

**A CRITICAL ANALYSIS OF TRIPLE TALAQ WITH SPECIAL REFERENCE TO
INDIAN CONSTITUTION**

-Parag Agarwal¹

ABSTRACT

“Either retain them with humanity, or dismiss them with kindness.”

- Quran, Chapter 11, V, p 229

Muslim Personal Law (Shariat) Application Act (1937 Act) recognises and enforces Triple Talaq and is ‘law’ in force. Triple Talaq does not fall within the confines of Article 25 (Right to Freedom of Religion). It is manifestly arbitrary and the 1937 Act insofar as it recognises the same, is unconstitutional and consequently struck down. The judgment in State of Andhra Pradesh v. Mc Dowell² is per incuriam. Triple Talaq against basic tenets of Quran and violates Sharia. Purpose of 1937 Act is to declare Shariat as the only law governing Muslims. Dissents with Nariman on the aspect that Shariat is ‘law’ in force under Constitution. It is a practice which had prevailed for a long time.

Triple Talaq does not violate the provision of articles 3 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) and 21 (Protection of life and personal liberty) which are sanctions against state action. Practice is, however, not present even in theocratic Muslim States.

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¹Student, Symbiosis Law College, Pune.

² 1996 AIR 1627, 1996 SCC (3) 709.

³ Art-14 & 15, Constitution of India.

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Introduction

India is also known by the name of land of many religions. It is the birthplace of four major religions- Hinduism, Sikhism, Jainism and Buddhism. It also has the second highest population of Muslims in the world, next only to Indonesia. India also has the third largest Shia population in the world. Out of 1028 million population, little over 827 million (80.5%) have returned themselves as followers of Hindu religion; 138 million (13.4%) as Muslims or the followers of Islam; 24 million (2.3%) are Christians, 19 million (1.9%) are Sikh, 8 million (0.80%) as Buddhists and 4 million (0.4%) are Jain. Our country also has immense diversity in its culture, caste, religion, customs, languages that give it uniqueness. Keeping in view these features, our forefathers conceived a Constitution which captures all its unique features.

Research Methodology

Definition of Research -

“The manipulation of things, concepts or symbols for the purpose of generalizing to extend, correct or verify knowledge, whether that knowledge aids in construction of theory or in the practice of an art.”

- D.Slesinger and M.Stephenson

For conducting this research, we have used the secondary method of research. Secondary research [also known as desk research involves the summary, collation, or synthesis of existing research rather than the primary research Which involves data collection from experiments. The tool used under this method is ‘other writings’ which involves writings of other researchers, books published, etc. The author(s) will analysis the case laws from various courts of country.

Objective of Study

Some says that triple talaq is invalid because it has no sanction in Muslim personal law. They believe that the religious domain does not allow for triple talaq. They draw a distinction between

instantaneous talaq, or talaq-i-bidat with talaq ahasan, which requires a 90-day period of abstinence after the pronouncement, and talaq hasan, which requires a one-month-long abstinence gap between utterances. The latter two are part of Islamic personal law, but the first one is not. They point out that only those features of a religion are constitutionally protected which are “integral” or “essential” parts of it. Constitutionally speaking, it is clear that triple talaq is a gross violation of the rights of women citizens. The right to religious freedom applies equally to women and men. It nowhere gives male citizens the permission to oppress female citizens. Muslim women have been denied their Quranic rights owing to misinterpretations and interference of patriarchal orthodox bodies. There is no evidence to show that talaq-i-bidat constitutes an integral part of the Islamic faith. There is no doubt that triple talaq violates women’s rights to equality and freedom, including freedom within the marriage, and should be invalidated by the Supreme Court. This view has created a paradoxical situation where, as long as personal laws are uncodified, they escape constitutional scrutiny, but the moment they are legislated by the state (as large parts of Hindu laws were in the 1950s), they become subject to the Constitution. However, the significance of the abolition of triple talaq shouldn’t be underestimated. And at the same time, there’s an urgent need to speak out not just against unjust personal laws, but also against the growing neglect and indeed discrimination that Muslim women suffer in different spheres. Any insight into the Quran unravels that polygamy in Islam was validated under strict conditions. It was primarily institutionalised to safeguard women and orphaned children living in an intolerant Arabian society. But it is quite difficult for the short-sighted minds of the mullahs to comprehend it today. The related verses in the Quran permitted a restricted polygamy under the exceptional circumstances only. The abolition of triple talaq is not a panacea for the deep and serious problems these women face. This view would be the easy and natural path for the court to take, it would also entail missing a significant opportunity.

Research Question

1. Whether to adjudicate the case in at assessing the relationship just between triple talaq and Muslim personal law?
2. Whether personal law can be subject to the Constitution at all. How the narrow view can be interpreted?

Constitutionality

We, the People of India having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic, Republic and to secure to all its citizens;

Justice, social, economic, political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and opportunity; and to promote among them all;

Fraternity, assuring the dignity of the individual and the unity and integrity of the nation ;

In our Constituent Assembly this, twenty sixth day of November 1949 do hereby Adopt, Enact and Give to ourselves this Constitution.

The Preamble of Indian Constitution aims to constitute India a Sovereign, Socialist, Democratic Republic. The terms socialist and secular were added to it by the 42nd amendment. The whole constitution is summarized in the preamble. It is the mirror to the spirit of the constitution. The arrangement of the words in the preamble is also very significant. Indian society is a multi-religious society, it is having different caste, religion along with several religion diversification. So, all these are the divisive factor in some way or the other and if not handled carefully then can cause a threat to the unity and integrity of the nation.

We are a nation which proudly profess to be the world's largest democracy, guaranteeing the protection of equal rights to all our citizens while boldly holding the flag aloft of being a secular nation. However, underneath all the rosy claims, lies the cruel underbelly of discriminatory and tyrannical personal laws which tear apart the foundation of equality upon which our great nation was built. The Delhi High Court considered different forms of Talaq in *Masroor Ahmed Vs State (NCT of Delhi) and Anr*⁴. It took the views of Sunni schools which were considered that triple talaq which is pronounced at one go is not regarded as three talaqs but only as one. The court took the notice of harsh abruptness of the practice of triple talaq which affects the divorced women as there is no chance left for reconciliation. The court observed that it is a development which may have filled a need at a specific purpose of time in history but it is found such a move

⁴ 2008(103)DRJ137.

would not be contrary to any essential precept of Islam or the Quran⁵ or any decision of the Prophet Muhammad. The court held that triple talaq will be regarded as one revocable talaq. The most heinous form of tyranny to which Muslim women have been subjected to since time immemorial is the outrageous practice of triple talaq. The court passed this ruling in order to break the custom of serving a Muslim wife with divorce capriciously and whimsically. The court held that the wife was liable to receive maintenance from the husband who is under an obligation to perform the duty. Invalidating⁶ arbitrary triple talaq, the Supreme Court held that the facts leading to talaq was required to be proven and a mere document stating the date or events of talaq would not be considered as valid talaq.

In Indian Society, Marriage is a social union or legal contract between individuals that creates kinship. In the Indian classical myths, we find that marriage is a sacred relationship between two individuals. The relationship between a couple is essentially a relationship of the souls. Whereas in Indian Society Talaq is not treated as a solution of some dispute in marriage.

Essentials

Capacity:

Every husband, who is of sound mind and attained age of puberty, is capable to declare talaq. No justification and reason are needed to be given by him. Person who do not fulfil the criteria are not competent to talaq. Talaq given by a minor or by an unsound mind is regarded as void and ineffective. If the man is lunatic, then if he declared his decision during lucid interval, it is valid. The parent cannot act on behalf. If the husband is insane and does not have any guardian, the judge declares the dissolution in favour of his interests.

Free Consent:

The consent of the husband must be free. Apart from this, the Hanafi law, even if the husband declares the talaq under coercion, undue influence, fraud and voluntary intoxication, it is valid and marriage can be dissolved. Although involuntary intoxication is void.

Formalities:

⁵ Kunhimohammed v. Ayishakutty, AIR 2012 Ker 60.

⁶ Shamim Ara vs. State of U.P. & Anr, JT2002(7)SC520.

In Sunnis, the talaq may be oral or written. The husband whenever feels, he may write a talaqnama, as there is no special formula or formalities which renders a talaq valid. Even if there is certain expression or action that the husband intends to break the marriage, it is sufficient. Witnesses are not required.

Talaq is an Arabic word and its legal meaning is 'to release'. Under Muslim Law, Talaq means repudiation of marriage by the husband. The court has intervened into the issue of triple talaq and has attempted to interpret the verses in the Quran. In *Yusuf v. Sowramma*⁷, Justice Krishna Iyer observed that the Muslim male enjoys unconstrained authority to dissolve the marriage. The holy Quran states that the man is forbidden to divorce his wife as long as she is faithful and obedient. In the state of affairs in India, he observed that, the teaching of Prophet and the verses of holy Quran has taken a contrary course and a misconception prevails with dealing with the wife's right of divorce. As a mode of divorce, Talaq is peculiar because muslim husband has an unrestricted right to divorce his wife without giving any reason. Muslim law does not require the existence of any fault or matrimonial offense as an excuse for talaq.

In a Case *Fazlur Rahman v Aisha*⁸, The validity of this type of divorce was questioned. It was argued that this type of divorce is against the Quranic Law and the court is bound not to give effect to the rule and it also opposed to a tradition of the Prophet. The Supreme Court observed that the correct law of divorce as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts of reconciliation between the husband and the wife by two arbitrators, one from the wife's family and the other from the husband; if the attempt fails, talaq may be effected.⁹

Triple Talaq & Holy Quran

Holy Quran, the paramount source of Islamic jurisprudence has not ordained that three divorces pronounced in the a single breath would have the effect of three separate divorces. to this effect the relevant verse of the Quran can be relied upon.

"A divorce is only permissible twice; after that, the parties should either hold together on equitable terms or separate with kindness"¹⁰

⁷ AIR 1971 Ker 261.

⁸ *Fazlur Rahman vs Musammat Ayasha And Ors.* 115 Ind Cas 546.

⁹ *shamim Ara v State of UP JT 2002 (7) SC 520.*

¹⁰ I-II : 229 Tras By A. Yusuf Ali.

The use of Arabic term 'Marratane' in the verse does not mean repeating it but effecting the divorce on two separate occasions. as it is explicit by the apparent meaning of the verse that even after two pronouncements of divorce on two different occasion, the chances for retaining the wife is very much open before the pronouncement of third divorce on separate occasion. virtually this third pronouncement if divorce make divorce irrevocable and the chance for retention comes to an end while some jurists are of the view that word, marratane means mere repetition of word talaq thrice or uttering three number of talaq indicate the purpose of effecting divorce.

Therefore, the instant verse (II : 229) establish that thrice divorces pronounced at one time does not amount to irrevocable divorce. In the case Rashid Ahmed v. Anisa Khatoon¹¹, man declared the triple talaq in the presence of his witness though in the absence of his wife. In quran there is no trace that the 'Three divorces' pronounced at one occasion would be treated as three divorces or irrevocable footing. Scholars have gone to the extent that the verse relating to the matter of three divorces is a definite and express enjoinder on the subject that mughallaza divorce will happen only when three divorce are pronounced one after another on different occasions.

Hence on the basis of quranic material as analysed above, it may be concluded that only one divorce in effect results from the three pronouncements at one occasion.

Politics over triple talaq

The BJP government headed by prime minister has said not to bring any political issue and aspects in this regards but one the senior leader has criticized it by saying “Muslims use this triple talaq to satisfy their willingness and feeling”.

Rashtriya Swayamsevak Sangh - a Hindu far-right group and ideological head of the BJP has supported this and further said this to support this by bringing “Uniform Civil Code”.

Flavia Agnes, a prominent women's rights lawyer, said “triple talaq has become typical low-lying fruit which everyone in this world can have access to it”.

Speaking at a seminar at Aliah University in the eastern city of Kolkata, she said that illiteracy and lack of awareness were the biggest problems when it came to women rights.

¹¹ (2001) 7 SCC 740.

“Talaq does not extinguish her economic rights, is not a magic wand that will solve all her problems”. Here in this patriarchal society men has been given more importance than the woman but in the modern world women are equal to men and should be treated with equal respect . “The Act¹² has a provision for “fair and reasonable settlement after divorce”.

Triple Talaq in Light of Constitution of India

All India Muslim Personal Law Board (herein after AIMPLB) argued on the issue of triple talaq that if court declared the practice illegal and unconstitutional, it will amount to religious hurt and oppose writing of Holy Quran. Further it is also contended by the AIMPLB tha Muslim personal laws are protected under the Article 25 on Constitution of India.¹³

Article 25 of Indian Constitution gives the Indian Citizen a fundamental right to of conscience and free profession, practice and propagation of religion. 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 reasonless 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 respondent¹⁴ said that personal laws are a legitimate basis for discrimination and therefore does not violate article 14 of the Constitution. The Court thereby favoured the respondents. At the same time the rights has been subjected to few limitation which empower state to declare any law which is in welfare of public at large. Moreover, the article is subjected to public order and morality. 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 AIMPLB¹¹, 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 women¹⁵ were entitled to a ‘fair and just’ amount of money within the ‘iddat’ period, beyond which, the husband was to have no liability. According to various incidents in past and various mattes listed before the Indian Judiciary, it is matter of fact that, practice of triple talaq is ruining various

¹² Muslim Womens Act,1986

¹³ Article 25 of Constitution of India : Freedom of conscience and free profession, practice and propagation of religion.

¹⁴ Danial Latifi and another v. Union of India,(2001) 7 SCC 740

¹⁵ Mohd. Ahmed Khan v.Shah Bano Begum And Ors,1985 SCR (3) 844.

families, It's just not a matter of wife, the practice also affect the children and other family members connected with the matter.

Taking note of Article 15(1) which says, state shall not discriminate against any citizen on ground of religion and the Article 25 is against women thus it violate their right vested under Article 15.

Further, Article 21 of Indian Constitution provide Indian Citizen protection of life and liberty and in various cases apex court mentioned the article 21 include right to live with dignity. In the case of triple talaq the dignity of Muslim Women is directly challenged and they have to reach the Hon'ble Supreme Court to protect their Right to live with dignity guaranteed by Constitution of India.

International Laws on Triple Talaq

In Saudi Arabia there are two ways to obtain a divorce depending on who initiates it, the first is easy and can be done by the husband and the second is extremely hard and is reserved for the wife. The first can be done by the husband simply by deciding in his heart to divorce his wife and in effect this becomes valid immediately. Then in his own time he can go to the courts and obtain a document of his decision and send a copy to the ex-wife. Alimony and child custody is not a big deal either and definitely not mandated. When it comes to the wife initiating a divorce it is a whole different issue. It's not even called divorce, it's called khula which literally means taking off as in taking off clothes or jewellery. What the woman has to do is prove that the husband did something. Abuse whether physical or verbal does not get a woman far in court even with a medical report because the Saudi judges tend to believe that she probably did something to provoke it. The only proof that will absolve the woman and get her treated favourably is one of three; proof that the husband is a drug addict, has AIDS or being a daughter of a VIP. Otherwise the process is stressful, expensive and might lead to her never seeing her children again.

As many as 22 Muslim countries – including Pakistan and Bangladesh or their provinces have abolished triple talaq either explicitly or implicitly. The list includes Turkey and Cyprus, which have adopted secular family laws. Tunisia and Algeria and the Malaysian state of Sarawak, which do not recognise a divorce pronounced outside a court of law; and Iran, where triple talaq doesn't have validity under its Shia law.

The invidious procedure of triple talaq is confined to the Sunnis alone, not only in India, but around the world. In a case¹⁶, the divorced Muslim woman was not even allowed to have telephonic conversation with her children. However, It has often been argued in India that religious minorities of any country are relatively impervious to change. They fear any alteration in their practices could lead to them losing their religious identity. But this apprehension doesn't afflict the Muslims of Sri Lanka, where they constitute a little less than 10% of the population. There are six subsections to Section 7 of the Ordinance passed by the Pakistan government in 1961. Any man after pronouncing talaq in any form has to give notice to the Chairman of the Union Council informing him about it and also provide a copy to his wife. Failure to do so could invite punishment up to one year or a fine of Rs 5,000. A talaq will not be effective until the expiry of 90 days after the man had served notice to the chairman. Within 30 days of receiving the notice, the chairman is required to constitute an arbitration council for reconciling the couples. If the wife is pregnant, the talaq shall not be effective until the expiry of 90 days or the pregnancy. Consequently, triple talaq remains abolished in Bangladesh as well. Judicial verdicts on such cases whether or not the failure to give notice to the chairman of Union Council leads to automatic revocation of divorce, hence the concept of triple talaq was also banned in Bangladesh. Sri Lanka's Marriage and Divorce (Muslim) Act, 1951, as amended up to 2006, doesn't recognise instant divorce. This is because the law requires a husband wishing to divorce his wife to give notice of his intention to a qazi (Islamic judge), who should attempt reconciliation between the couples over the next 30 days. It is only then the husband can give talaq to his wife – that too, in the presence of the qazi and two witnesses.

Judicial View

In *Sara Bai v Rabia Bai*¹⁷, The Bombay High Court recognized triple divorce on irrevocable footing. In the instant case one Haji Adam Siddiqui with two witnesses approached Qazi and before him he pronounced talaq in absence of his wife. Talaqnama was prepared by Qazi and it was duly signed by all concerned and step was taken to hand over her Iddat allowance with the communication of talaq. But she managed to make the same. Haji Adam died very soon. His divorced wife filed a suit assuming herself wife of Haji Adam for maintenance and residence, but the Bombay High Court refused to accept her contention and held above referred talaq on irrevocable footing. It was held that talaq being absolute it was effective as soon as words were

¹⁶ *Shayara Bano v. Union of India*

¹⁷ ILR 1905

written even without wife's receiving the writing. Justices Bachelor held that it (divorce) was good in law, though bad in theology.

Further, In case of Ahmad Giri v Mst. Megh¹⁸ The court observed that the Talaqul-Biddat is most prevalent form of obtaining divorce in India. Any change in this respect cannot be brought about by judicial interpretation. If there is a general desire among the Muslims to revert to the pristine of Islam, how such changes in the present state on Muslim Law can be brought out, in the words of Syed Amir Ali, "whether by general synod of Muslim doctors or by the direct action of the legislatures, it is impossible to say".

Justice Krishna Iyer¹⁹ made a significant observation regarding divorce. He observed that it is popular fallacy that a muslim male enjoys, under quranic law, unbridled authority to liquidate the marriage. The Holy Quran expressly forbids a man to seek pretext for divorcing his wife so long as she remains faithful and obedient.

Apex Court in a case²⁰ observed "Talaq-ul-Biddat or Talaq-i-Bidai, that is, giving an irrevocable divorce at once or at one sitting or by pronouncing it in the tuhr once in an irrevocable manner without allowing the period of waiting for reconciliation or without allowing the will of Allah to bring about reunion by removing difference or cause of difference and helping the two in solving their differences, runs counter to the mandate of Holy Quran and has been regarded, by all under Islam, as sinful. The learned Judge further observed that the mode of talaq giving unbridled power to the husband cannot be deemed operative as same has the effect of perpetuating discrimination on the ground of sex, that is, male authoritarianism. The need of the time is that codified law on Muslim marriage and divorce should be enacted keeping pace with the aspiration of the constitution. However, one thing is clear: gender justice cannot be achieved through personal laws, especially in the case of Muslim women. Muslim personal law, as followed in India, is inherently biased against women and many times leads to their exploitation. Moreover, because of the application of personal law in the matters of marriage, divorce, maintenance, inheritance and the like, Muslim women are precluded from enjoying the benefits accrued to them through secular law, which their counterparts from other religious communities enjoy.

Justice Tilhari cited with approval the following passage of honorable Justice Krishna Iyer. "Reform of law of marriage and divorce for Muslims as for others must be guided by right

¹⁸ AIR 1955.

¹⁹ Yusuf v Sowramma AIR 1971

²⁰ Rahmatullah v State of UP and Others AIR 1994

principles. In any matter of family law reform, I think there are three clear competing issue all of which have to be weighted. First and foremost, there is strong interest of the society generally that everything should be done to encourage and maintain stability and performance of family Unit not only for the sake of couples but also for the sake of children. In the case of Aisha Bibi v. Qadir Ibrahim²¹, the husband gave the wife an instant divorce in her absence without any just cause. Secondly, there is public interest in allowing marriage which have hopelessly broken down to be decently and rationally dissolved. Thirdly, there is a public interest that in any matrimonial dispute, justice should be seen to be done so that clearly guilty party should not be permitted to profit from situation which he and he alone had been instrumental in creating.

The Supreme court held the conclusion that law with regard to triple divorce should be understood in the light of the discussion of the case. To provide solution of such vexed problem by invoking constitutional provisions unnecessarily will be futile exercise. It will invite the trouble from the community concerned.²²

Conclusion

Hence, in conclusion of the submissions made above, I would like to submit that Law should be dynamic, not static and reform should be provided where essential. The provisions of triple talaq deserve a patient hearing and a reasonable debate and a conclusion that is not forced and extremely reasonable, correct and conducive with the provisions of the Constitution as well as having respect to the faith, beliefs and way of living Muslims have taking into account the changed dynamics of the society. Since Triple Talaq has been held to be violative of Article 14 of the Constitution, the Supreme Court has declared Section 2 of the 1937 Act to be void to the extent that it recognizes and enforces Triple Talaq. The Supreme Court has, therefore, held that Triple Talaq does not form a part of the Fundamental Rights provided under Article²³ of the Constitution that is Freedom of conscience and free profession, practice and propagation of religion.

²¹ (1910) 3 Madras 22

²² Iqbal Bano v State of UP (2007) 6 SCC 785

²³ Art-25(1), Constitution of India.