

## **THE CONSTITUTIONAL VALIDITY OF THE PRACTICE OF TRIPLE TALAQ AMONG MUSLIMS**

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Triple Talaq is a practice of divorce by Muslims in India. It has been a subject of controversy and debates within the community, raising the issues of justice, gender equality and human rights. The Government of India and the Supreme Court of India have been involved in addressing the issues.

First, before understanding what triple talaq is, we must understand what a 'Nikah' (Marriage) stands for in Islam. Nikah is essentially a contract laid down in a 'Nikahnama' drawn between the husband and the wife. This contract can have conditions and has a compulsory 'consideration' (Meher) to be paid at the time of the marriage. This consideration is paid by the man to the wife, and can be at time waived off by the woman as per her own will. So the basic difference between a Hindu Marriage and a Muslim Marriage is that for Hindus, marriage is a divine sacrament whereas for Muslims, it is contract drawn between the husband and the wife.<sup>2</sup>

So to explore the question of triple talaq, one must understand that in Islam, everything is followed as per Sunnah (Deeds of the prophet). Hence, most Muslim women bodies opposing 'triple talaq' want the Muslim bodies to adopt 'Talaq-e-Sunnah' (Divorce as per the Prophet's sayings and Quranic dictation) and discard 'Talaq-e-Biddah' (Divorce as per a later formed mode of divorce which propagates instant divorce).<sup>3</sup>

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<sup>2</sup> DR. KAUSER EDAPPAGATH , "DIVORCE AND GENDER EQUITY IN MUSLIM PERSONAL LAW OF INDIA ",PAPERBACK,, 2014

<sup>3</sup> <http://www.news18.com/news/india/triple-talaq-all-you-need-to-know-about-controversial-muslim-divorce-1349841.html>

## TALAQ- E-SUNNAH

According to the Prophet's sayings, giving talaq to a wife in a fit of rage or anger is strictly prohibited. The Quran advises the husband to settle the differences through a mutual conversation as the first step. This step is known as the Fa'izu Hunna. If the differences continue between the husband and the wife, the parties should refrain from any conjugal acts till they settle their dispute. This step of physical separation known as the Wahjuru Hunna is prescribed so that the couple re-unites. However, even if this second step fails, it is recommended that the husband must attempt to talk to the wife, make peace with her and talk about the gravity of the situation. This third step is known as the Wazribu Hunna. However, Quran advises that even if the third step fails, the fourth step of 'arbitration' must be followed. In this step, a member from each of the spouses' family is present and the parties try to make amends in the strained relationship.<sup>4</sup>

It is only after all these four steps have failed that a husband pronounces the first talaq. The husband has to compulsorily wait for a wife's iddah (menses) to complete before pronouncing another talaq. Not more than two talaqs can be pronounced during the course of iddah. Iddahs are considered to be the three monthly courses. During these three month cycles, a man cannot give his third talaq. This had been envisaged so that the couple sorts out their differences in this period. Quran prescribes that if a woman has attained the age of menopause then the period of iddah is three months, whereas if a woman is pregnant, then the period of Iddah would be till the child is born or the termination of pregnancy.

If the differences still persists then the third talaq is pronounced, after which the relations between the husband and the wife are severed. Hence, the women groups who are claiming to revive this practice are only vouching for the fact that they get the maximum time to sort out their differences which is often not possible in an 'instant talaq'.

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<sup>4</sup> Supra n.1

## WHAT EXACTLY IS THIS ‘INSTANT TALAQ’? HOW IS IT DIFFERENT FROM TALAQ-E-SUNNAH?

Instant Talaq is something which has its genesis is women being divorced through SMS or over a mere phone call. This instant talaq is essentially ‘Talaq-e-Biddah’. ‘Biddah’ means innovation and essentially all Muslims are advised against introducing ‘biddahs’ in their religion. This practice of talaq was first promoted by Caliph Umar, and is staunchly opposed by all the petitioners who have approached the Supreme Court for a reform in the case of triple talaq. However, the Muslim Personal Law Board has not still spoken up on the issue and claims that this can be sorted out internally. Dr. Asma Zehra, an executive member of the All India Muslim Personal Law Board, was questioned about this during a recent press conference and said, “We have left it for our Ulema (scholars) to decide what is best for us.” However, this answer is far from the truth, as something which is not mentioned in the Qur’an or is a part of the Sunnah can never be justified as a lawful act by a Muslim.<sup>5</sup>

Instantaneous triple talaq or Talaq-ul-Biddat does not apply to all Muslims as is commonly believed and propagated. Out of the four schools of jurisprudence in Sunni law and the fifth Shia school of jurisprudence, only one – the Hanafi school – allows for instantaneous triple talaq. Shia jurisprudence prohibits Talaq-ul-Biddat. So before we exclaim ‘Muslims aren’t a monolith but...’ we should also consider that not all Muslims practice the Hanafi school of law.<sup>6</sup>

The archaic practice of triple talaq is not only anti-women, it is also anti-Islam. It has already been abrogated in more than 20 countries, including Pakistan and Bangladesh. A triple talaq divorce is valid even if the husband says “talaq” three times on the phone, in a letter or even on WhatsApp.

The AIMPLB has, time and again, opposed the abolition of triple talaq in India by arguing that it is based on sharia law. However, the Quran does not mention triple talaq as a method for divorce. According to the Quran, the correct way to get a divorce is to pronounce it three times on three different occasions, following a three-month waiting period wherein there is ample

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<sup>5</sup> Alka Singh, “Women in Muslim personal law”, Rawat Publications, 1992

<sup>6</sup> DR. KAUSER EDAPPAGATH, “DIVORCE AND GENDER EQUITY IN MUSLIM PERSONAL LAW OF INDIA “,PAPERBACK., 2014

opportunity for the couple to reconcile. Another method the Quran prescribes for talaq is to pronounce it during two successive periods of purity (tuhr), during which the talaq remains revocable. If the talaq is not revoked and is pronounced a third time, it becomes irrevocable.

Even if the AIMPLB agrees to abolish triple talaq and replace it with the Quranic form of talaq described above, the right to talaq as well as the right to revoke it stays with the husband. Some Islamic scholars argue that Islam also gives a woman the right to divorce her husband in the form of khula (a wife separating from her husband after returning a payment). However, khula and talaq cannot be equated because a woman can only seek khula from her husband at the cost of returning her mehr (dower) to him.

#### DO THE WOMEN HAVE ANY RIGHT TO DIVORCE THE HUSBAND IN ISLAM?

A. There are broadly two methods under which a wife can claim divorce. One is Talaq-e-Tafweez and the other is Talaq-e-Khula. Under Tafweez, the husband 'may' delegate his power to give talaq to his wife or any third party. This right has to be in the form of a contract with conditions, like, 'if a man marries again' then there can be a divorce, etc. But a contract will not be without conditions or be absolute.<sup>7</sup>

The second one is Khula. This is a divorce which is at the 'request' of the wife. In this case the woman has to make an offer of divorce to the man. The man must accept the offer with consideration, which often means the woman, has to give back the Meher taken during marriage. After these two steps, a Khula is granted. The woman often approaches a qazi-court as well to demand a Khula from the man. There needs to be an execution of a Khulanama.<sup>8</sup>

But something which needs to be broadly observed is that in both the cases, it's only a request or a husband's wish to draw up a contract to give the wife an option to divorce him. Thereby, putting the husbands first, and somehow lacking in achieving gender equality in this regard.

#### ARE THERE ANY OTHER ISLAMIC COUNTRIES WHICH HAVE TAKEN REFORMS IN THE MODE OF TALAQ?

Let's begin with our neighbor Pakistan. Pakistan in 1961 had passed the 'The Muslim Family Laws Ordinance'. According to this law, if a man wishes to divorce his wife, he will pronounce

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<sup>7</sup>Suraiya Tabassum, *Waiting for the New Dawn: Muslim Women's Perception of Muslim Personal Law and Its Practices*, Indian Social Inst., 2003

<sup>8</sup> Ibid.

talaq and approach the Chairman of the Union Council which is appointed by the state, and give him a written notice and forward the same to his wife. Within 30 days of the receipt of the notice, the Chairman will set up an Arbitration Council which shall consist of himself, a representative of each of the spouse, and the board would try to bring reconciliation. If any individual tries to bypass this legislation then they will be punished with simple imprisonment for a year or a fine which may extend to Rs 5,000 or both.

Another example is Morocco, which has a majority population of Islam. They have the Moroccan Family Code (Moudawana) passed in 2004. The code aims at putting both husband and wife on the equal footing, thereby prohibiting the man from pronouncing divorce unilaterally except when the procedure is being supervised by someone. The code also attempts to bring arbitration and conciliation between the parties concerned. The code further states that if a man chooses to still divorce a wife, then a divorce can only be granted only if the husband pays off all the due rights held by the wife and the children. Like Morocco, Algeria, Indonesia, Iran and Tunisia have similar legislations which do not recognise a divorce given by a husband unilaterally, and compel the parties to resort to a court of law.

The Supreme Court of India is on the verge of making a significant ruling on the abhorrent practice popularly known as triple talaq, or as Muslims known it, talaq-ul-bidat, the Sharia law that keeps the 90 million Muslim women in India on the verge of constant insecurity faced with the prospect of dissolution of their marriage in mere seconds with the repetition of the word ‘talaq’ thrice, signifying irrevocable divorce. In an era of social media, ‘talaq, talaq, talaq’ need not even be said face-to-face. Some louts and cowards convey it through WhatsApp, text messages, from remote locations.

Fourteen years ago, in a landmark judgement in the Shamim Ara vs State of UP <sup>9</sup> case, 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

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<sup>9</sup> (2002 (7) SCC 518)

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.”

the practices of triple talaq, halala (bar against remarrying a former husband unless you have married another man in between) and polygamy have been challenged before the Supreme Court in *Shayara Bano vs Union of India*, with the demand that they be deemed unconstitutional. Shayara Bano is a Muslim lady from Uttarakhand who filed a petition in the Supreme Court of India challenging the constitutional validity of Triple talaq. The All India Muslim Personal Law Board (AIMPLB) has opposed the implementation of a UCC in an affidavit filed before the Supreme Court.

'Triple talaq' is a customary practice prevalent among Muslims that dissolves a marriage when the husband says the word 'talaq' thrice. The custom is criticised for being unilateral and biased against women, and is banned in 22 countries of the world. It has been challenged in the Supreme Court and the Centre has formally opposed the practice, saying it is against the principle of gender equality. Several women's rights groups have also spoken out against the practice and its ill effects, especially on Muslim women. On the other hand, the Muslim Law Board has consistently said that triple talaq is a 'personal law' and thus, cannot be modified by the Centre. The issue has given rise to a heated debate on the need for a Uniform Civil Code in India

Amidst all the hoopla surrounding the UCC, many Muslim women in India remain unsure on which side they stand. On the one hand, Muslim personal law ordains certain practices that have proved to be derogatory for the rights of women; on the other hand, the ruling party has not been able to instil confidence in India's Muslim population. However, one thing is clear: gender justice cannot be achieved through personal laws, especially in the case of Muslim women. Muslim personal law, as followed in India, is inherently biased against women and many times leads to their exploitation. Moreover, because of the application of personal law in the matters of marriage, divorce, maintenance, inheritance and the like, Muslim women are precluded from

enjoying the benefits accrued to them through secular law, which their counterparts from other religious communities enjoy.<sup>10</sup>

The best example to understand the predicament that surrounds the rights of women under Muslim personal law is maintenance. The Shah Bano case and its aftermath very aptly illustrated the problem arising due to the lack of a UCC in India. The question before the court in Shah Bano was whether a Muslim woman is entitled to claim maintenance under section 125 of the Criminal Penal Code (or secular law) from her former husband even after the period of iddat has expired. The husband claimed that he did not need to pay maintenance any longer as Muslim law stipulates that maintenance must only be paid during the period of iddat and not beyond it. The court, taking a secular view, allowed Shah Bano to claim maintenance even after this period.<sup>11</sup>

The Shah Bano judgment was seen as a blow to Muslim personal law and, under pressure from the religious orthodoxy, the government was forced to pass the Muslim Woman (Protection of Rights on Divorce) Act, 1986. The Act specifies that a reasonable amount of maintenance is to be paid to a divorced wife within the iddat period by her former husband. The validity of this Act was challenged before the Supreme Court in Danial Latifi. The court, though upholding the validity of the Act, held that the duty of a Muslim man to his divorced wife is not confined to the iddat period and that a reasonable and fair provision extending beyond that must be made by the former husband within the iddat period.<sup>12</sup>

Had the Supreme Court not acted as a saviour in cases where former husbands refused to pay maintenance, thousands of Muslim women would have been divorced and forced to live without any support. It is only due to the decision of the Supreme Court in Danial Latifi that Muslim women are able to enjoy the fruits of Section 125 of the Criminal Penal Code in the same manner that Hindu and Christian women do.

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<sup>10</sup> Alka Singh, "Women in Muslim personal law", Rawat Publications, 1992

<sup>11</sup> DR. KAUSER EDAPPAGATH, "DIVORCE AND GENDER EQUITY IN MUSLIM PERSONAL LAW OF INDIA", PAPERBACK., 2014

<sup>12</sup> Ibid.

Although the question of maintenance to Muslim women has been settled by the Supreme Court, the judicial decisions came through long-drawn litigation process, cumbersome legislations and political chaos. From Shah Bano to Danial Latifi, it took 15 years for Muslim women to get where they are today. Things would have been much easier for them had a UCC been in place.

During the hearings before its final judgement, the Supreme Court of India, on 13 May 2017, has described Triple Talaq as the "worst form of marriage dissolution". It also noted that the custom is banned in Muslim-majority countries Saudi Arabia, Morocco, Afghanistan and Pakistan.<sup>13</sup>

The Centre told the Supreme Court that triple talaq was not intergral to Islam, but was a gender issue within the Muslim community. Rohatgi, responding to Sibal and a battery of senior lawyers favouring triple talaq, said even the core of religion has to be tested on the touchstone of fundamental rights.

Referring to the responses of the AIMPLB, he said that even they say that triple talaq was "undesirable", "sinful" but yet valid and wondered "then how it can be said to be integral to religion".

Referring to the batch hearing, Attorney General Mukul Rohatgi said that the practice of triple talaq is a tussle between the "haves and have-nots" inside the community. "The prism through which you see the case is not like majority versus minority; this is a case where it is an intra-community tussle between Muslim men and women. This time Muslim women have questioned the centuries-old hegemony suffered by them at the hands of their male counterparts". Fight is between men of the Muslim community, who are more powerful and educated, and the women, who are frequently uneducated and aren't as powerful.

He referred to sati, infanticide, Devdasi and untouchability among Hindus, and said that they have been done away with. He said that under Article 25 (right to practice religion) of the Constitution, even the core component of religion can be tested on grounds of fundamental

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<sup>13</sup> <http://timesofindia.indiatimes.com/india/how-can-theologically-sinful-triple-talaq-be-a-practice-supreme-court-asks-muslim-law-board/articleshow/58731995.cms>. Accessed on 21st may,2017

rights. "Rights given under Article 25 of the Constitution cannot be considered as absolute," he said. He added that the court must look into these aspects, because a community cannot decide what constitutes a fundamental right.

He said that if the right to religion went against the fundamental rights, then it is the Constitution which will prevail over practices like triple talaq. In a major announcement on the ongoing case over the validity of triple talaq, the Centre on Monday said that court it will come out with legislation to regulate marriage and divorce among Muslims if the Supreme Court holds triple talaq as invalid and unconstitutional. The Holy Quran considers the importance of family and it provides four steps before pronouncement of divorce.

"Triple talaq is far from being fundamental and very far from being sacramental to Islam. It violates every good thing which Islam prescribes. What we are seeing in the form of triple talaq is similar to the pre-Islamic era practice where female infants were buried alive," he had said. Jethmalani had said "the right of triple talaq is available only to the husband and not to the wife and it breaches Article 14 (Right to Equality) of the Constitution." He had said triple talaq was a discrimination on the ground of sex and this practice was abhorrent to the tenets of holy Quran and no amount of advocacy can save this "sinful" practice which is contrary to constitutional tenets. How can a woman be allowed to become ex-wife only because her husband wants and this is "the highest kind of unconstitutional behaviour", the noted jurist had said. He had said the irrevocable nature of triple talaq can be negated if the three-time pronouncement of talaq in one go is considered one leaving the scope for reconciliation and re-union during the 'iddat' (waiting) period. Referring to the prevalent practice in Islamic nations, he had said even if one says talaq thrice in a go, it was considered as one, thus negating irrevocability of divorce.

So we are hopeful that the apex court in Shayara Bano vs Union of India, will ban triple talaq, make uttering that word in repetition a crime; rule that divorce is a legal matter between husband and wife, to be decided in a court, with issues like maintenance and justice attached to it. Muslim women have their hands tied while the guillotine of divorce dangles, perpetually ready to drop at the whims of their husbands who enjoy undisputed power. Such discrimination and inequality

hoarsely expressed in the form of unilateral triple-talaq is abominable when seen in light of the progressive times of the 21st century.<sup>14</sup>

Shayara Bano case is most likely to be the catalyst to reform the Muslim Personal Law in India. That would be a blow for gender equity and justice. That would be a just victory for the underprivileged Muslim women over the patriarchal orthodoxy of the Muslim clerics. The majority of Muslim women in India often have no say in their future. India Today reported, citing Census 2011 data, that out of all married Muslim women, 13.5% were married before the age of 15, and 49% were married between 14 and 19 years of age. A survey by Bharatiya Muslim Mahila Andolan revealed that 95% of divorced Muslim women received no maintenance from their husbands. Out of all divorced women, 65.9% were divorced orally, with no strings attached.

For religious zealots and those eager to protect their own machismo customs, banning triple talaq would signify uniform civil code in India. That would surely be welcome. But more importantly, banning an evil practice like triple talaq which even neighboring countries like Pakistan and Bangladesh have outlawed, would go a long way in giving respect and dignity back to not just Muslim girls and women, but all women in India. If Shah Bano proved to be historic for the issue of maintenance post-divorce, Shayara Bano might prove to be the same for pre-divorce.

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<sup>14</sup> <http://timesofindia.indiatimes.com/india/how-can-theologically-sinful-triple-talaq-be-a-practice-supreme-court-asks-muslim-law-board/articleshow/58731995.cms>. Accessed on 21st may,2017