

## Legislation and Assorted Aspects with Triple Talaq in India

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### Abstract

Talaq-ul-biddat has its origin in the second century of the Islamic era. After two years of ruling, second caliph Umar enforced triple divorce, as per which no one will be permitted to take his wife back after pronouncing three divorces in one go. Author Umar Ahmad Usmani in his book named "Women's Rights in The Qur'an, Women and Modern Society" refers to the noted Egyptian historian Muhammad Husain Haykal's book 'Umar-al-Farouq' in which the author says that caliph Umar made such an (interpretation) for avoiding hassle and indeed it was need of the hour. Then author Umar Ahmad Usmani further quotes from Haykal's book to show why caliph Umar was constrained to enforce triple divorce. The author says that, when Arabs in the era of caliph Umar were conquering every part of the Gulf, after winning the battles they used to bring male and female slaves both with them to the land of Mecca and Medina. These women were very attractive and charming and the Arabs were captivated by their charm and wanted to marry them. However, these women insisted on the men giving irreconcilable divorce to their former wives. To satisfy them they would pronounce triple divorce in one go and pretend to having divorced their wives for good. From there, it is in practice. Muslims are governed by the Muslim Personal Law (Shariat)

Act, 1937 which was passed by the British Government. This law was binding on all Muslims living in India. The British Government also passed an Act for Muslim wives to uplift their rights, namely the Dissolution of Muslim Marriage Act, 1939. These acts contained the detailed provisions about divorce and Triple Talaq was one of them and therefore it was among the Indian Muslims to dissolve marriage through Triple Talaq Muslim marriages in India are considered to be a private matter, unless the couple themselves decided to register their marriage under the Special Marriage Act of 1954. Owing to these historical factors, the checks that have been placed on the husband's unilateral right of divorce by governments of other countries, such as prohibition of triple talaq, had not been implemented in India.

*Keywords : Muslim Marriage Act in India, Muslim Personal Law Board, Triple Talaq*

## **Introduction**

Triple talaq, instant divorce and *talaq-e-mughallazah* (irrevocable divorce), was a form of Islamic divorce which has been used by Muslims in India, especially adherents of Hanafi Sunni Islamic schools of jurisprudence. It allowed any Muslim man to legally divorce his wife by uttering the word *talaq* (the Arabic word for "divorce") three times consecutively in oral, written or, more recently, electronic form. The use and status of triple talaq in India has been a subject of controversy and debate. Those questioning the practice have raised issues of justice, gender equality, human rights and secularism. The debate has involved the Government of India and the Supreme Court of India, and is connected to the debate about a uniform civil code (Article 44) in India. On 22 August 2017, the Indian Supreme Court deemed instant triple talaq (*talaq-e-biddah*) unconstitutional. Three of the five judges in the panel concurred that the practice of triple talaq is unconstitutional. The remaining two declared the practice to be constitutional. Three of India's neighbouring countries — Pakistan, Bangladesh and Sri Lanka — are among the 23

countries worldwide that have banned triple talaq. The Quran established means to avoid hasty divorces. It prescribes two waiting periods of three months before the divorce is final in order to give the husband time to reconsider his decision.

Talaq-e-Biddat or Triple Talaq is a form of divorce that was practiced in Islam, whereby a Muslim man could divorce his wife by pronouncing talaq three times. The man need not cite any reason for the divorce and the wife need not be present at the time of pronouncement of talaq. To ban the evil practice of Triple Talaq was a demand from Muslim women for a very long time. ShayaraBano a woman from Uttarakhand, who suffered mental and physical torture by her husband and his family for not fulfilling their demand for dowry, was granted instant Triple Talaq by her husband through a letter, ending their 14-year marriage. Her husband also denied her the custody of her two children. ShayaraBano challenged this practice before the Supreme Court on the ground that the said practice is discriminatory and against dignity of women.

### **Supreme Court Verdict:**

Supreme Court found that the said practice of divorce to be manifestly arbitrary, in the sense that, the marital tie can be broken capriciously and whimsically by a Muslim husband without any attempt to reconcile to save the marriage. Supreme Court, in a majority judgment rendered on 22nd August, 2017, set aside the practice of divorce by pronouncing instant Triple Talaq as violative of Article 14 of the Constitution. Supreme Court judgment vindicated the position taken by the Government that talaq-e-biddat is against constitutional morality, dignity of women and the principles of gender equality and also against gender equity guaranteed under the Constitution of India.

### **Demand for Reform:**

Even after the Supreme Court's order declaring this practice as unconstitutional, practice of Triple Talaq continued. From the date of judgment of Supreme Court, i.e., from 22nd August, 2017 up to introduction of the Bill in Parliament, i.e., up to 28th December, 2017, there were reported around 100 instances of pronouncing of Triple Talaq in the country. Because there was no law to punish those who continued to practice 'Triple Talaq' and to provide legal remedies to the victims of such practice, a need has arisen to make a law for effective implementation of the Supreme Court judgment. The commitment of the Government, led by Prime Minister Shri. Narendra Modi, to give gender justice, gender dignity and gender equality to the Muslim women was a major initiative behind this reform.

#### **Legislative Reform:**

To give immediate effect to the verdict of the Supreme Court the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was promulgated on the 19th September, 2018 and two more Ordinances were promulgated thereafter.

#### **Quantifying Benefits:**

From various sources including State police authorities, several media reports show that there has been substantial reduction in the Triple Talaq cases due to legislative intervention by the Government headed by Hon'ble Prime Minister of India, Shri. Narendra Modi.

#### **Qualitative Changes:**

The Act will improve the existing conditions of Muslim women and will help them to come out of domestic violence and discrimination they are facing in the society. The Muslim Women (Protection of Rights on Marriage) Act after a very long discussion and opposition finally got the verdict (the Indian Supreme Court judgement of August 2017 described below) to all women. It

stipulates that instant triple talaq (talaq-e-biddat) in any form – spoken, written, or by electronic means such as email or SMS – is illegal and void, with up to three years in jail for the husband. Under the new law, an aggrieved woman is entitled to demand maintenance for her dependent children. The Government first introduced the bill to Parliament on 22 August 2017. MPs from Rashtriya Janata Dal, All India Majlis-e-Ittehadul Muslimeen, Biju Janata Dal, All India Anna Dravida Munnetra Kazhagam, Indian National Congress and All India Muslim League opposed the bill. Several Opposition lawmakers called for it to be sent to a select committee for scrutiny.

It was passed on 28 December 2017 by the Lok Sabha, or lower house of the Indian Parliament, where the ruling BJP held the majority of seats. The bill followed a 2017 Supreme Court ruling that the practice of instant triple talaq is unconstitutional and a divorce pronounced by uttering *talaq* three times in one sitting is void and illegal. Muslim triple talaq petitioner Ishrat Jahan welcomed the Bill when it was presented. Also Arif Mohammad Khan welcomed and appreciated the decision taken by Government and Parliament of India. The triple talaq bill proposed by the previous Modi government lapsed when an election was called and the Lok Sabha was dissolved before the bill was sent to the Rajya Sabha for approval. Practice *Main article: Divorce in Islam § Talaq al-bid'ah and triple talaq* Triple talaq is a form of divorce that was practised in Islam, whereby a Muslim man could legally divorce his wife by pronouncing *talaq* (the Arabic word for divorce) three times.

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

irrevocable. In the recommended practice, a waiting period was required before each pronouncement of *talaq*, during which reconciliation was attempted. However, it had become common to make all three pronouncements in one sitting. While the practice was frowned upon, it was not prohibited. A divorced woman could not remarry her divorced husband unless she first married another man, a practice called *nikah halala*. The practice of *talaq-e-biddat* is said to have been around since the period of Caliph Umar, more than 1400 years ago.

The Supreme Court described it as "manifestly arbitrary" and said that it allows a man to "break down marriage whimsically and capriciously". Instant divorce is termed *talaq-e-bid'at*. A hadith by An-Nasa'i stated that Muhammad had accused a man of mocking the Quran by uttering divorce thrice in one go. Talaq pronounced thrice simultaneously from Muhammad to the first two years of Umar's reign as caliph was only considered as a single divorce according to Sahih Muslim. The latter however allowed it, upon seeing the people did not observe the iddah, but also had men using such divorce flogged. Abu Hanifa and Malik ibn Anas considered it irrevocable despite its illegality. Al-Shafi'i considered it permissible but Ahmad ibn Hanbal considered it to be invalid. Triple talaq is not mentioned in the Quran. It is also largely disapproved by Muslim legal scholars. Many Islamic nations have barred the practice, including Pakistan and Bangladesh, although it is technically legal in Sunni Islamic jurisprudence.

Triple talaq, in Islamic law, is based upon the belief that the husband has the right to reject or dismiss his wife with good grounds. The All India Muslim Personal Law Board (AIMPLB), a non-governmental organisation, had told the Supreme Court that women could also pronounce triple talaq, and could execute *nikahnamas* that stipulated conditions so that the husbands could not pronounce triple talaq. According to AIMPLB, "Sharia grants right to divorce to husbands because Islam grants men a greater power of decision-making." Background *Further information: Islam*

*in India and Divorce in Islam* Muslim family affairs in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937 (often called the "Muslim Personal Law"). It was one of the first acts to be passed after the Government of India Act 1935 became operational, introducing provincial autonomy and a form of dyarchy at the federal level. It replaced the so-called "Anglo-Mohammedan Law" previously operating for Muslims, and became binding on all of India's Muslims.

The sharia is open to interpretation by the ulama (class of Muslim legal scholars). The ulama of Hanafi Sunnis considered this form of divorce binding, provided the pronouncement was made in front of Muslim witnesses and later confirmed by a sharia court. However, the ulama of Ahl-i Hadith, Twelver and Musta'li persuasions did not regard it as proper. Scholar Aparna Rao states that, in 2003, there was an active debate among the ulama. In traditional Islamic jurisprudence, triple talaq is considered to be a particularly disapproved, but legally valid, form of divorce. Changing social conditions around the world have led to increasing dissatisfaction with traditional Islamic law of divorce since the early 20th century and various reforms have been undertaken in different countries. Contrary to practices adopted in most Muslim-majority countries, Muslim couples in India are not required to register their marriage with civil authorities. Muslim marriages in India are considered to be a private matter, unless the couple decided to register their marriage under the Special Marriage Act of 1954. Owing to these historical factors, the checks that have been placed on the husband's unilateral right of divorce by governments of other countries and the prohibition of triple talaq were not implemented in India.

The practice faced opposition from Muslim women, some of whom filed a public interest litigation in the Supreme Court against the practice, terming it "regressive". The petitioners asked for section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, to be scrapped,

describing it as being against Article 14 of the Constitution (equality before the law). On 13 May 2017, during the hearings before its final judgment, the Supreme Court described instant triple talaq as the "worst form of marriage dissolution". It noted that the custom is banned in the Muslim-majority countries of Saudi Arabia, Morocco, Afghanistan, and Pakistan. On 8 December 2016, the Allahabad High Court observed in a ruling that the practice of instant triple talaq was unconstitutional and violated the rights of Muslim women. In March 2017, over 1 million Indian Muslims, a majority of whom were women, signed a petition to end instant triple talaq. The petition was started by the Muslim Rashtriya Manch, an Islamic organisation affiliated to the Rashtriya Swayamsevak Sangh.

The petitioners against instant triple talaq have given evidence showing how instant triple talaq is simply an innovation that does not have much to do with Quranic beliefs. This is supported by the interpretation of Quranic text by many Islamic scholars, historical evidence and legal precedent. On 10 May 2017, senior cleric Maulana Syed Shahabuddin Salafi Firdausi denounced triple talaq and *nikah halala*, calling them un-Islamic practices and instruments to oppress women. The practice was also opposed by Hindu nationalists and Muslim liberals. Congress leader Kapil Sibal tweeted: "Absence of consensus in Court makes it more difficult to forge consensus within communities. Glad that Court set aside a 'sinful' practice." However, Sibal also made statements supporting triple talaq (see the following section). Over the year women organisations like Bharatiya Muslim Mahila Andolan and several others opposed this practice in particular and further demanded more reforms in Muslim personal laws.

Triple talaq has been supported by the All India Muslim Personal Law Board (AIMPLB), a non-governmental body that supervises the application of Muslim personal law. It believes that the State does not have the right to intervene in religious matters. The AIMPLB's lawyer Kapil Sibal



had said that though instant talaq can be thought of as a sin by some, but that "setting the validity of customs and practices of a community is a slippery slope". Kapil Sibal cited Article 371A to state that even the Constitution does intend to protect matters of practice, tradition and customs of communities. However, Sibal has also made statements opposing the practice.

The All India Muslim Personal Law Board (AIMPLB) defends the practice. In April 2017, citing a report prepared by Muslim Mahila Research Kendra in co-ordination with Shariah Committee for Women, AIMPLB claimed that Muslims have a lower rate of divorce compared to other religious communities, countering the argument that Muslims have the highest number of divorces in the country due to the practice of triple talaq. It also claimed that it had received forms from 35 million Muslim women across the country, supporting shariat and triple talaq. AIMPLB issued a code of conduct in April 2017 regarding talaq in response to the controversy over the practice of triple talaq. It warned that those who divorce for reasons not prescribed under shariat will be socially boycotted, in addition to calling for boycott of those who use triple talaq recklessly and without justification. It also stated that it should be delivered in three sittings with a gap of at least one month each.

Talaq is an Islamic word for divorce, denoting dissolution of marriage when a Muslim man can sever all marital ties with his wife. Under the Muslim law, Triple Talaq means liberty from the relationship of marriage, eventually or immediately, where the man, by simply uttering the word 'talaq' three times, ends his marriage. This instant divorce is called Triple Talaq, also known as 'talaq-e-biddat'.

The Muslim Personal Law (Shariat) Application Act of 1937 had legalised and allowed the practice of Triple Talaq which gave a Muslim husband special privileges over his wife.

## Conclusion

The Government formulated a bill and introduced it in the Parliament after 100 cases of instant triple talaq in the country since the Supreme Court judgement in August 2017. On 28 December 2017, the Lok Sabha passed The Muslim Women (Protection of Rights on Marriage) Bill, 2017. The bill was planned to make instant triple talaq (*talaq-e-biddah*) in any form — spoken, in writing or by electronic means such as email, SMS and WhatsApp illegal and void, with up to three years in jail for the husband. MPs from RJD, AIMIM, BJD, AIADMK, and AIML opposed the bill, calling it arbitrary in nature and a faulty proposal, while Congress supported the Bill tabled in the Lok Sabha by law minister Ravi Shankar Prasad. 19 amendments were moved in the Lok Sabha but all were rejected. All the Muslims in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937. This law deals with marriage, succession, inheritance and charities among Muslims. The Dissolution of Muslim Marriages Act, 1939 deals with the circumstances in which Muslim women can obtain divorce and rights of Muslim women who have been divorced by their husbands and to provide for related matters. These laws are not applicable in the state of Goa, where Goa civil code is applicable for all persons irrespective of religion. These laws are not applicable to Muslims who married under the Special Marriage Act, 1954. The case was called *Shayara Bano v. Union of India & Others*. The bench that heard the controversial triple talaq case in 2017 was made up of multifaith members. The five judges from five different communities are Chief Justice JS Khehar (a Sikh), and Justices Kurian Joseph (a Christian), RF Nariman (a Parsi), UU Lalit (a Hindu) and Abdul Nazeer (a Muslim). The Supreme Court examined whether Triple talaq has the protection of the constitution—if this practice is safeguarded by Article 25(1) in the constitution that guarantees all the fundamental right to "profess, practice and propagate religion". The Court wanted to establish whether or not triple talaq is an essential feature of Islamic belief and practice. In a 397-page ruling, though two judges

upheld validity of instant triple talaq (*talaq-e-biddat*), the three other judges held that it was unconstitutional, thus barring the practice by a 3–2 majority. One judge argued that instant triple talaq violated Islamic law. The bench asked the central government to promulgate legislation within six months to govern marriage and divorce in the Muslim community. The court said that until the government formulates a law regarding instant triple talaq, there would be an injunction against husbands pronouncing instant triple talaq on their wives.

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