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**Yashveer singh**  
Research Scholar, Department  
of Law, M.D.U Rohtak, India

## Triple Talaq: Unconstitutional and Arbitrary

**Yashveer singh**

### Abstract

This paper focuses on the details of Triple Talaq and Triple Talaq bill [2]. It deals with the Islamic rules which regulate the masses. It deals the types of divorce among the Muslims and also that how triple talaq is a valid or not and justified or not as a method of divorce which is in practice. The paper attempts to analyze the rules and the genuineness of the law. It deals whether there is equality among people and about the Muslim personal laws as well. The research also includes the demerits of the Triple Talaq. In this paper the focus is on the topic of triple talaq which is a controversial issue at present. It also includes the position of women among the Muslim category as they face a double discrimination, firstly on the basis of being a girl and secondly on the fact that she is born as a Muslim girl. It includes certain case laws based on triple talaq. The research methodology of the paper is basically descriptive and analytical.

**Keywords:** Arbitrary, Triple Talaq, Unconstitutional and Muslim Women

### Introduction

Amidst protests from a few political parties, some muslim leaders, the Lok Sabha passed by voice vote the Bill that makes instant triple talaq or talaq-e-biddat a criminal offence, with a jail term of up to three years. The proposed law would be applicable to the entire country, except in Jammu and Kashmir. It would make instant talaq punishable and would be a cognizable, non-bailable offence [3]. Union Law Minister Ravi Shankar Prasad said the Bill — The Muslim Women (Protection of Rights on Marriage) Bill 2017 — will act as a deterrent since there have been 100 cases of triple talaq even after the landmark judgment [4] of the Supreme Court delivered in August this year. He said that while 22 Islamic countries, including Pakistan and Bangladesh, had regulated instant triple talaq, there was no effective law in India.

December 28<sup>th</sup> 2017 will be marked as a very important day for Muslim women's rights because 'Muslim Women's Marriage Rights Protection Bill, 2017 took the first decisive step towards becoming a law on this day. Pronouncing divorce by the Muslim men in one go will be deemed a crime with the passing of this bill. This bill is perhaps the biggest undertaking after the Independence to offer equal rights to Muslim women. Triple Talaq given in one go – be it orally, through email or through an SMS or Whatsapp – will now be a thing of history. According to this bill, a Muslim husband who divorces his wife through Triple Talaq orally, Written or in any electronic form, will be liable to the punishment of three years imprisonment, as well as fine. A new era of self-respect and equality has started for Muslim women [5]. But the Rajya Sabha did not take up the triple talaq bill, with the government earlier rejecting the opposition's insistence on sending the bill to a Select Committee for detailed scrutiny. The result of the opposition to the opposition and the government was that due to political stalemate, three divorce bills were hanged. During the winter session of Parliament, the government's failed efforts could not even pass it. The Parliamentary Affairs Minister said that the government will then try to create a political consensus on the three divorce bills during the budget session of parliament starting on 29<sup>th</sup> January 2017[6].

### Marriage Nikah

Before understanding what triple talaq is, we must understand what a „Nikah“ (Marriage)

**Correspondence:**  
**Yashveer singh**  
Research Scholar, Department  
of Law, M.D.U Rohtak, India

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 [7]. 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) [8].

### Historical Background of Divorce

To understand the nature and concept of divorce in Islamic law, a brief account of its historical background is necessary [9]. Among all the nations of antiquity, the power of divorce was regarded as a natural corollary to marital obligation. Among the pre-Islamic Arab the power of divorce possessed by the husband was unlimited and was frequently exercised without any regard to the marital obligations. They could divorce their wives at any time, for any reason or even without any reason. They could give divorce and also revoke the same as many times as they preferred. They could, moreover, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance [10]. In pre-Islamic Arabia, divorce was used as an instrument of torture. These social and moral ills and injustices engaged the attention of the prophet of Islam. Fully conscious of the evils flowing from divorce, he framed the laws of marriage and divorce in order to remove these evils.

### Divorce Talaq

The Prophet, who is head of the community, affirmed that all the things that have been permitted under the law, the worst are divorce. He treats it as an evil and suggests everyone to avoid it as far as possible. But in some situations, it becomes a necessity where living together is not possible. It is better to separate from the spouse rather than to be in a surrounding full of agony and abhorrence. But the basis of divorce in Islam is the inability of the spouse to live together for a genuine reason due to living together is impossible. There are provisions guaranteed under the Islamic law to get divorce from both the side of husband and wife. The term 'talaq' means repudiation or simply divorce. But in Islam, the husband only has the right to get divorce through the method of talaq and the wife by the judicial orders from the court.

### Talaq-ul-Sunnat Revocable Talaq

Talaq-ul-Sunnat is regarded to be the approved form of Talaq. It is called as Talaq- ul-Sunnat because it is based on the Prophet's tradition (Sunna). As a matter of fact, the

Prophet always considered Talaq as an evil. If at all this evil was to take place, the best formula was one in which there was possibility of revoking the effects of this evil. With this idea in mind, the Prophet recommended only revocable Talaq, because in this form, the evil consequences of Talaq do not become final at once. There is possibility of compromise and reconciliation between husband and wife.

Talaq-ul-Sunnat is also called as Talaq-ul-raje. Only this kind of Talaq was in practice during the life of the Prophet. This mode of Talaq is recognised both by Sunnis as well as by the Shias. Talaq-ul-Sunnat may be pronounced either in Ahsan or in the Hasan form [11].

### Talaq Ahsan Most Proper

This is the most proper form of repudiation of marriage. The reason is twofold: First, there is possibility of revoking the pronouncement before expiry of the Iddat period. Secondly, the evil words of Talaq are to be uttered only once. Being an evil, it is preferred that these words are not repeated. In the Ahsan Talaq there is a single declaration during the period of purity followed by no revocation by husband for three successive period of purity. In this form, the following formalities are required:

- a) The husband has to make a single pronouncement of Talaq during the Tuhr of the wife. Tuhr is the period of wife's parity i.e. a period between two menstruations. As such, the period of Tuhr is the period during which cohabitation is possible. But if a woman is not subjected to menstruation, either because of old age or due to pregnancy, a Talaq against her may be pronounced any time.
- b) After this single pronouncement, the wife is to observe an Iddat of three monthly courses. If she is pregnant at the time of pronouncement the Iddat is, till the delivery of the child. During the period of Iddat there should be no revocation of Talaq by the husband.

Revocation may be express or implied. Cohabitation with the wife is an implied revocation of Talaq. If the cohabitation takes place even once during this period, the Talaq is revoked and it is presumed that the husband has reconciled with the wife.

When the period of Iddat expires and the husband does not revoke the Talaq either expressly or through consummation, the Talaq becomes Irrevocable and final.

It may be noted that the characteristic feature of the Ahsan form of Talaq is a single pronouncement followed by no revocation during the period of three month's Iddat. Therefore, where a husband makes any declaration in anger, but realising his mistake afterwards, wants to cancel it, there is sufficient time for him to do so. Single pronouncement of the civil words of Talaq and sufficient opportunity to the spouses for reconciliation, are the two reasons for calling this form as the 'most proper' form of Talaq [12].

### Talaq Hasan Proper

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

- (a) The husband has to make a single declaration of Talaq in a period of 'Tuhr.
- (b) In the next Tuhr, there is another single pronouncement for the second time. It is significant to note that the first and second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, the words of Talaq become ineffective as if no Talaq was made at all.
- (c) But, if no revocation is made after the first or second declaration then lastly the husband is to make the third pronouncement in the third period of purity (Tuhr). As soon as this third declaration is made, the Talaq becomes irrevocable and the marriage dissolves and the wife has to observe the required Iddat.

It may be noted that the important feature of Talaq Hasan is its revocability before the third pronouncement and its irrevocability after the third. In order to make an effective Talaq, the words must be uttered three times in three consecutive period of purity [13].

### **Talaq-Ul-Biddat (Triple-Talaq)**

Triple Talaq was neither recognized nor sanctioned by Quran and The Holy Prophet. It was not in practice during the span of first caliph but the second caliph brought this concept of instant divorce. It came into existence to meet some emergency situation and was not made a law permanently. Unfortunately, the Hanafis jurists on the strength of this administrative order of second caliph declared this form of divorce as valid [14].

Triple-Talaq is also known as Talaq-Ul-Biddat which gives a right to a man that whenever he thinks fit, he may give divorce to his wife anytime and which becomes void and irrevocable. This not only violates Muslim women rights but this also makes them inferior in the eyes of society as well as in the eyes of men. Since what does triple-Talaq conclude that it is on the whims of men due to which most of them think that they are superior to Muslim women. It is true that every religious practice is sacred, and no one has right to interfere in these religious practices. It is being said by some of the Muslims that triple talaq comes under the ambit of religion but on the other hand some of the Muslims contradict the same. Now a days this practice is being misused by many Muslim men which severely affects their wives life and we don't agree that religion can take away the basic human rights and natural rights of any human being which this practice does and the most barbaric thing about this type of divorce is that it will be completed even in the absence of wife and even if the wife does not have any knowledge of such divorce. And it will become void and irrevocable. In addition to this, the most interesting fact about this is that it is being used by men but consequences are faced by women. According to the Hanafis when Talaq-ul- Biddat is pronounced, the wife will become alienated from the husband and he cannot remarry her. She becomes 'Haram' (totally prohibited) for him. Neither can he take her back nor can he go for fresh nikah with her. He can go for nikah with her only after paying a penalty of 'Halala' meaningly, she has to marry another man and her marriage must consummate and then that person divorces her on account of marital conflict or she becomes a widow. Muslims are India's largest minority community with a population of 155 million and their marriages and divorces are governed by the Muslim personal law, ostensibly based on the Sharia. The invidious procedure of triple Talaq is confined to the Sunnis alone,

not only in India, but around the world. And the most of the population of Indian Muslims is Sunnis [15].

### **Concerns Regarding the Triple Talaq**

Most of the Muslim men treat their wives as mere possession, they think that they can marry them anytime as well as get rid of them by just uttering talaq thrice. But it is to be noted that women are being deserted by their husband who give them instant talaq without any justification and reasonable cause. It is somewhat clear that it is a patriarchal society as the divorce is possible by any medium like telephone, telegram, letter, text message, social media etc. In the case Rashid Ahmed v. AnisaKhatoon [16], man declared the triple talaq in the presence of his witness though in the absence of his wife. The talaqnama was executed and the decree for divorce was allowed. This concept of triple talaq has made the husband very dominant and wife very fragile. It was rightly stated by Justice Krishna Iyer that "It is a fallacy that Muslim men enjoys under Muslim-Quranic law." [17]

### **The Constitutionality of Triple Talaq**

In the Holy Book Quran, nikah means 'Misaqan Ghaliza' that means a strong bond and it explains how and with whom one can enter into this strong bond and this bond cannot be dissolved without proper reason and method. Triple talaq has not only resulted in atrocity but also infringed the fundamental rights guaranteed to the citizens of India.

Article 14<sup>[18]</sup> is the right to equality in which no person is above the law, as it is supreme. Every person is equal in the eyes of law irrespective of gender or religion. We have seen that, in triple talaq all right of divorce is bestowed upon the men only. As the marriage is undertaken by the free consent of both the parties, dissolution of such marriage also should be by the free consent of the parties, only then equality exists. But in triple talaq the husband can pronounce the divorce without even the knowledge of the wife, which in itself is infringing the Muslim wife's right to equality. The Muslim wife have to go to the Qazi and have to prove the atrocities committed by her husband in order to get a divorce where a husband can pronounce talaq without any reasonable logic. Triple talaq has conferred unlimited and absolute power to give instant divorce to his wife, even when there is no just or reasonable cause. In one of the case, a woman was given triple talaq as she did not wake up when her husband returned late from work. In this case, she was not at all aware of the fact that she had been divorced; it was later informed by her mother-in-law about the scenario. This shows that how the doctrine of triple talaq has been misused so as to satisfy the male ego and to suppress women without any just cause.

Article 15(1) state that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them." Article 15(1) does not permit any kind of discrimination; whereas triple talaq violates it. Triple talaq is an detestable practice in which all the rights are conferred upon the men and women are considered mere as puppets, whom they can control as they desire. The Muslim women tend to suffer triple penalty because of their gender.

Article 21 is the most sacred fundamental right conferred by the law of laws. It speaks about the right to life and personal liberty, which has been violated by the doctrine of triple talaq. It encroaches upon the basic dignity that a woman holds under article 21. The Quran encourages

people to respect the women and not to abandon her without any just reason or for satisfying the male ego. If a spouse gives divorce to his spouse without any logical and rational cause it will not only violate the Quran but also the supreme law of the land. It violates the basic rights of a woman as she does not get to know why she has been given divorce and also is deprived of her rights on her children and her matrimonial house. She becomes dejected and helpless after such divorce. The most important contention which makes a triple talaq violative of article 21 is this concept is totally arbitrary and woman has no say in this process which is totally unfair and unconstitutional [19].

Article 25(1) provides freedom of religion where every citizen is given the right to choose and practice and freely any religion of his or her own choice. It also states that no one should interfere with it. Muslim marriages and divorces are governed by Muslim personal laws and they are solely responsible for the infringement of fundamental rights of Muslim women. In Quran, it is nowhere mentioned that talaq-ul-biddat that is triple talaq should be practiced to dissolve the marriage. Marriage and successions are not a part of religion and with the changing time the law also needs to change. This idea was supported by Hon'ble court in *Prakash v. Phulavati* and it was stated that there can be no discrimination on the grounds of religion.

Therefore, it is clearly visible from the above instances that triple talaq is violative of constitution. It violates the basic structure of the constitution which provides justice to both men and women equally but it is not justifiable as, it is discriminatory to women and this practice is totally arbitrary in nature which makes it violative of fundamental rights guaranteed under constitution.

In the recent judgement in *Sharyara Bano v. Union of India*, the triple talaq has been held unconstitutional and illegal in eyes of law. It was the need of the hour, as mentioned above as it violates the above articles of the constitution.

### **Judicial Decisions on Triple Talaq**

#### **Mohd. Ahmed Khan vs Shah Bano Begum and Ors [20]**

This was one of the landmark judgements in the legal history, in 1985. This case explained that what should be included under the decree of the Supreme Court.

In this case the issue was that Ms. Bano claimed the maintenance under the Cr.P.C rather than through the personal laws, after getting divorced from her husband Mohd. Ahmed Khan. According to the personal laws, she could only claim maintenance only during the period of iddat, but as in the Indian laws, she had to be given maintenance all through her life, with some exceptions too, under which she didn't come.

As the plaintiff and the defendant were Muslims, were to be governed by the Muslim Personal Law. Since the petition was filed under the Cr.P.C, the district court, the High Court and the Supreme Court passed their judgements, favouring Ms Shah Bano. This judgement was criticized by the AIMPLB, as they claimed that decree of Personal laws was beyond the jurisdiction of the courts. The Shah Bano Case received various public stances. Government then had passed a legislation, termed as 'The Muslim Women (Protection of Rights on Divorce), 1986', and aimed to overturn the judgement of the SC. According to this legislation, Muslim women were entitled to a 'fair and just' amount of money within the 'iddat' period, beyond which, the husband was to have no liability.

#### **Ahmedabad Women Action Group (AWAG) v. Union of India [22]**

According to Muslim laws it allows Muslim men to have four marriages, along with the right to divorce, under the concept of Talaq, whereby, the husband possess the right to divorce by pronouncing the term 'Talaq', without judicial methods, and this may happen without her consent. The PIL was filed in this case addressing both these issues.

In the light of these arguments, the court was of the opinion that India and Indians have been governed by personal laws, regardless of the time period. It was of the view that interference by the court would lead to several undesirable results, as the verdict of personal laws was beyond the jurisdiction of the courts. The petition was dismissed.

#### **Danial Latifi and another v. Union of India [23]**

After the judgement of *Shah Bano's* case, there was a disorder in the Muslim personal law. The parliament passed and enforced The Muslim Women Act, 1986, which provided that under section 3(1)(a), a divorced woman is entitled to reasonable and fair provisions, and maintenance within the 'iddat' period. One of the council, Danial Latifi confronted the above act, claiming that it was unconstitutional, and in violation of Article 14 and 21.

The petitioner, in his argument said that that the Act is unconstitutional and has the potential of overpowering the Muslim women, and weakens the secular character. It is reasonable to deprive the Muslim women of the applicability of section 125 of Cr.P.C and present act is in violation of article 14 and 21. To this, the respondent said that personal laws are a legitimate basis for discrimination and therefore does not violate article 14 of the Constitution. The Court thereby favored the respondents.

#### **Shamim Ara. v. State of U.P.[24]**

The petitioner married the respondent in 1948, in accordance with the Muslim personal law, and had four sons. The wife filed an application in the court, under Sec. 125 of the Cr.P.C, claiming that her husband had abandoned her and there was cruelty by him. The family court rejected her appeal, on the grounds that she had already been divorced. However, a sum of Rs. 150/- was granted as maintenance for one son, till he attained majority.

The petitioner denied her divorce. The SC was of the view that the mere plea of a Talaq would not validate the same. The Quranic process of obtaining a Talaq needs to be fulfilled.

#### **Shayara Bano v. Union of India and others**

This case has brought enthusiasm in everyone's mind as it has challenged the concept of 'instantaneous triple Talaq' and not the concept of 'triple Talaq'. The PIL was filed by Ms Shayara Bano. This petition has been greatly supported and believed to have given a chance to those who have suffered. The PIL was initiated by Ms Shayara Bano, a resident of Uttarakhand, who was constantly abused by her husband and eventually divorced by way of Triple Talaq at one go. Her difficulty was heard by the SC of India. India is a secular country and its citizens deserve to be happy, content and should always have the right to equality and justice.

The Hon'ble Supreme Court has chosen to allow the rights

of those who truly deserve it, is commendable and a positive step towards the injustice that women are subjected to. The bench of the Supreme Court has declared the judgement that the triple talaq has been held unconstitutional and violative of various articles in the Indian Constitution.

### Islamic Countries Can Ban Triple Talaq Also

There are more than 20 Islamic countries that have banned this inhuman practice of triple talaq including neighbouring countries like Pakistan, Bangladesh, Sri Lanka, etc. Egypt was the first ever country to declare triple talaq as invalid and it provides 90 days procedure for divorce. In 2006, Sri Lanka amended its Marriage and Divorce Act, 1951 that does not grant validity to the concept of triple talaq. As stated, the law requires a husband wishing to divorce his wife to give notice of his intention to a Qazi (Islamic judge), who should attempt a reconciliation between the couples over the next 30 days. In the case of disagreement after the devised period, the husband can give talaq to his wife only in the presence of the Qazi and two witnesses. Many people who understand and study Muslim Law rates the Lankan law as the most ideal legislation on triple talaq. The abolition of triple talaq in Pakistan took place in 1951 and they also have a system of validating a talaq after a period of 90 days only and not before that. Tunisia and Algeria both adopted Tunisian code of personal status and banned instant talaq. In 1959, Iraq contrary to most Arab countries has banned the triple talaq [25]. In spite of all above countries who have a great number of muslim population residing in their countries has banned the archaic and intolerable practice of talaq-ul-biddat then why can't we abolish this in human practice.

### Conclusion

Marriage is a very sacred relationship and it should be dissolved in very sacrosanct manner irrespective of religion but this corrupt practice of triple talaq violates the basic human rights which are conferred upon the women citizens of India. This practice makes Muslim men superior to the Muslim women. The after effect of divorce is another vulnerability which a woman has to suffer; they become economically poor and socially backward. The society does not accept and they are taken for granted even by their own parents. They are taunted and treated roughly as if it is they themselves who are responsible for the divorce.

It is been noted that in the Muslim community, marriage is a contract between a male and a female and it is completed only when both the parties pronounce 'Qubool hai' thrice, but then during divorce, it is only the husband who can pronounce 'talaq' thrice. This explicitly violates Article 14 that every person should be treated equally. Muslim women have to suffer because they are Muslim and certain rights have been taken away from them. By this, it is evident that there is a violation of Article 15. The most supreme right Article 21 is also violated as Muslim women are not given the right to choose about their life by themselves. Article 25 is violated as the religious practices under the Muslim community are not protected under this article.

The Supreme Court once again have gave us hope, and have made us believe in our legal system, by declaring triple talaq to be unconstitutional and illegal and we hope that B.J.P Government will successfully passed the Muslim Women (Protection of Rights on Marriage) Bill 2017 in

Rajya Sabha also. It gives Muslim women a new hope to lives her life with dignity and respect. It is the right time that the state should promote awareness regarding this issue so as to uplift the status of Muslim women in the country.

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