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## The Current Status of Triple Talaq in India

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### Abstract

The Muslim Women (Protection of Rights on Marriage) Act, 2019, was recently passed. This research paper deals with the journey of triple talaq and issues related to Muslim family law from the beginning when Caliph, Umar decreed to give validity to talaq-e-biddat till the present practice of triple talaq in India. It also ascertains various interpretation since Muslim law is not codified and is subject to Sharia law. This paper discusses the Judicial discourse from *Shah Bano* to *ShayaraBano* and indicates the transformation in the development of Muslim personal law in India. It also highlights the salient features of “The Muslim Women (Protection of Rights on Marriage) Act, 2019”.

**Keywords:** Muslim women, Triple Talaq, Talaq-e-biddat, Muslim personal law.

### Introduction

Recently, the Parliament passed the Muslim Women (Protection of Rights on Marriage) Act, 2019, thereby criminalizing the practice of instant Triple Talaq. The Supreme Court in *Shayara Banocase* had declared the practice of Triple Talaq (*talaq-e-biddat*) as unconstitutional. However, the penal provision of the Act i.e. a Muslim husband declaring instant Triple Talaq can be imprisoned for up to three years is alleged to be disproportionate for a civil offence.

### Some key features of the Act of 2019

- Any pronouncement of “talaq” by a Muslim husband to his wife in any manner, spoken or written, will be void and illegal.
- Any Muslim husband who communicates the “talaq” orally or in writing may face punishment up to three years in jail. The punishment may be also extended.
- If a Muslim man pronounces “talaq” to his wife, then the woman and her children are entitled to receive an allowance for subsistence. Such an amount can be determined by a Judicial Magistrate of the First Class.
- A Muslim woman is entitled to the custody of her minor children even if her husband has pronounced “talaq” to her.

- The offence is also compoundable (i.e. the parties may arrive at a compromise), 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 with the reasonable grounds for granting bail.

### **Key issues in the Act**

Divorce is a civil matter and making *Triple Talaq* a criminal offence is disproportionate to criminal jurisprudence. The Supreme Court declared *Triple Talaq* as invalid and did not ask the government to make it a penal offence. The Supreme Court by holding that Triple Talaq is unconstitutional implied that mere utterance of Talaq thrice does not result in the dissolution of marriage, rather it remains intact.

However, by criminalising Triple Talaq the law presumes marriage has ended and for that Muslim man shall be punished. Thereby criminalising the Triple Talaq goes against the spirit of the Supreme Court judgement. Further, if the husband is imprisoned, how he can pay maintenance allowance to wives and children.

Also similar to misuse of Indian Penal Code section 498A (Dowry Harassment) which led to harassment of the affected men, the penal provision in Triple Talaq can be subject to such harassment.

### **Practice of Triple Talaq**

- The Triple Talaq was held to be violative of Article 14 (the right to equality), which is held by the Supreme Court from *Shah Bano case* in 1985 to *ShayaraBano case* in 2017.
- The Government held that 473 cases of Triple Talaq have taken place even after two years of judgement pronounced by the Supreme Court.
- The law has been placed as a deterrent to eradicate social evils. For example: Untouchability was abolished by the Constitution, but the continued practice of untouchability forced Parliament to enact the Untouchability (Offences) Act in 1955 and later renaming it as Protection of Civil Rights Act in 1976.

### **To eliminate atrocities faced by women in domestic space parliament enacted:**

- The Dowry Prohibition Act in 1961
- Prevention of domestic violence Act 2005

Triple Talaq is banned in more than 20 Islamic countries including Pakistan. Terming Triple Talaq as unconstitutional as a step towards establishing uniform civil code (Enshrined in Article 44 of directive principle of state policy), but criminalising it goes against the ethos of Fundamental rights i.e. article 25 and 26 the freedom of religion. Talaq in its original sense

means repudiation or rejection. Under Muslim law, it means a release from marriage tie, eventually or immediately. Although Muslim marriage is a civil contract, the husband enjoys special privileges over wife. Husband may divorce his wife at any time he likes but wife cannot. Thus, the talaq has been described as “a one-sided engine of oppression”, in the hands of the Muslim husband. Under Hanafi Muslim law divorce at the instance of wife is most restrictive. It should not be overstated in this regard, since the basic principle of Muslim divorce law is to end a marital tie to head off from future problems.

As in *MoonsheeBuzloorRuheem v Shumsoonnissa Begum*<sup>1</sup> the Privy Council a century ago ascertained that “the matrimonial law of the Muslim favors the stronger sex like that of every ancient community where the husband can dissolve the marriage arbitrary”. In another century old case in *MoonsheeBuzul-Ul-Raheem v Luteefut-Oon-Nissa*<sup>2</sup> Privy Council held that “dissolution of marriage by talaq is a whimsical act of husband to renounce his wife at any stage of life at his own pleasure, at any cause”.

### Objectives of Paper

To focus on the practice of *Triple Talaq* in India to protect the fundamental rights of Muslim women guaranteed by the Constitution of India.

### Research Methodology

The paper is based on primary data collected from Books & Articles and secondary data collected from internet, newspapers, magazines and journals.

### Concept of triple talaq

Talaq is an Islamic word for divorce and it literally means separating and breaking of marriage. In essence, ‘the talaq is a unilateral repudiation or cutting off the marital tie’<sup>3</sup>. Since, the Muslim marriage is a Civil contract and not a sacrament.

Muslim law imposes obligation upon the husband to pay consideration of the marriage to the wife as a mark of respect. As per sharia perspective, there are more ways to end a marriage and talaq is just one of them. Under the Hanafi School, founded by Abu Hanifa. It is to be said that the divorce is only at the instance of the husband is prominent rather than simple.

In Hanafi law, the *talaq-ul-biddat* or *triple talaq* may be used by husband. Although it is not accepted by classical jurisprudence, husband has the advantage of simplicity and finality. says it “is usually done by ignorant Muslims to satisfy their selfish motives”. However, such divorce has full validity in the eyes of law. The most common method of *talaq-ul-biddat* is for the triple pronouncement of talaq al-hasan to be brought together in a single sitting. No evidence is

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<sup>1</sup>Ahmad A, *Mohammedan Law* (23 ed.).

<sup>2</sup>(1861)8 MIA 397 (395).

<sup>3</sup>Arshad Raffia, *Islamic Family Law*.

required to prove the talaq pronounced by husband, the presence of third person is also not necessary and the wife left with no option to challenge talaq.

The relevant verses under Chapter LXV of Holy Quran say, “Divorce is only permissible twice; after that, the parties can hold up together or proceed with separation”. Sunni law gives effect to *talaq-ul-Biddat* through its traditional interpreters, even if it violates the Quranic law procedures. According to interpreters *talaq-ul-Biddat* is “Sinful but effective” proposition in English “Bad in theology but good in law”. This irregular mode of talaq was introduced by Omeyyads in order to evade the stringency of law<sup>4</sup>. A specified above triple talaq or *talaq-ul-Biddat* becomes irrevocable immediately pronounced by husband and children born after the dissolution of marriage by triple talaq will be illegitimate.

In *Rashid Ahmad v. Anisakhatoon*<sup>5</sup>, talaq was pronounced thrice by the husband in presence of the witnesses but in absence of wife. After four days talaqnama was executed. But even after the valid talaq husband and wife started living together and four children’s born to them. Court held that, since the talaq is valid but there is no evidence to prove that another marriage has been consummated. Thus, the women failed to perform iddat and children’s born to them are illegitimate as the bar to remarriage was not removed according to the principles of Muslim personal law.

### **Terror of Triple Talaq**

Initially, the practice of triple talaq was considered as Afterthought<sup>6</sup>. When a deserted wife knocks the door of court to get relief either of separate maintenance or restitution of conjugal rights after waiting so long years for reconciliation, the husband tries to defend himself by pretending to have divorced his wife in past, even if it is not because no burden of proof lies on husband to prove the statement of triple talaq and intention for dissolution of marriage. These instances turn the marriage scary when court refuses to decree relief in favor of wife.

But in *DagduPathan v Rahimbipathan*<sup>7</sup>. Aurangabad bench of Bombay High Court refused to accept husband plea of talaq in a case of maintenance for the very first time and held that mere making a statement that the husband has triple talaq his wife is not sufficient, the stages in which talaq has preceded and the factum of talaq is required to be proved before the court. Then only court would be able to decide the genuineness and validity of triple talaq. Here court relied upon the words of Quran, “divorcing the wife without reason just to harm her for protesting the husband’s unlawful demand and divorcing her in violation of sharia law is haram”.

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<sup>4</sup>Menski DP. *Muslim Family Law*, 1998.

<sup>5</sup>AIR SC, 1932, PC 25.

<sup>6</sup>See supra note 2

<sup>7</sup>2003(1) BOMCR 740

## What is Halala

*Halala* is practice by some sects of Sunni Muslims, in order to remarry her previous husband, a female divorcee has to marry someone and after consummation she have to dissolve the marriage. In other words, the women who sleeps with the stranger to save their marriage. This is very inglorious practice by Sunni Muslims which seems unjust and unnatural practice not only to non-Islamic people but also to followers of Islam<sup>8</sup>.

If women fail to marry someone and consummate the marriage and goes back to previous husband without halala, the children born to them will be illegitimate. Even when Muslim divorcee live with the same husband after triple talaq without consummating her marriage with another person is also considered as a Sin and also become a taboo. In all cases it is women who has to suffer, in a country like India this is very common practice and women are forced to face stigma.

In a well-known Adnan Sami case,<sup>9</sup> the husband blatantly used the concept of *halala* with a selfish motive. Adnan Sami is a noted Pakistani musician (now Indian Citizen) who got married to an Arab girl and divorced her when wife offered him *Khula* and marries her again two years later. Remarriage was absolutely lawful as they performed the marriage going by the true Islamic law. Finding herself in stumble once again, she filed a divorce petition under the Dissolution of Muslim Marriage Act 1939. Husband contested the validity of three years old marriage stating that “girl had not performed halala” before remarrying him and the second marriage with her was void. As her petition before family court fails to give her relief but in an appeal before High Court of Bombay she obtained relief. But still we have to worry about the women who is forced to obey repugnant customs of Islam.

## Triple Talaq in other Countries

There are more than 22 Countries (Islamic states) in the world who declared the practice of triple talaq null and void, but why is still accepted in India? The answer is very simple “Politics”<sup>10</sup>. As India is a Secular state and not an Islamic state despite of it India is also a male dominant State where majority of lawmakers are men. Also, Indian government doesn’t want to intervene with Muslim personal laws as it is solely based on Quran and its practice. After independence India declare itself as a secular nation which respects all the religion and Article 25 of Constitution of India gives freedom to practice any religion.

The laws in UAE, Iraq, Egypt, Morocco, Philippines, Sudan, Jordan, Kuwait, Philippines, Syria and Yemen, these states have totally derecognized the concept of triple talaq. In all the above-mentioned countries every talaq effects only a single revocable divorce, which can be revoke

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<sup>8</sup>Riaz, *Fatima v, Mohd Sharif*. 2007, DMC 26 Del.

<sup>9</sup>AIR, 2010 Bom 109.

<sup>10</sup><https://scroll.in/article/806299/if-pakistan-and-21-other-counties-have-abolished-triple-talaq-why-shouldnt-india>

during wife's iddat, failing that for renewal of remarriage anytime with her consent. Even the device of *halala* for validating remarriage of the parties also stands abolished in these countries. As these practices are inhuman in nature and against the dignity of woman which must be abolished in India as well.

### **Vision of Supreme Court on Triple Talaq Cases**

In majority of the triple talaq cases, the particles of domestic violence are clearly visible. Husband is the dominant partner in the marriage who arbitrary in the state of being angry divorce his wife without any justifiable reason and even without encroaching for reconciliation and arbitration. This oppressive act of husband discriminates the fundamental rights of women on the grounds of Sex and Religion.

In *Mohd. Ahmed Khan v. Shah Bano Begum*<sup>11</sup>, the five-member bench of the Supreme Court consisting of Chief Justice Chandrachud, Justice Venkatahramaiah, Justice Chinappa Reddy, Justice Desai & Justice Mishra. The court held that section 125 of CrPC open to every divorced wife irrespective of any religion who are entitled to approach the court for maintenance. The Apex Court also clarified that "wife" includes unmarried women who is not yet remarried. The Court further observed that mere paying deferred dower at the time of divorce is not the conclusion. The husband is entitled to maintain not only divorced wife but also the children's born to them. However, the Court found that even Koran imposes an obligation to maintain the wife after divorce without rhyme and reason, wife should not be kicked out on the streets just to die without roof.

In, *Shamim Arav State of U.P & ors*<sup>12</sup>, the appellant-wife filed an application under section 125 of Criminal Procedure Code complaining about cruelty to her, her children and of desertion. In reply husband mercilessly said he had divorced her earlier and therefore he is not entitled to maintenance. No evidence provided regarding the statement of circumstances, no proof for reconciliation and no witness were in support of talaq. The Family Court rejected the plea of wife for maintenance. Wife appealed in Allahabad High Court and again failed to seek any relief.

Apex court in Special Leave Petition rejected the arbitrary triple talaq and held, the liability of husband to maintain his wife shall not come to an end based on just mere communication that she has been divorced.

Justice Lahoti further held that, the talaq must pronounced in support of Quranic Injunction. The term 'pronounce' shall not be used as meaning of dictionary it denotes "to utter formally, to declare, to proclaim, to articulate".

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<sup>11</sup>AIR 1985 SC 945

<sup>12</sup>(2002)7 SCC 518

In, *Riaz Fatima v Mohd Sharif*<sup>13</sup>, husband pleaded that wife is disentitled to maintenance since he had already divorced her. He also challenged the paternity of child by alleging his wife of bad character. Husband also produced the copy of fatwa to prove the validity of talaq. Magistrate Court rejected the contention of the husband and awarded maintenance to the wife and child. Where Sessions Court set aside the order of maintenance. Delhi High Court in appeal laid down the guidelines regarding the procedure of pronouncing triple talaq.

1. Divorce shall not be against the mandate of Holy Quran and must be for reasonable cause.
2. Burden of proof lies on husband to prove the proclamation of triple talaq in presence of witnesses or in writing. Till then talaq will not be valid.
3. Prior to divorce an attempt must be made for settlement/Conciliation by the husband.
4. Husband must show proof of payment of *Meher* (Dower).

The court held that before Muslim husband divorce his wife he must fulfill all the pre-requisites in order to give validity to triple talaq pronounced by him.

In 2017, the Supreme Court of India comprising of five judge's constitution bench in *ShayaraBano v. Union of India*<sup>14</sup> passed landmark judgment in the history of triple talaq by banning the Muslim practice of triple talaq in India by declaring it as an Unconstitutional and struck it down by 3:2 majority. ShayaraBano (wife) challenged the 'talaqnama' delivered to her by husband pronounced talaq, talaq, talaq in presence of two witnesses. Wife challenged the same before the apex court to declare the divorce as "void ab initio" relying upon the claim which violates her fundamental rights.

## Constitution of India and Triple Talaq

Power vested with the Supreme Court Under Article 141 to declare any law which shall be binding upon lower courts and individuals are bound to obey it. Declaring triple talaq as Unconstitutional is the exercise of power vested under Article 141<sup>15</sup>. Triple talaq also renounces equality before law of Muslim women. It violates the fundamental right under Article 15(1)<sup>16</sup> on the ground of Sex. Triple talaq was held illegal and unconstitutional by the Honorable Supreme Court of India on grounds that it violates the Fundamental rights guaranteed by the Constitution under Article 14, 15, 21 & 25<sup>17</sup>. Triple Talaq is manifestly arbitrary and was violative of Article 14 (the Right to Equality) and did not enjoy the protection of Article 25(1) of the Constitution.

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<sup>13</sup>I (2007) DMC 26 (Del)

<sup>14</sup>(2017) 9 SCC 1

<sup>15</sup>The Constitution of India, 1950 Article 141 - Law declared by Supreme Court to be binding on all courts.

<sup>16</sup>The Constitution of India, 1950 Article 15(1) - The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

<sup>17</sup>Supra note 14, *ShayaraBano v. Union of India* (2017) 9 SCC1, Shayara Bano's triple talaq case: All you need to know about her fight for equality <https://www.firstpost.com/india/shayara-banos-triple-talaq-case-all-you-need-to-know-about-her-fight-for-equality-3437628.html> (Last Accessed on 10 September 2019)

Despite of setting aside the practice of triple talaq by honorable Supreme Court and legislation, there has been cases reported in several parts of the country on divorce by talaq-e-biddat. As reported Muslim men still are still divorcing their wives with selfish motive.

## Conclusion

1400 years old practice comes to an end, it is difficult to understand the position of women's who was divorced by Triple Talaq by her husband. Trivial fights between husband and wife takes place in every societies in the world this doesn't mean that husband should put his hands up from the marital tie and responsibilities towards his wife and children and leave them on streets without roof. Some Muslim men abuse this practice to get rid of wife and to marry other women and some abuses this weapon as a threat to demand dowry. In modern world men are misusing this practice whimsically by pronouncing talaq via WhatsApp, postcard, emails messages and other means of electronic communication. Triple talaq is always considered as vagarious and whimsical act of the husband. Second Caliph, Umar who gave assent to practice triple talaq was just to meet with emergency situations to protect the religion from abuse and not to declare it as a permanent law.

No doubt Muslim women are suffering a lot, they always live with a fear of triple talaq and forced to survive like a slave. Practice of *talaq-e-biddat* violates the basic human right of women. Marriage is a sacred relationship and a gift of God. Even the Holy Quran doesn't approve this form of talaq and it declared as Haram by some Jurists. Quran permits talaq only after the attempt of reconciliation and in presence of two witnesses. It is so disgust to observe such kind of practice where the marriage solemnizes by consent of both the partners by pronouncing "Quboolhai" thrice and dissolving such auspicious marriage arbitrary without the consent of wife, even non-Muslims can sense and smell it as a sinful practice. Gender friendly personal laws are required with the passage and change of time in a secular state like India. The journey from *Shah Bano* to *ShayaraBano* determines various precedents in favor of Muslim women. These precedents now protect the fundamental rights of Muslim women. *Triple Talaq* has led to the subjugation of Muslim women even after 72 years of independence but its solution must come through coexistence rather than coercion.

*Triple Talaq* is often known for its controversy through the world and it is banned in the Muslim-majority countries of Saudi Arabia, Morocco, Afghanistan and Pakistan. There are many instances where Muslim clerics flout the Supreme Court ban on triple talaq by using the term "talaq-e-bain" to divorce the wife unilaterally. So, in such cases, *Triple Talaq* in some form or other name is likely to continue even after this Act. Since most personal laws reflect the hierarchical notions of society and thereby accord secondary status to women. So gender just personal laws are required in the present scenario. Hence legal awareness in the Muslim community and strict implementation of this Act is required.