



## The journey of triple Talaq in India

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### Abstract

This article deals with the most critical 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 abolishment of this practice in India. This paper also ascertain various interpretation since Muslim law is not codified and subject to Sharia law. Covering the move of Judiciary from Shah Bano to Shayara Bano and exhibiting the transformations/Up & downs in the development of Muslim personal law in India. This paper also highlights “The Muslim Women (Protection of Rights on Marriage) Bill, 2017” along with aim and objectives of the bill and concludes with some interesting analyses.

**Objectives of Paper:** To focus on the validity 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.

**Keywords:** triple talaq, irrevocable talaq, talaq-e-biddat, protection of Muslim women

### 1. Introduction

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. (Doi, 1984, pp. 168-169) <sup>[6]</sup>.

As pointed out by Justice Krishna Iyer in a felicitous manner that “Islamic Law is more sinned against than sinning in *A. Yousuf Rawther v Sowaramma* <sup>[1]</sup>. Even in *Moonshee Buzloor Ruheem v Shumsoonnissa Begum* <sup>[2]</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 *Moonshee Buzul-Ul-Raheem v Luteefut-Oon-Nissa* <sup>[3]</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.

### 2. 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>[4]</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 (699-767 A.D) <sup>[5]</sup>. 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. (Doi, 1984, p. 179) <sup>[6]</sup> 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 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 <sup>[6]</sup>.

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

<sup>1</sup> AIR 1971 Ker 216 Justice Krishna Iyer held that a Muslim woman can sue for dissolution of marriage under section 2(ii) of Dissolution of Muslim Marriage Act, 1939 because the husband failed to maintain her even after a cause.

<sup>2</sup> (1867)11 MIA 551 (610)

<sup>3</sup> (1861)8 MIA 397 (395)

<sup>4</sup> DAVID PEARL & WERNER MEENSKI, MUSLIM FAMILY LAW p. 281 (3d ed. 1998)

<sup>5</sup> D.F MULLA, PRINCIPLES OF MAHOMEDAN LAW xix (20<sup>th</sup> ed., 2013)

<sup>6</sup> Mohd. Umar khan v. Gulshan Begum, 1992 cri LJ p.899 at 900 (MP)

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>[7]</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.

*Rashid Ahmad v. Anisa khatoon*<sup>[8]</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.

### 3. Beginning of triple talaq

No verse in the Holy Quran can be interpreted which give authenticity to so called triple talaq. Triple talaq is recognized but it is disapproved form of dissolution of marriage. Prophet condemned triple talaq as “*playing with the book of God while I am still alive*”<sup>[9]</sup>.

After the death of Prophet, the second Caliph, Umar started giving effect to triple talaq in order to prevent the misuse and abuse of religion. When Arabs conquered Egypt, Persia, Syria and other States, they found women over there more better in appearance in comparison with Arabian woman. Women from Syria and Egypt insisted that if they want to marry them, they should divorce their existing wives by pronouncing triple talaq in one sitting. And, this condition was duly accepted by Arab men because they knew that under Islam divorce is only permissible twice in two separate periods of *tuhr*, and pronouncing triple talaq in one sitting is void, un-Islamic and shall not be effective. Arabs had a bad intention that in this way they cannot only marry these women but also retain their wives.

When it comes to the knowledge of Caliph Umar, he decreed to give validity of dissolution of marriage by triple talaq irrevocably. It was mere an Administrative measure to meet emergency situations and not to make law. But, unfortunately Hanafi Jurist declared practice of triple talaq valid and cover religious sanction to it which is now a horrifying precedent<sup>[10]</sup>.

### 4. Horror of Triple Talaq

Initially, the practice of triple talaq considered as Afterthought<sup>[11]</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 proof 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<sup>[12]</sup>.

But in *Dagdu Pathan v Rahimbi pathan*<sup>[13]</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*”.

### *Nikah 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<sup>[14]</sup>. 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. If women fail to marry someone and consummate the marriage and goes back to previous husband without nikah halala the children’s 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>[15]</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 hand 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.

### 5. Position 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

<sup>7</sup> AQIL AHMAD, MOHAMMEDAN LAW P. 171, 2008

<sup>8</sup> (1932) 59 IA 21 (All): 1932 PC 25

<sup>9</sup> TAHIR MAHMOOD, MUSLIM LAW IN INDIA AND ABROAD P. 132 (2<sup>nd</sup> ed. 2016)

<sup>10</sup> AQIL AHMAD, MOHAMMEDAN LAW P. 174-175, 2008

<sup>11</sup> Saleha v sheikh AIR 1973 MP 207

<sup>12</sup> *Ajmera v Moin* 1983 ALJ 1332

<sup>13</sup> 2002 (3) MhLJ 602

<sup>14</sup> Ahmad, Athar (2017-04-05). "The women who sleep with a stranger to save their marriage". BBC News. Retrieved 25.03.2018

<sup>15</sup> *Sabah Adnan Sami Khan v Adnan Sami Khan* AIR 2010 Bom 109

“Politics”<sup>[16]</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 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<sup>[17]</sup>. As these practices are inhuman in nature and against the dignity of woman which must be abolished in India as well.

## 6. Supreme Court Ruling

In majority of the triply 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 (Article 15)<sup>[18]</sup>.

The 18 April 1996 rally towards Mantralaya in Bombay marked as the first step towards protecting Muslim women’s rights was the commencement of social justice movement against triple talaq<sup>[19]</sup>.

Thousands of Muslim women file petition before the magistrate courts for enforcement of their rights under section 125 of CrPC (Criminal Procedure Code) for maintenance or Muslim women (protection of Rights upon Divorce) Act, 1986 and Domestic Violence Act, 2005.

In 1985, Mohd. Ahmed Khan v Shah Bano Begum<sup>[20]</sup>, - The five-member bench of the Supreme Court consisting of Chief Justice Chandrachud, Justice Venkatarajah, 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. Supreme Court also clarified that “wife” includes unmarried women who is not yet remarried. 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.

<sup>16</sup> Triple Talaq | The Continuing Horror by Ayushi Sarma <https://medium.com/she-zaadi/triple-talaq-the-continuing-horror-5fb06693a9d3> (Last Accessed on 21, March 2018)

<sup>17</sup> TAHIR MAHMOOD, MUSLIM LAW IN INDIA AND ABROAD P. 145 (2<sup>nd</sup> ed. 2016)

<sup>18</sup> The Constitution of India, 1950 - Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

<sup>19</sup> The first rally held against triple talaq was in 1966]

<https://www.firstpost.com/india/triple-talaq-verdict-live-supreme-court-to-decide-today-whether-practice-is-constitutionally-valid-3958989.html> (Last Accessed on 30, March 2018)

<sup>20</sup> AIR 1985 SC 954

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 Ara v State of U.P & ors<sup>[21]</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”.

In, Riaz Fatima v Mohd Sharif<sup>[22]</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 proof 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 proof 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 *Shayara Bano* case 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. Shayara Bano (wife) challenged the ‘*talaq nama*’ 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<sup>[23]</sup>.

<sup>21</sup> MANU/SC/0850/2002

<sup>22</sup> (2007) DMC 26 Del

<sup>23</sup> Shayara Bano vs Union Of India And Ors. WP(C) NO. 118 of 2016 [http://supremecourtsofindia.nic.in/supremecourt/2016/6716/6716\\_2016\\_Judge\\_ment\\_22-Aug-2017.pdf](http://supremecourtsofindia.nic.in/supremecourt/2016/6716/6716_2016_Judge_ment_22-Aug-2017.pdf) (Last accessed on 30 March, 2018)

### ▪ *Triple talaq and the Constitution*

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>[24]</sup>.

Article 25 — which guarantees Freedom of Practice and Propagation of Religion, this religious freedom subjects to Fundamental Rights. Triple talaq also renounce equality before law of Muslim women it also violates the fundamental right under Article 15 (1)<sup>[25]</sup> on the ground of Sex. Triple talaq, Nikah halala and polygamy 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>[26]</sup>.

Despite of setting aside the practice of triple talaq by honorable Supreme Court and sureness of All India Muslim Personal Law board, there has been cases reported in several parts of the country on divorce by talaq-e-biddat. As reported illegalizing triple talaq is not working as Muslim men doesn't seem respecting the decision of the court and arbitrary and still with selfish moves they are divorcing their wives. As suggested by the Supreme Court that central government should make law on triple talaq within 6 months after the Judgement of *Shayara Bano case* to penalize the offenders.

### 7. Triple talaq Bill

The Muslim Women (Protection of Rights on Marriage) Bill, 2017, was introduced in the Parliament by the Central government on 28 December 2017 and passed on the very same day. The Bill defines talaq as talaq-e-biddat, Instant triple talaq or any other form of similar talaq pronounced by the Muslim man dissolving marriage irrevocably. It declares all such form of talaq void i.e. not enforceable by the law<sup>[27]</sup>. Chapter II of the Bill deals with offence and penalty. Section 4 of the Bill sanction the practice of triple talaq and whoever pronounces triple talaq upon his wife shall be punished with imprisonment which may extent up to 3 years.

Chapter III of the Bill deals with the allowances and Custody of minor children's. A Muslim woman is entitled to seek subsistence allowance from her husband. This provision of the bill applies to women and her dependent children's. Moreover, the Muslim women against whom talaq has been pronounced can seek the custody of minor children.

### 8. Conclusion

1400 years old practice comes to an end, it is difficult to understand the position of women's who triply divorced by

her husband. As India is a Country where women are fully dependent on their husband to live, they treat husband as an Idol. 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<sup>[28]</sup>.

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 "Qubool hai" 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 in the form of Uniform Civil Code is required with the passage and change of time in a secular state like India. The journey from shah Bano<sup>[29]</sup> to Shayara Bano<sup>[30]</sup> determines various precedents in favor of Muslim women. These precedents now protect the fundamental rights of Muslim women. It violates the right to equality guaranteed under Article 14, on the grounds of gender discrimination it also violates right guaranteed under Article 15, Article 21- Right to life includes right to live with dignified life and Article 25 gives freedom to practice any religion & protects the all religious practice, hence all these fundamental rights are assassinated.

Misusing triple talaq should be condemned since it is against the Quranic Injunction. I agree with the judgement of the Honorable Supreme Court and fully support the law constituted by the parliament (The Muslim Women (Protection of Rights on Marriage) Bill, 2017 which abolish the practice of talaq-e-biddat and penalize the offender. This bill is live example for development of Common Civil Code in India.

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<sup>24</sup> The Constitution of India, 1950 Article 141 – Law declared by Supreme Court to be binding on all courts.

<sup>25</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>26</sup> 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 30 March 2018)

<sup>27</sup> Section 3 of The Muslim Women (Protection of Rights on Marriage) Bill, 2017 - Any pronouncement of talaq by a person upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.

<sup>28</sup> Supra 10.

<sup>29</sup> Supra 20.

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