogatory to the dignity of the women.'<sup>34</sup>

In *Nagma Bibi VS State of Orissa*<sup>35</sup> the court held that "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." Such a practice violated the Muslim's women right to life too. This practice is a particular confluence of Patriarchal conservatism and ill informed and shallow interpretation of religious text, that too to the prejudice of women. When Talaq is said abruptly, then there is no possibility or scope for any settlement, and any livelihood choices or options for women who, just are rendered alone and single without any support system. It is a single right given to men, where men can decide, choose and deliver at their own choice. In *Dagdu VS. Rahimbi Dagdu Pathan*<sup>36</sup> the Bombay High court held that the Quran states that husband could only divorce his wife for reasonable causes; that Talaq even if it is oral must be proved before the court if it is contested.

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<sup>32</sup> Article 25 of Indian Constitution.

<sup>33</sup> *Ahmedabad Women Action Group (AWAG) & Ors. v. Union of India*, AIR 1997 SC 3614; *Mst. Zohra Khatoon v. Mohd. Ibrahim*, AIR 1981 SC 1243.

<sup>34</sup> *In Rahmat Ullah v. State of U.P.* U.P. Civil and Rev. Cases Reporter 1994 (1) pp.530, 611 and 612.

<sup>35</sup> (2003) 6 SCC 611.

<sup>36</sup> Equivalent citations: 2003 (1) BomCR 740.

In *Kunhimohammed v. Ayishakutty*<sup>37</sup> Kerala High Court held that Muslim Personal Law tolerating polygamy and permitting arbitrary and unilateral termination of marriage by pronouncement of talaq by the husband offend the constitutional fundamental rights to equality and life under Articles 14 and 21 of Muslim women. Recently on 22nd August 2017 Supreme court of India in *Shayara Bano vs Union Of India And Ors*<sup>38</sup> declared the practice of *talaq-e-bidat unconstitutional* which provided absolute right to Muslim men to divorce their wives immediately and irrevocably, on the basis that it violated the Article 14, 15 and 21 of Constitution of India. Supreme Court was also held that the practice of irrevocable triple talaq violates the basic human rights of women as well as their civil, economic, social and cultural rights as envisaged in international treaties and covenants.

**UNIFORM CIVIL CODE AND TRIPLE TALAQ:** Article 44 of the Constitution provided that “the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.” Uniform civil code is the proposal to replace the personal laws based on the scriptures and customs of each major religious community in India with a common set governing every citizen. These laws are distinguished from public law and cover marriage, divorce, inheritance, adoption and maintenance. The Muslim personal law<sup>39</sup> in India was enacted in 1937 by the British Government. Section 2 of the Shariat Act provides for the dissolution of marriage among Muslim couples. It also includes the divorce by triple talaq which gave a Muslim husband absolute authority to repudiate the marriage. According to this section a husband shall divorce his wife by repudiating the marriage without giving any specific cause or reason. So it is totally an arbitrary and violative of Constitutional provisions because the present Muslim law in force in India is Anglo-Muhammadan law based on English commentaries and translations. It is not based on the Quran, the Shariah. English judges on the Privy Council, ignorant of the Quran, held in 1897 that the courts in India should not “put their own construction on the Quran in opposition to the express ruling of commentators”.<sup>40</sup> In *Mohammed Ahmed Khan v. Shah Bano Begum*<sup>41</sup> Chief Justice of India, Y.V. Chandrachud, came out strongly in favour of a uniform

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<sup>37</sup> (2010 (2) KHC 63).

<sup>38</sup> Writ Petition (C) No. 118 of 2016.

<sup>39</sup> Muslim Personal Law (Shariat) Application Act, 1937.

<sup>40</sup> Indian Express, AG Noorani, 15 December, 2015.

<sup>41</sup> AIR (1985 SC 945).

civil code, observing that, “A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies.” In *John Vallamattom v. Union of India*<sup>42</sup> Chief Justice V.N.Khare held that the common civil code would help the cause of national integration.

In *Sarla Mudgal v. Union of India*<sup>43</sup> the Supreme Court directed the Central Government through the Prime Minister to take a fresh look at Article 44. Justice V. R. Krishna Iyer ruled in the Kerala High Court<sup>44</sup> that “the view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions... Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce... It is a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage... Commentators on the Quran have rightly observed — and this tallies with the law now administered in some Muslim countries like Iraq — that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quran laid down and the same misconception vitiates the law dealing with the wife’s right to divorce. After quoting from the Quran and the Prophet, Galwash concludes that “divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting reconciliation have failed, the parties may proceed to a dissolution of the marriage by ‘talaq’ or by ‘khula’.” So there is a great need to enact uniform civil code so that the rights of Muslim women should be protected against such a discriminatory and arbitrary divorce.<sup>45</sup> Kerala High Court in *Agnes Alias Kunjumol vs Regeena Thomas*<sup>46</sup> on 18 May, 2010 has made it clear that Articles 25 and 26 are no impediments for promulgating a uniform civil code which is an absolute necessity. But, other considerations seem to deter the legislature from codifying the laws and having a uniform civil code.

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<sup>42</sup> AIR 2003 SC 2902.

<sup>43</sup> AIR 1995 SC 1531.

<sup>44</sup> *Yousuf Rawther vs Sowramma* ( AIR 1971 Ker 261).

<sup>45</sup> *Ibid.*

<sup>46</sup> RSA.No. 703 of 2009.

## **KEY FEATURES OF MUSLIM WOMEN (PROTECTION OF RIGHTS OF MARRIAGE) ORDINANCE 2018:**

There was an urgent requirement to enact such type of legislation which protects the human rights and dignity of Muslim women against the arbitrary practice of triple talaq. In 2017 in compliance with the directions of Supreme Court, the Union Government has brought a law to restrict the practice of irrevocable talaq which is arbitrarily exercising by Muslim men. The title and official name of the law is the Muslim Women (Protection of Rights of Marriage) Ordinance 2018. The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was promulgated on September 19, 2018. The Muslim Women (Protection of Rights on Marriage) Bill, 2018 was introduced and passed in Lok Sabha on December 28, 2017 and is pending in Rajya Sabha.

According to the provisions of this ordinance practice of irrevocable talaq is illegal and void. The practice of such talaq results in an imprisonment of three years for the husband. To prevent the misuse of such law the government has inserted various provisions such as bail for the accused before trial. The various characteristics of this ordinance are under the following:

- The present Ordinance is applicable to the whole of India except the State of Jammu and Kashmir
- In accordance with the provisions of said Ordinance, any pronouncement of 'talaq' by a Muslim husband to his wife in any manner, spoken or written, shall be void and illegal.
- Any Muslim husband who practices such 'talaq' orally or in writing shall be imprisoned upto three years in jail. The punishment may be also extended.
- Practice of triple talaq is non- bailable offence.
- The Ordinance also states that despite the presence of general laws in force, if a Muslim man pronounces 'talaq' to his wife, then the woman and her children are entitled to receive an allowance for subsistence. Such amount can be determined by a Judicial Magistrate of the First Class.
- The Ordinance also provided that a Muslim woman is entitled to the custody of her minor children even if her husband has pronounced 'talaq' to her.
- The offence is pronouncing talaq is cognizable if the Muslim woman on whom it is pronounced, communicates the information to a police officer.

- The offence is also compoundable, if the Muslim woman insists for the same and the Magistrates allows certain terms and conditions which he may determine.
- A person accused of this offence cannot be granted bail unless an application is filed by the accused after a hearing in the presence of the Muslim woman (on whom talaq is pronounced) is conducted and the Magistrate is satisfied about the reasonable grounds for granting bail.

Thus these are the various key features of the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018. This ordinance was promulgated to prevent the barbaric and inhuman practice of triple talaq by Muslim Husbands against their wives.

### **CONCLUSION AND SUGGESTIONS:**

From the above it is concluded that the practice of triple talaq among Muslims is arbitrary and against the Quranic values. Divorce through irrevocable talaq is not lawful because it is against the provisions of Quran. Referring the relevant provisions of Quran the the various High Courts in India observed that Talaq-e-bidai i.e. irrevocable talaq is not valid under shia and maliki law and even though Hanifi and maliki law recognize it, but an irrevocable talaq given in one sitting would be sinful and against the mandate of Holy Quran. It is also concluded that the practice of irrevocable talaq by Muslim Husband is against the provisions of the Constitution of India because it gives opportunity to the husband to dissolve the marriage by a single pronouncement without any reason or fault of the wife. It is the mode of divorce which amounts to 'practice derogatory to the dignity of the women. So irrevocable talaq appears to be violative of the Fundamental Duties as provided in Article 51-A(a),<sup>47</sup> (e),<sup>48</sup> (f),<sup>49</sup> (h)<sup>50</sup> of the Constitution and fundamental rights provided under Article 14, Article 15 and Article 21 of the Constitution. Triple Talaq is a weapon of victimisation of Muslim women in the hands of Muslim men. Triple Talaq destroys a woman dignity and obstructs the Muslim women progress in the society and it also economically, socially and emotionally degrade the Muslim women. It can also be said the

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<sup>47</sup> Duty to abide by the constitution and respect its ideal and institutions.

<sup>48</sup> Duty to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional diversities, to renounce practices derogatory to the dignity of women.

<sup>49</sup> To value and preserve the rich heritage of our composite culture.

<sup>50</sup> To to develop the scientific temper, humanism and the spirit of inquiry and reform.

Section 2 of the Muslim personal law<sup>51</sup> Application Act is invalid and unconstitutional as it is repugnant to natural justice and the rights enshrined under several articles of the constitution of India. The Government should take efforts to to enact uniform civil code for the whole of the country so that the rights of Muslim women should be protected against such a discriminatory and arbitrary divorce. Some various suggestions have been given to curb such discriminatory practice of divorce by Muslim husband against Muslim wife:

- (1) Uniform civil code should be enacted for whole of the country so that rights of women should be protected against arbitrariness of personal laws.
- (2) Uniform civil code should include marriage, divorce, adoption, guardianship, maintenance, succession and inheritance which are governed by personal laws and customary practices of various religious denominations in India.
- (3) Personal laws and customary practices of various religious denominations in India should be codified to bring them in line with fundamental rights.
- (4) Uniform civil code or codification of such customary practices of various religious denominations should ensure gender equality.
- (5) Practices of polygamy, polyandry and similar practices should be banned and regulated strictly.
- (6) The practice of triple talaq should be abolished in toto.
- (7) There should be uniform age of consent for marriage across all personal laws and customary practices.
- (8) All the religious denominations should have common grounds for divorce.
- (9) Compulsory registration of marriage should be implemented strictly.
- (10) Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 should be strictly implemented. The Government must follow the guidelines of Supreme Court given in Shayara Bano vs Union Of India And Ors.<sup>52</sup>

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<sup>51</sup> Muslim Personal Law (Shariat) Application Act, 1937.

<sup>52</sup> Writ Petition (C) No. 118 of 2016.

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