



TRIPLE TALAQ IN INDIA: A LEGAL STUDY

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ABSTRACT

Triple talaq is a form of instant divorce in muslim law. Triple talaq is subject to Muslim Personal Law. Basically, there are two kind of personal law which are known as Hindu law and Muslim law and both are also known as family law. Triple is now banned in India. This is an ancient form of divorce and this form of divorce has been practiced by Indian Muslims. Earlier it was available to muslims in India, especially, adherents of Hanafi Sunni Islamic school of Jurisprudence. Triple talaq means a muslim man could legally divorce his wife by proclaiming three times consecutively the word talaq. Talaq is an Arabic word which means 'Divorce' in English. Triple talaq could be in spoken, written or in electronic form. Although the provision has been held unconstitutional in India now. But the situation was worst earlier when only husbands were allowed to take divorce from their wives. Triple talaq was not allowed to muslim women. Triple talaq is also known as Talaq-UI-Biddat.

Keywords: Triple Talaq, Divorce, Family Law, Personal Law, Jurisprudence, Proclaim, Unconstitutional, Punishable, Banned, Islamic Countries, Talaq-ul-Biddat.

1. INTRODUCTION

Triple talaq is not a new phenomenon in India. It is a kind of divorce in muslim personal law. Muslims are governed by the holy book Quran and rules given by mohammad Prophet. Islam is one of the oldest form of religion across the world. Everything is in codified in Quran. There are codified laws for marriage, divorce, succession, kinship, hiba, meher etc. in Quran and narration of various volumes of Hadees available. Divorce laws are prescribed in Quran widely but rules of talaq most of the times misinterpreted by the muslim scholars and people. Even though Prophet Mohammad said talaq should be avoided at any cost unless it is impossible to carry forward the marriage relations. Triple talaq refers that a husband can divorce his wife merely verbally uttering the word 'talaq' three times and marriage dissolved. Talaq is an act of repudiation of marriage by the husband in exercise of his power which has been conferred on him. The term divorce includes all terms of separation originating from the husband and repudiation for talaq in the limited sense, namely of separation effected by use of appropriate word. Generally both the parties of marriage have equal rights but in the context of divorce husband's right is much wider than the rights of the wife. The husband can dissolve the marriage tie at his will. A divorce can also take place by mutual agreement but the wife cannot divorce herself from her husband without his consent. Wife can purchase her divorce from her husband and this is known as "Talaq-E-Tafweez". Marriage may also be dissolved by judicial decree under the Dissolution of Muslim Marriage Act, 1939.

Classification of Dissolution of Marriage

(1) By death of a party to the marriage (2) By divorce- (A) Divorce by husband- (a) Talaq- Talaq-ul-sunnat and Talaq-ul-biddat (b) Ila (c) Zihar (B) Divorce by wife- (a) Talaq-e-tafweez (C) Divorce by mutual consent- Khula and Mubarat (D) Divorce by judicial separation under Dissolution of Muslim Marriage Act, 1939- (a) Lian (b) Fask.

Kinds of Talaq (Divorce) under Muslim law

There are two kinds/forms of talaq in Islam-

(1) Talaq-ul-Sunnat and (2) Talaq-ul-Biddat.

A. **TALAQ-UL-SUNNAT** – It is known as revocable divorce. It is a valid form of divorce in muslim law. It is also the approved and considered form of talaq by Prophet Mohammad. The prophet always considered talaq as an evil and recommended only revocable divorce. The word 'Sunnat' means Muhammad's way of life viewed as a model for muslims. It is also known as 'Talaq-ul-Sunna'. It means divorce in accordance with the requirement of the traditions. It is a traditional mode of divorce. It is valid according to all schools and sub-schools of Muslim law.

Talaq-ul-Sunnat is divided in two catagories- (A) Talaq-ul-Ahasan and (B) Talaq-ul-Hasan.

a) **Talaq-ul-Ahasan**- It is the most proper form of repudiation of marriage and there are two reasons behind it. (a) There is possibility of revoking the pronouncement before expiry of the Iddat period (Iddat period means period of waiting) (b) The words of Talaq are to be

uttered only once. It is preferred that these words are not repeated. 'Ahasan' itself is an Arabic word which means 'best'. It is also known as most approved form or most proper form of talaq. This talaq consists of a single pronouncement of divorce made in a period of tuhr (tuhr means purity-the period between two menstruations) or at any time if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period of iddat. There must be no sexual intercourse till the birth of the child in case of a pregnant woman. The requirement that pronouncement of should be made during a period of tuhr applies only to 'Oral' Divorce. It does not apply to talaq in writing. This requirement is not applicable- (a) where the parties have been away from each other for a long time or (b) when the marriage has not been consummated.

Revocation of Divorce- This talaq may be revoked either (i) by express words or (ii) impliedly by cohabitation within the iddat period. On such revocation, it is not necessary for the wife to undergo intermediary marriage. Husband can simply say 'I have retained you'.

b) Talaq-ul-Hasan – It is considered to be a 'proper' mode of divorce. In this mode parties to the marriage can revoke the divorce before the completion of three tuhrs (time period between two menstrual cycles). Hence, the man has to pronounce 'talaq' after completion of every single tuhr to his wife and therefore, the parties get opportunity for reconciliation. Hasan means 'good' in Arabic. This kind of talaq is also regarded to be proper and approved form. In this form of divorce, husband is required to pronounce the formula of talaq (the utterance of the words-'I divorce thee') three times during three successive tuhrs. If the wife has crossed the age of menstruation then the pronouncement of the talaq may be made after an interval (gape) of 30 days between the successive pronouncements. It is therefore, "a divorce upon a divorce", where the first and second pronouncements are revoked and followed by a third, only then talaq becomes irrevocable. It is necessary that no intercourse should have taken place during the period of purity in which the pronouncement has been made. For instance, when the wife is in tuhr, without having intercourse with her, the husband pronounces talaq. Then he revokes it (a) by words or (b) by intercourse. After the second pronouncement, husband again revokes it. When the wife enters her third period of purity and before any intercourse take place, husband makes a pronouncement of divorce. The movement husband utters the third pronouncement and marriage stands dissolved irrevocably.

B. Talaq-ul-biddat- This form of divorce is also known as Talaq-ul-Bain. It is known as irrevocable talaq. It is the irregular mode of talaq introduced by omayyads in order to escape the strictness of law. Biddat means disapproved, wrong innovation or to some extent, forbidden. In common parlance, this is also called 'instant triple talaq'. This form of talaq was allowed by Omar second caliph of Islam. It is recognized only under Sunni law. Talaq-ul-Biddat in any of its forms is not recognized by the Shias and Malikis. A peculiar feature of this talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. The prophet Mohammad never approved a talaq if there was no opportunity for reconciliation. The irrevocable talaq was not in practice during his life. Talaq-ul-Biddat has its origin in the second century of the Islamic Era. The Talaq-ul-Biddat has two forms- (a) triple irrevocable talaq and (b) single irrevocable talaq.

a) Triple Irrevocable Talaq- Talaq is pronounced in a single pronouncement made during tuhr and with a clear intention to irrevocably dissolving the marriage like "I divorce thee irrevocably".

b) Single Irrevocable Talaq- Three pronouncements are made in single tuhr, either in one sentence like "I divorce thee, three" or in a separate sentence like "I divorce thee, I divorce thee, I divorce thee".

Following are required for single form of talaq- (a) Marriage must be consummated (b) A single irrevocable pronouncement of talaq may be made. If a husband says to his wife, "I had divorce thee in 'talaq-ul-biddat' form", it is enough and an irrevocable divorce will come into effect. (c) Such pronouncement may be made any time either in a period of tuhr or even during menstruation (d) Such pronouncement may be made even if the husband had sexual intercourse with her since the last menstruation (e) Marriage is dissolved immediately on the irrevocable pronouncement of talaq.

Triple Talaq, Judgements and Law in India- Talaq means repudiation or rejection but according to muslim talaq means release from the marriage tie immediately or eventually. Talaq-ul-bidaat is a recognized form of divorce among the Hanafis. Shias and Malikis do not recognize this form of divorce.

In Moonshee Bulzoor versus Lateefutoon Nisa 8 MIA 397 it was declared that under muslim law talaq is the mere arbitrary act of a muslim husband who may repudiate his wife at his own pleasure with or without any cause. Husband can pronounce the talaq at any time. It is not necessary for husband to obtain the prior approval of his wife for dissolution of his marriage. A revocable pronouncement of talaq does not dissolve the marriage till the period of iddat has expired, but an irrevocable pronouncement dissolves the marriage.

In Sarabai versus Rabia Bai (1906) 30 Bom. 537- It was said that talaq-ul-biddat is theologically improper. This form of talaq is from the moral point of view.

In Fazular Rahman versus Aisha (1929)8 Pat. 690- The validity of talaq-ul-biddat was questioned in this case. It was argued in this case that this type of divorce is against the Quran and the court is not bound to give effect to such rule. It is also opposed to a tradition of the Prophet.

In Rashid Ahmad versus Anisa Khatoon (1932) 59 IA 21(ALLD)- In this case after the pronouncement of triple talaq husband and wife lived together and five children were born to them. Husband GhyasUddin treated Anisa Khatoon as his wife and children as legitimate. As there was no intermediate marriage, the bar to remarriage created by the divorce was not removed. Keeping in view, the above mentioned circumstances, remarriage could not be presumed and the children born after triple talaq were held to be illegitimate.

Shayara bano Vs. Union of India (2017) 9 SCC 1- The Supreme Court of India banned instant triple talaq or talaq-ul-biddat unconstitutional. Parliament of India declared the practice of triple talaq as illegal and unconstitutional in 30th July 2019. Triple talaq is a recognized but disapproved

form of divorce. It is considered by the Islamic Jurists as an innovation within the fold of Shariat. It commands neither the sanction of holy Quran nor the approval of the holy Prophet.

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL, 2017 (TRIPLE TALAQ BILL)-

- 1) **Divorce form**- Triple talaq is illegal in any form like spoken, written or in electronic form like SMS, what'sapp or message .
- 2) **Declaration**- It refers to the pronouncement of talaq three times by a Muslim man in one sitting to his wife resulting in an instant and irrevocable divorce.
- 3) **Cognizable offence**- The triple talaq bill makes a declaration of talaq-e-bidat as cognizable offence. It gives powers to a police officer to arrest the offender without requiring a warrant.
- 4) **Complaint**- Complaint can be filed by aggrieved woman or any of her relation by blood or marriage.
- 5) **Punishment provision**-A Muslim man pronouncing instant triple talaq attracts a jail term of 3 years under the triple talaq bill.
- 6) **Bail**- The accused is entitled to bail which can be granted by a magistrate. The bail can be granted only after the magistrate has heard the aggrieved woman.
- 7) **Reconciliation provision**- It also provides scope for reconciliation without undergoing the process of nikah halala if the two sides agree to stop legal proceedings and settle the dispute.
- 8) **Nikah halala**- It refers to practice under which a divorced Muslim woman has to marry another man and consummate the marriage and get a divorce. Only then can she be eligible to remarry her former husband.
- 9) **Custody of Minor children**- Under the triple talaq bill, the divorced Muslim woman is entitled to seek custody of minor children. This would be determined by a magistrate.
- 10) **Maintenance provision**- A woman divorced through talaq-e-biddat is entitle to demand maintenance for her and her dependent children under the triple talaq bill. The magistrate has the power to determine the amount of subsistence allowance.

ARGUMENTS IN FAVOUR OF BANNING TRIPLE TALAQ-

- 1) 92 percent of Muslim women in India wanted the triple talaq to be banned.
- 2) It is against the rights of equality and women empowerment.
- 3) It propagates the dominance of men over women.
- 4) It gave men the right to arbitrarily divorce their wives without any valid reason.
- 5) Technology has given birth to new modes of triple talaq such as through skype, SMS, Whats'sapp, text messages and email.
- 6) The 'triple talaq' has been abolished in 21 Islamic theocratic countries. Many countries across the globe have already banned the triple talaq. In Pakistan, Indonesia, Egypt, Turkey and Bangladesh among many others Islamic countries have banned the triple talaq. There is no reason for a democratic and secular India to continue this lopsided practice.
- 7) It is against the constitutional principles of gender equality, secularism, right to life of dignity etc.
- 8) It is against Article 14 (Right to Equality) and Article 15(1) which states that there shall be no discrimination against any citizen on the basis of gender, race etc. This kind of talaq is biased against the interests of women.
- 9) The constitution of the country says that it shall strive to bring a uniform civil code for the entire country. Doing away with triple talaq will definitely be a step closer to the constitution-makers dream of having a uniform civil code for all citizens.
- 10) However, the National Commission of Women says that this matter cannot be linked to uniform civil code. Nevertheless, it should be banned in order to protect the interests of Muslim women.
- 11) The Supreme Court has also declared that this practice is unconstitutional and not protected by Article 25 which regards the freedom of religion. The Allahabad High Court had said that no personal law board was above the constitution in Decemeber 2016.
- 12) Experts also opine that only the essential or integral features and aspects of a religion are protected by the Constitution. Triple talaq was not an integral feature of Islam.

ARGUMENTS AGAINST BANNING OF TRIPLE TALAQ-

- 1) It is well established that criminalizing something does not have any deterrent effect on its practice. The harsh punishment defies the doctrine of proportionality.
- 2) Three years in prison of the convicted husband will end up penalizing the already aggrieved wife and children too.
- 3) In the recent judgment, it is never said by the Supreme Court that triple talaq is to be criminally punished.
- 4) Parliament should have passed a law stating that the utterance of the words “talaq, talaq, talaq” (pronouncement of talaq three times) would amount to “domestic violence” as defined in the Protection of Women from Domestic Violence Act, 2005.
- 5) The Protection of Women from Domestic Violence Act, 2005 was conceived as a law that ensures speedy relief within 3 months to an aggrieved woman.
- 6) While Protection of Women from Domestic Violence Act, 2005 is civil in nature, still it has a reasonably stringent penal provision built into it.
- 7) Since marriage is a civil contract, the procedures to be followed on its breakdown should also be of civil nature only.
- 8) Civil redress mechanisms must ensure that Muslim women are able to negotiate for their rights both within and outside of the marriage.
- 9) Five arguments the All India Muslim Personal Law Board provided to the SC in favour of triple talaq- (a) Triple talaq provides security to wife. (b) Women get killed when men don't have an easy divorce. (c) Obtaining a divorce from courts scandalizes women's character but the damage is little for men. (d) Obtaining a divorce from courts “deters re-marriage” prospects of men, women. (e) Triple Talaq is a sin but valid and effective form of divorce.

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019-

- 1) **The purpose of this act** - (a) To protect the rights of married Muslim women (b) To prohibit divorce by pronouncing talaq by their husbands (c) To provide for matters connected therewith or incidental thereto.
- 2) **This act declared talaq as void and illegal**- (a) Any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner shall be void and illegal. (b) Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend upto 3 years and shall also be liable to fine.
- 3) **It provides for the protection of the rights of married Muslim women**- (a) Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance for her and dependent children, as may be determined by the Magistrate. (b) This act says that a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband.

TRIPLE TALAQ AND THE INDIAN CONSTITUTION-

It is the violation of Article 14, Article 15, Article 21 and Article 25 of the Indian Constitution.

- 1) Article 25 of the Indian Constitution guarantees about religious freedom and includes Freedom of Practice and Propagation of Religion.
- 2) Article 25 is also subject to restrictions like all other Fundamental Rights. It does not protect religious practices that can negatively affect the welfare of citizens.
- 3) Article 25 is overridden by Article 14 which guarantees the Right to Equality because triple talaq denies a Muslim woman's equality before the law.
- 4) Article 25 is also subject to Article 15 (1) which states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex etc. It violates Article 15 (1) of the Constitution.
- 5) The Muslim Personal Law (Shariat) Application Act, 1937 section 2 declares triple talaq as a statutory right and bring it under Article 13 of the Indian Constitution. Article 13 defines law and says that all laws framed before or after the Constitution shall not be violative of the fundamental rights.

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