



## Triple talaq after shayara bano judgement

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### Abstract

The Supreme Court of India on 22 August 2017 delivered a historic decision in the constitutional bench decision on the validity of 'Talaq-e-Biddat' or 'Triple Talaq' under the Muslim personal law. The Hon'ble Court, declared by 3:2 majority the practice of Triple Talaq as unconstitutional. The decision of the Apex court will have a wide impact on the question of primacy between the fundamental right to the freedom of religion enshrined in the Constitution of India in the Article 25 and the fundamental right to equality under the Article 14, both of which the Hon'ble Supreme Court is duty bound to protect. The validity of 'Triple Talaq' is also significant from the point of view of gender justice as 'Talaq-e-Biddat' was seen to be blatantly discriminatory towards the Muslim women and the wider question of progressive reforms under the Muslim personal laws. In this paper we enquire that what will be the impact of judicial pronouncement in shayara bano judgement on triple talaq in muslim society.

**Keywords:** Talaq-e-Biddat, Talaq, Triple talaq, personal law, validity, freedom of religion, discriminatory, pronouncement

### Introduction

The Supreme Court of India on 22 August 2017 delivered a historic decision in the constitutional bench decision on the validity of 'Talaq-e-Biddat' or 'Triple Talaq' under the Muslim personal law. The Hon'ble Court, declared by 3:2 majority the practice of Triple Talaq as unconstitutional. The decision of the Apex court will have a wide impact on the question of primacy between the fundamental right to the freedom of religion enshrined in the Constitution of India in the Article 25 and the fundamental right to equality under the Article 14, both of which the Hon'ble Supreme Court is duty bound to protect. The validity of 'Triple Talaq' is also significant from the point of view of gender justice as 'Talaq-e-Biddat' was seen to be blatantly discriminatory towards the Muslim women and the wider question of progressive reforms under the Muslim personal laws.

### Concept of Triple Talaq

Triple talaq is a form of marriage dissolution in Muslim Law, whereby a husband can give the divorce to his wife by stating talaq three times in one row. The presence of wife is not required, she can be given talaq without assigning valid reason. The term "talaq" refers to the repudiation of marriage by husband under Muslim law. The practice of triple talaq has been prevailing since ancient times in India.

Triple Talaq, also known as talaq-e-biddat, instant divorce and talaq-e-mughallazah (irrevocable divorce), is a form of Islamic divorce which has been used by Muslims in India, especially adherents of Hanafi Sunni Islamic schools of jurisprudence. It allows any Muslim man to legally divorce his wife by stating the word talaq (the Arabic word for "divorce") three times 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 while simultaneously asking the government to ban the practice by enacting a law.

### Historical Perspective

Historically, the rules of divorce were governed by the Sharia, as interpreted by traditional Islamic jurisprudence, although they varied depending on the legal school. In Modern Times, as personal status (family) law were codified. They generally remained within the orbit of Islamic Law, but control over the norms of divorce shifted from traditional jurists to the state. Triple Talaq is 1400 year old practice among Sunni Muslim. This is not mentioned in the Quran and the Sharia law. As per Quran, marriage is intended to be unbounded in time the relationship between the spouses should ideally be based on love and the important decision concerning both spouses should be made by mutual consent. When the marital harmony cannot be attained, the Quran allows and advises the spouse to bring the marriage to an end although this decision is not to be taken lightly and the community is called upon to intervene by appointing arbiters from two families to attempt a reconciliation. The Quran establishes two further 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, and a man who takes an oath not to have sexual intercourse with his wife, which would lead to automatic divorce, is allowed a four month period to break his oath. The Quran modified the gender inequality of divorce practices that existed in pre-Islamic Arabia, although some

patriarchal elements and the others survived and nourished in later centuries. Before Islam, divorce among the Arabs was governed by unwritten customary law, which varied according to region and tribe its observance depended on the authority of the individual and groups involved. In the opinion of classical jurist variously classified pronouncement of talaq as forbidden and reprehensible unless it was motivated by a compelling cause such as impossibility of cohabitation due to irreconcilable conflict, though they did not require the husband to obtain court approval or provide a justification. The jurist imposed certain restrictions on valid repudiation for example the declaration must be of sound mind and not coerced. Upon talaq, the wife is entitled to the full payment of Mahr if it had not already been paid. he husband is obligated to financially support her until the end of the waiting period or the delivery of her child, if she is pregnant. In addition she has a right to child support and any past due maintenance, which Islamic law requires to be paid regularly in the course of marriage. It may involve "triple talaq" i.e. the declaration of talaq repeated three times or a different formula "you are haram for me". In the legal school view is that a triple talaq performed in a single meeting constituted a "major" divorce, while other classified it as a "minor" it resects pre-Islamic divorce customs rather than Quranic Principles, though legally valid form of divorce in traditional Sunni jurisprudence, Muhammad denounced the practice of triple talaq, and the second Caliph Umar punished husbands who made use of it.

#### Judicial Pronouncement Regarding Triple Talaq

in *Sarabai v. Rabiabai Bachelor, J.* referred to Triple Talaq and said that "it is good in law though bad in theology". In a Privy Council decision in 1932, 5 years before the 1937 Act, namely *Rashid Ahmad v. Anisa Khatun, (1931-32) 59 IA 21: AIR 1932 PC 25*, the Privy Council wassquarely called upon to adjudicate upon a Triple Talaq.

Lord Than kerton speaking for the Privy Council put it Thus: "There is nothing in the case to suggest that the parties are not Sunni Mahomedans governed by the ordinary Hanafi law, and in the opinion of their Lordships, the law of divorce applicable in such a case is correctly stated by Sir R.K Wilson, in his *Digest of Anglo-Muhammadan Law, 5th ed., at p. 136*, as follows: "The divorce called talak may be either irrevocable (bain) or revocable (raja). A talak bain, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A talak bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage, either:—(a) Once, followed by abstinence from sexual intercourse, for the period called the iddat; or (b) Three times during successive intervals of purity, i.e. between successive menstruations, no intercourse taking place during any of the three intervals; or (c) Three times at shorter intervals, or even in immediate succession; or (d) Once, by words showing a clear intention that the divorce shall immediately became irrevocable. The first-named of the above methods is called ahsan (best), the 327 second hasan (good), the third and fourth are said to be bidaat (sinful), but are, nevertheless, regarded by Sunni lawyers as legally valid.

#### The Privy Council went on to state

Their Lordships are of opinion that the pronouncement of the triple talak by Ghiyas-ud-din constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talaq actually pronounced under compulsion or in jest is valid and effective.

In *Shamim Ara v. State of U.P., (2002) 7 SCC 518*, this Court after referring to a number of authorities including certain recent High Court judgments held as under:

The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected. In *Rukia Khatun case [(1981) 1 Gau LR 375]* the Division Bench stated that the correct law of talaq, as ordained by the 392 Holy Quran, is: (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts." Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place.

Recently in *shayara bano case* the Supreme court after daily hearings came to the conclusion with majority of 3:2 that the triple talaq is unconstitutional and directed the central government to make legislation within 6 months i.e. by 22nd Feb 2018. Complying with the orders of the apex court the central government drafted the bill "Muslim Women Protection of Rights on Divorce) Bill 2017 states that the Muslim husband will be punished with 3 years of imprisonment if he gives the instant divorce. The bill is yet to be passed by Parliament.

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