

## TRIPLE TALAQ: AN OVERVIEW

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### ABSTRACT

Through this paper author would like to critically analyze the judgement passed by honourable Supreme Court of India with regard to Triple Talaq. The judgement declared the practice of triple talaq as null and void. In furtherance to this under Modi Government, Loksabha passed

**The Muslim women (Protection of rights on marriage) Bill 2018** through which laws became more stringent for protection of Muslim women. The bill makes all declaration of talaq, including in written or electronic form, to be void and illegal. It defines talaq as *talaq-e-biddat* or any other similar form of talaq pronounced by a Muslim man resulting in instant and irrevocable divorce . Talaq-e-biddat refers to the practice under Muslim personal laws where pronouncement of word 'talaq' thrice in one sitting by a Muslim man to his wife results in an instant and irrevocable divorce.

Also through this paper author will ponder over the atrocities faced by Muslim women due to instant divorce .A collective study and background of triple talaq is analysed thoroughly through this research paper. In addition to this a comparative study is drawn between Muslim and non Muslim countries where this practice is prevalent since decades. In India this practice infringes various constitutional rights of Muslim women and creates gender inequality. Hence author has compiled detailed research about triple talaq and its historical germination into derogatory practices for women around the nation.

## INTRODUCTION

Triple talaq is a form of divorce that was practised in India, whereby a Muslim man could legally divorce his wife by pronouncing *talaq* (the Arabic word for divorce) three times. The pronouncement could be oral or written, or, in recent times, delivered by electronic means such as telephone, SMS, email or social media. The man did not need to cite any cause for the divorce and the wife need not have been present at the time of pronouncement. After a period of *iddat*, during which it was ascertained whether the wife is pregnant, the divorce became irrevocable. In the recommended practice, a waiting period was required before each pronouncement of *talaq*, during which reconciliation was attempted. However, it had become common to make all three pronouncements in one sitting. While the practice was frowned upon, it was not prohibited. A divorced woman could not remarry her divorced husband unless she first married another man, a practice called *nikah halala* until she remarried; she retained the custody of male toddlers and prepubescent female children. Beyond those restrictions, the children came under the guardianship of the father.

Triple talaq is a 1,400 year-old practice among Sunni Muslims. It is "manifestly arbitrary" and allows a man to "break down [a] marriage whimsically and capriciously".

Triple talaq as a practice is not mentioned in the Quran or Sharia law. It is also largely disapproved by Muslim legal scholars. Several Islamic countries, including Pakistan and Bangladesh, have banned it, although it is technically legal in Sunni Islamic jurisprudence. Triple talaq, in Islamic law, is based upon the belief that the husband has the right to reject or dismiss his wife with good grounds. If the wife wants to end her marriage and her husband does not agree to give a talaq, she has to comply with proceedings under the Dissolution of the Muslim Marriages Act. As far as Sharia is concerned she needs to obtain a release from the marriage bond by the husband agreeing to such, by granting a *Khula*, or if he refuses to seek the dissolution of the marriage (*faskh*) by order of a sharia court judge (*qazi*).

The All India Muslim Personal Law Board (AIMPLB),<sup>1</sup> a non-governmental organisation, had told the Supreme Court that women could also pronounce triple talaq, and could execute *nikahnamas* that stipulated conditions so that the husbands could not pronounce triple talaq. The practice of instant divorce is already banned in 22 Muslim-majority countries, including Pakistan.

In September 2016, AIMPLB had filed an affidavit in the Supreme Court as a response to petitions by Shayara Bano and others who were opposing triple talaq. It stated that "Sharia grants right to divorce to husbands because men have greater power of decision-making."

The government has set up a ministerial committee to consider a legislation to put an end to instantaneous triple talaq

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<sup>1</sup> AIMPLB Home Page

## **HISTORICAL BACKGROUND**

Muslim family affairs in India are governed by the **Muslim Personal Law (Shariat) Application Act, 1937** (often called the "Muslim Personal Law"). It was one of the first acts to be passed after the **Government of India Act, 1935** became operational, introducing provincial autonomy and a form of **diarchy** at the federal level. It replaced the so-called "Anglo-Mohammedan Law"

Previously operating for Muslims, and became binding on all of India's Muslims.

The **shariat** is open to interpretation by the **ulama** (class of Muslim legal scholars). The **ulama** of **Hanafi** Sunnis considered this form of divorce binding, provided the pronouncement was made in front of Muslim witnesses and later confirmed by a sharia court. However, the **ulama** of **Ahl-i Hadith** **Twelver** and **Musta'li** persuasions did not regard it as proper. Scholar **Aparna Rao** states that, in 2003, there was an active debate among the **ulama**.

In traditional Islamic jurisprudence, triple talaq is considered to be a particularly disapproved, but legally valid, form of divorce. Changing social conditions around the world have led to increasing dissatisfaction with traditional Islamic law of divorce since the early 20th century and various reforms have been undertaken in different countries. Contrary to practices adopted in most Muslim-majority countries, Muslim couples in India are not required to register their marriage with civil authorities. Muslim marriages in India are considered to be a private matter, unless the couple decided to register their marriage under the Special Marriage Act of 1954. Owing to these historical factors, the checks that have been placed on the husband's unilateral right of divorce by governments of other countries and the prohibition of triple talaq were not implemented in India.

Muslim law rests on the four-fold pillars of the **fiqh**, namely<sup>2</sup>: the **Quran** (**kitab**), the **Sunnah** (**Hadiths**)<sup>3</sup>, the **Ijma**<sup>4</sup> and **Qiyas**<sup>5</sup>. A 'principle' to become 'law' must find a place in the above mentioned sources. If the solution of a problem is given in the Quran then it is the final ruling of **Shari'ah**. If there is no clear exposition in the Quran, we look at the traditions of the Prophet documented in the form of **hadiths** by his companions. If the problem has no solution in either of the two then only is resort taken to **Ijma**.<sup>6</sup> There is no Quranic basis to establish that three divorces on a single occasion will amount to an irrevocable divorce; in fact the Prophet (PBUH) despised divorce and described marriage as his **Sunnat**. The Quran lays down only two kinds of divorces i.e. **Talaq-Ahsan** and **Talaq-Hasan** the same being in conformity with the dictates of Prophet (PBUH). The above two forms are considered to be the most proper forms of pronouncing the divorce. The third form i.e. **Talaq-ul-Bidat**, is considered to be the most sinful, innovated

<sup>2</sup> MULLA, Principles of Mahomedan Law, Lexis Nexis-Butterworths (19th edn, 15th reprint, New Delhi), Section 33 at p. 22

<sup>3</sup> Meaning the perceptions, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by generations

<sup>4</sup> Meaning the concurrence of opinion of the companions of Mahomed and his disciples.

<sup>5</sup> Being analogical deductions derived from comparisons of the first three sources

<sup>6</sup> Furqan Ahmed, Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspect (Regency Publication, New Delhi, 1994) at p. 41 9

form of divorce as it is against the letter and spirit of Quran and was disallowed by the Prophet (PBUH) himself.

According to the Quran, a person is not supposed to divorce his wife when she is menstruating.<sup>7</sup> When a muslim divorces his wife, he has to divorce them for the period of their iddah<sup>8</sup> and wait for three courses (menstruation).<sup>9</sup> The prescribed time period of iddah is about three months and in case of pregnant women, the iddah period is till delivery.<sup>10</sup> During this period, the husband can take them back if they wish to (reconciliation).<sup>11</sup> Divorce given for two times is revocable<sup>12</sup> but it is not so when made for a third time. As stated by Prophet (PBUH) and narrated by Aisha “Once a Muslim woman has been divorced by her husband thrice, she cannot remarry him unless and until she is married to another man (and such marriage must be consummated compulsorily) and divorces her so as to free her. It is only after this, she can marry her former husband.”

Though Shias and Sunnis have different views regarding triple talaq certain important things like the rules of purity of the woman (from menstruation), status of her virginity, waiting periods as specified in Quran etc. must be strictly adhered to, to validate any divorce. The slightest deviation nullifies the divorce. It is provided in the Holy Quran, there must be efforts towards reconciliation between the parties to divorce. In the famous case of “Shamim Ara v. State of U.P & A.N.R (2002)<sup>13</sup>”, the Supreme Court declared triple talaq invalid and banned . So how can you ban a banned thing ?The problem is not talaq but of men honoring the rights of women. The Supreme has upheld this view of Quran stating that there must be valid reasons for divorcing someone and there must be an attempt to reconcile. This view has further been upheld by many High Courts including the Kerela HC in Kunimohammed v. Ayishakutty.<sup>14</sup> It is well known that the personal laws do not derive their validity on the ground that they have been passed or made by legislature or other competent authority in the territory of India. The foundational sources of both Hindu and the Mahomedan laws are their respective scriptural texts (The State of Bombay v. Narasu Appa Mali 1952:para20)

### **TRIPLE TALAO IN INDIA**

Triple Talaq , also known as talaq -e-biddat , instant divorce and talaq-e-mughallazah ( irrevocable divorce) is a form of Islamic divorce which has been used by Muslims in India, especially adherents of Hanafi Sunni islamic schools of jurisprudence . In this a man could legally divorce his wife by pronouncing

<sup>7</sup> Surah at-Talaq 65:1]

<sup>8</sup> [Surah al-Baqarah 2:222];

<sup>9</sup> [Surah al-Baqarah 2:228]

<sup>10</sup> [Surah at-Talaq 65:4]

<sup>11</sup> [Surah al-Baqarah 2:228]

<sup>12</sup> [Surah al-Baqarah 2:229]

<sup>13</sup> 2010(2)KHC63

<sup>14</sup> 2010,KLT ,Ker,2,p.71

talaq (the Arabic word for divorce) three times. The pronouncement could be oral or written or in recent times, delivered by electronic means such as telephone, SMS, email, or social media. The man did not need to cite any case for the divorce and the wife need not have been present at the time of pronouncement. After a period of iddat during which it was ascertain whether the wife is pregnant the divorce became irrevocable.

In the recommended practice, a waiting period was required before each pronouncement of talaq during which reconciliation was attempted.

However, it had become common to make all three pronouncements in one sitting. While the practice was frowned upon, it was not prohibited. A divorced woman could not remarry her divorced husband unless she first married another man, a practice called nikah halla. Until she remarried; she retained the custody of male toddlers and prepubescent female children. Beyond those restrictions, the children came under the guardianship of the father.

### **TRIPLE-TALAQ AND PART III OF THE INDIAN CONSTITUTION**

The Muslim Personal Law (Shariat) Application Act of 1937 is the foremost legislation that deals with application of the Shari'ah, which is the religious legal system governing Muslims in India. As per Section 2 of the Act of 1937, Shari'ah applies to talaq (a form of divorce) as well. As per religious texts it means 'divorce' but in law it signifies the absolute power which the husband possesses of divorcing his wife at all time. Among the different modes of talaq, Talaq-ul-Biddat (Triple Talaq) is the most disapproved, detestable and draconian forms of divorce. This form of talaq is invalid and unconstitutional as it is repugnant to natural justice and various fundamental rights enshrined under Part III of the Constitution of India.

Equality as enshrined in Article 14 is the essence of democracy and a basic feature of the Constitution and it has been expanded to include concepts of non-arbitrariness and principle of natural justice. It is a necessary corollary of Rule of Law and its underlying object is to secure everyone equality of status and of opportunity. If any law is arbitrary or irrational it would fall foul of Article 14. Every State action must be reason and if the act is uninformed in reason then it is per se arbitrary. The wife only if such right has been delegated to her by the husband himself. Giving of triple talaq is manifestly arbitrary as it does not recognise equality of status of women with that of men. Moreover it is unreasonable as triple talaq is not preceded by any forms of reconciliation before effecting divorce. The wife is not given chance to represent her case before the arbiters during reconciliation as there is none (the wife also doesn't have a right to resort to

the judicial process of courts). This is also an unjust violation of principle of natural justice. A provision not unconstitutional by later development and thinking, such as gender equality.

**LEGAL JOURNEY OF THE TRIPLE TALAO ISSUE**

- Private matters of Muslims in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937, which is commonly known as Muslim Personal Law. Prior to this act, the personal and religious matters of Muslims were governed by an Anglo-Mohammedan Law, enacted by British.
- Marriage is also a private matter and is governed by Muslim Personal Law unless the marriage is registered under *Special Marriage Act of 1954*.
- Since it was the divorced woman who suffered most, the practice of Triple Talaq was challenged via Public Interest Litigations / other cases in Supreme Court as well as High Courts.
- The issue of triple talaq came in public prominence in 1985 in Shah Bano case. The victimised wife, besides seeking alimony from her husband who gave triple talaq, also challenged the long-standing practices of talaq-e-bidat, nikah halala and polygamy. The matter came to a close with the passing of Muslim Women (Protection of Rights on Divorce Act), which made it necessary for the husband to pay alimony to his wife 90 days after divorce.
- The first notable judicial pronouncement came in 2002 in the *Shamim Ara v. State of UP*<sup>15</sup> Though Talaq was not held invalid in this case, yet, the Justice RC Lahoti said that *talaq must be pronounced on cogent plausible and reasonable grounds*. This verdict also said that prior to talaq; the spouses must appoint two arbitrators, who would make all efforts for reconciliation and resolution. Once all efforts having failed, talaq shall come into effect. This verdict though did not invalidate the triple talaq, yet, tried to give it a process.
- In 2002 only, the Aurangabad bench of Bombay High Court invalidated the triple talaq by giving reference from Quran in *Dagdu Pathan vs Rahimbi* In this case, the court declared that a Muslim husband cannot repudiate the marriage at will and has to prove that all stages – conveying the reasons for divorce, appointment of arbitrators and conciliation proceedings between the parties were followed.
- These judgments served the basis of several later rulings and thus invalidated the instant talaq.
- In December, 2016, the Allahabad High Court observed in a rule that this practice is unconstitutional.
- In May, 2017, the Supreme Court also described it as worst form of marriage dissolution.

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<sup>15</sup> SC 2002

## **SUPREME COURT'S VERDICT**

The five judge bench of Supreme Court examined the case (*Shayara Bano Vs. Union of India*)<sup>16</sup> with two specific questions:

- Does the practice of Triple talaq enjoys protection of the constitution and is safeguarded by Article 25(1) in the constitution that guarantees all the fundamental right to “profess, practice and propagate religion”?
- Is the practice of Triple Talaq is an essential feature of Islamic belief and practice?

The SC gave verdict by a 3-2 majority. The essence of the 397 page verdict was as follows:

- Instant Triple Talaq is unconstitutional and arbitrary.
- It violated Islamic law while being used as a tool to oppress the women.
- The bench also asked the Central Government to enact a law / legislation in next six months to govern marriage and divorce in the Muslim community.
- Until the government formulates a law, there would be an injunction against husbands pronouncing Instant triple talaq on their wives.

Thus, the Supreme Court order banned the instant talaq while not touching other modes of divorce.

### **5. THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL 2017**

As per the directions of the Supreme Court, the central government drafted a Muslim Women (Protection of Rights on Marriage) Bill, 2017 and introduced it in Parliament on 28 December 2017. The bill was passed by Lok Sabha on the same date. The Bill is not to be passed in Rajya Sabha before becoming an act.

The Muslim Women (Protection of Rights on Marriage) Bill was passed by the Lok Sabha on December 28, 2017 to make the practice of instant triple talaq prevailing in Indian Muslim society a criminal offence with three years imprisonment and fine to the accused husband. Following are key facts about it:

- The Muslim Women (Protection of Rights on Marriage) Bill, 2017 was introduced in Lok Sabha by the Minister of Law and Justice, Mr. Ravi Shankar Prasad on December 28, 2017.
- The Bill makes all declaration of talaq, including in written or electronic form, to be void (i.e. not enforceable in law) and illegal. It defines talaq as talaq-e-biddat or any other similar form of talaq pronounced by a Muslim man resulting in instant and irrevocable divorce.

<sup>16</sup> 22 August, 2017

- Talaq –e-biddat refers to the practice under Muslim personal laws where pronouncement of the word ‘talaq’ thrice in one sitting by a Muslim man to his wife results in an instant and irrevocable divorce.
- Offence and Penalty: The Bill makes declaration of talaq a cognizable and non-bailable offence (A cognizable offence is one which a police may arrest an accused person without warrant), A husband declaring talaq can be imprisoned for up to three years along with a fine.
- Allowance :A Muslim women, against whom talaq has been declared, is entitled to seek subsistence allowances will be decided by a first class magistrate,
- Custody of Minor children: A Muslim women against whom such talaq has been declared is entitled to seek custody of her minor children. The determination of custody will be made by magistrate
- However, its future is apparently found hanging in balance as the Rajya Sabha failed to pass it due to disagreement between the government and opposition. Certainly, the behaviour of the opposition members in the upper house must have disappointed the Muslim Women for now.

But their struggle against the unjust gender injustice will remain a challenge to the muslim orthodoxy if they don't understand the direction of the wind is blowing in their favour of those whose struggle has at least succeeded in dividing the muslim community where a sizeable section particularly the modern Islamic scholars has widely welcomed the struggle to reform the Muslim Personal Law.

An article published in the Hindu entitled ‘Unjust Injustice’ states the facts about the Supreme judgement on Triple Talaq giving detailed explanation about stand of all the judges of Supreme Court. Verdict was delivered by a panel of five judges from different faiths.

Hinduism: Justice U U Lalit

Christianity: Justice Kurian Joseph

Islam: Justice Abdul Nazeer

Sikhism: Justice J S Khehar

Three of five judges on the constitutional bench have not accepted the argument that instant talaq, is essential to Islam and as per their view it deserves constitutional protection under article 25.

In this article author discussed the main ground to struck down triple talaq that “this form of talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it”.

Court did not even elaborate on how Triple Talaq violates gender equality. On the contrary, Justice Nariman says that having held the practice to be arbitrary, there is really no need to go into the element of



discrimination . In addition to this, author here highlights the fact that the present case was initiated suo moto by the court, but opinion against talaq could not have gathered critical mass. Few women also stood up to the community's conservative elements and challenged it. Also chief justice J S Khehar in his minority opinion wrote 'It is not open to a court to accept an egalitarian approach over a practice which constitutes an integral part of religion'. On the other hand All India Muslim Personal Law Board and all those who supported its regressive opinion that even an unworthy practice should not be dislodged by judicial verdict, should now accept modern social order. Also news published by Aljazeera gives a lot of facts about decade long history of Triple talaq and how it came into being. It tells us that Muslim family affairs in India are governed by Muslim Personal Law (Shariat) Application Act, 1937(often called Muslim Personal Law). It was one of the first acts to be passed after Government of India Act 1935 became operational, introducing provincial autonomy and a form of dyarchy at the federal level. It replaced the so called "Anglo –Mohamedan Law" previously operating for Muslims, and became binding on all of India's Muslims. The shariat is open to interpretation ny ulama (class of legal scholars).The ulama of Hanafi Sunnis considered this form of divorce binding provided the pronouncement was made in front of Muslim witnesses and later confirmed by a sharia court. Scholar Aparna Rao states that, in 2003, there was an active debate among ulama.In traditional Islamic jurisprudence; triple talaq is considered to be particularly disapproved, but legally valid form of divorce. Changing social conditions around the world have led to increasing dissatisfaction with traditional Islamic law of divorce since the early 20<sup>th</sup> century and various reforms have been undertaken in different countries. Contrary to practice adopted in most Muslim –majority countries , Muslim couples in India are not required to register their marriage with civil authorities .Muslim marriages in India are considered to be a private matter , unless the couple decided to register their marriage under the Special Marriage Act of 1954. Owing to these historical factors, the checks that have been placed on husband's unilateral right of divorce by governments of other countries and the prohibition of triple talaq were not implemented in India.

Considering the facts that triple talaq is un-Islamic, negated by highly regarded Islamic scholars, that such a practice has been invalidated in many Muslim-majority nations and that it blatantly violates provisions of Constitution of India. The rights of more than 170 million Muslim women of India are at stake. 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, modes of worship etc. which are integral to the religion.

## CONCLUSION

India is a diverse country where every religion has its importance and has the right to continue its practice. Muslims are the largest minority in India and have been given various privileges to follow their religion and are not bound to do anything which is against their religion or something which they are not allowed to do.

Triple Talaq, a practice that is being followed in India under the cover of religion and traditions has divested results in our society. Suppress the right of other because of religion is not acceptable. But this practice has gone against many rights enshrined in our Constitution. A husband divorces his wife over ohone just because he wanted a son ; another person send a text on whatsapp and ends the marriage, there and then only; another person ended his marriage with his wife in a drunken state not even realising the consequences of it. These instances clearly shows that this practice must be stopped, the aftermath of this inimical practice not only ruins the life of the wife but also shatters the dreams of children and affects future life of husband. The wife loses trust in marriage, alumina, which is a must, is not provided to the wife because of whom she and her kids have to live a life in poverty. Unemployment, illiteracy, criminal activities are few aftermath of this practice. Husband too take this practice granted, they marry whosoever they want to and for how short period they want to, at times they have a purpose behind it and when the purpose is over they leave the girl like that only. In India we have arrived at this commonsense tat women in marriage have less rights then men. Article 25 and 26 of Constitution are equally meant for men and women, whatever be the denomination. Triple Talaq is against the Progressive spirit of Quran. It symbolise the subordination, subjugation and suppression of human rights of women. The practice of triple talaq is grossly injurious to the human rights of 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. The Sharia law as practiced in India falls short of meeting the evolved standards of gender equality and justice, now it is the society who has to change it. India has moved away from clutches of orthodoxy and fanaticism, this ere is an era of empowerment, literacy, and freedom, and then why not give women her due.