Justifiability of Triple Talaq: An Update

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Introduction:

Triple Talaq is a form of divorce practiced in India, whereby a Muslim man can legally divorce his wife by pronouncing Talaq (the Arabic word for divorce) three times. The pronouncement can be oral or written, or, in recent times, delivered by electronic means such as telephone, SMS, Email or Whats App. The man need not cite any cause for the divorce and the wife need not be present at the time of pronouncement. After a period of iddat, during which it is ascertained whether the wife is pregnant with a child, the divorce becomes irrevocable.[1] In the recommended practice, a waiting period is required before each pronouncement of Talaq, during which reconciliation is attempted. However, it has become common to make all three pronouncements in one sitting. While the practice is frowned upon, it is not prohibited.[2] A divorced woman may not remarry her divorced husband unless she first marries another man, a practice called Nikah Halala. Until she remarries, she retains the custody of male toddlers and pre-pubertal female children. Beyond those restrictions, the children come under the guardianship of the father.[3]

The Muslim family affairs in India are governed by The Muslim Personal Law (Shariat) Application Act, 1937 (Muslim Personal Law), 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.[4] The Shariat is open to interpretation by the ulama (class of Muslim legal scholars). The ulama of Hanafi Sunnis consider 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, Ithna Ashariyya and Musta'lian Isma'ili Shia persuasions do not regard it as proper.

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The All India Muslim Personal Law Board (AIMPLB), has told the Supreme Court that women can also pronounce Triple Talaq, and can execute nikahnamas that stipulate conditions so that the husbands cannot pronounce Triple Talaq.[5]

The Supreme Court of India on Tuesday 22 August 2017 declared in the case of Shayara Bano v. Union of India[6] the practice of Triple Talaq as an unconstitutional by 3:2 majority. Justices Kurian Joseph, UU Lalit and RF Nariman delivered the majority Judgment. Chief Justice Khehar and Justice Abdul Nazeer dissented.

Keywords: Divorce in Islam/Constitutionality of Triple Talaq/Justifiability of Triple Talaq/The Narrow View/Justifiability of Triple Talaq.

Divorce in Islam

Under Muslim Jurisprudence, The term Talaq is commonly translated as "Repudiation" or simply "Divorce".[7] In classical Islamic law it refers to the husband's right to dissolve the marriage by simply announcing to his wife that he repudiates her.[8] Classical jurists variously classified pronouncement of Talaq as forbidden or reprehensible unless it was motivated by a compelling cause such as impossibility of cohabitation due to irreconcilable conflict,[9] though they did not require the husband to obtain court approval or provide a justification. The jurists imposed certain restrictions on valid repudiation. For example, the declaration must be made in clear terms; the husband 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. The 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.[10]

Giving the husband a prerogative of repudiation was based on the assumption that men would have no interest in initiating a divorce without good cause, given the financial obligations it would incur. Additionally, classical jurists were of the opinion that "The female nature is wanting in rationality and self-control".[11] Requiring a justification was seen as being potentially detrimental to the reputation of both spouses, since it may expose family secrets to public scrutiny.

Talaq is considered in Islam to be a reprehensible means of divorce. The initial declaration of Talaq is a revocable repudiation (Talaq raj ah) which does not terminate the marriage. The husband can revoke the repudiation at any time during the waiting period (iddah) which lasts

three full menstrual cycles. The waiting period is intended to give the couple an opportunity for reconciliation, and also a means to ensure that the wife is not pregnant. Resumption of sexual relations automatically retracts the repudiation. The wife retains all her rights during the waiting period. The divorce becomes final when the waiting period expires. This is called a "Minor" divorce (al-baynuna al-sughra) and the couple can remarry. If the husband repudiates his wife for the third time, it triggers a "Major" divorce (al-baynuna al-kubra), after which the couple cannot remarry without an intervening consumated marriage to another man.[12] This is known as Tahlil or Nikah Halala. Making the third pronouncement irrevocable prevents the husband from using repeated declarations and revocations of divorce as a means of pressuring his wife into making financial concessions in order to "Purchase her Freedom".[13] In traditional Islamic jurisprudence, Triple Talaq is considered to be a particularly disapproved, but legally valid form of divorce.[14] 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.[15] 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, 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, have not been implemented in India.[16]And as per the Koran, only after four serious attempts at reconciliation (which includes arbitration) is a Muslim husband permitted to utter the first divorce, which is followed by a three-month waiting period called iddah. If within iddah the marital dispute gets resolved, conjugal relations may be resumed without undergoing the procedure of remarriage. But after the expiry of iddah the husband can either re-contract the existing marriage on fresh and mutually agreeable terms or irrevocably divorce his wife in the presence of two witnesses by pronouncing the final talaq.[17]

This is the only method of divorce mandated in the Koran. Other forms such as Talaq-e-bid'a,Talaq-e-hasan, Talaq-e-ahsan and Talaq-e-tafweez are concepts of Hanafi jurisprudence. They find no mention in the Quran. Thankfully, it was the Quranic procedure that the apex court endorsed in 2002 when in the Shamim Ara v. State of U.P.[18] case

it invalidated talaq not preceded by arbitration or reconciliation attempts between the husband and the wife. It may be pointed out here that the pronouncement of three talaqs in one sitting does not constitute even one divorce as held by The Ahl-e-Hadees sect. In the Koranic view, first divorce becomes effectual only after the parties have gone through the process of reconciliation and arbitration. Divorces uttered without exhausting these options have no legal validity in Islam.

In this context, the views of Salman Khurshid quoted in the media are astonishing if true. Mr. Khurshid had told the apex court on May 12 that The All India Muslim Personal Law Board (AIMPLB) is the best body to guide the court on the varying philosophies of schools of Islam about Triple Talaq.

The reality is, had the AIMPLB been open-minded about different schools of Muslim thought, it would not be blindly advocating the Hanafi viewpoint that validates Talaq-e-bid'a (instant Triple Talaq). The board would have made use of legal devices such as takhayyur and talfiq al mazaahib which allow jurists to amalgamate the doctrines of various Islamic legal schools to formulate reformist interpretations that are capable of outlawing unjust practices such as Talaq-e-bid'a. On the contrary, the preface to the AIMLPB's Compendium of Islamic Laws released in 2001 categorically states that the original Urdu version of the compendium contains extensive notes in Arabic drawn from "authentic books of the Hanafi law", which is a clear indication of the board's intention to view Islam only through the prism of Hanafi law and nothing else.

Constitutionality of Triple Talaq

Given the reluctance of Muslim religious bodies in India to give up their sectarian conformism and delegitimize Talaq-e-bid'a, the Supreme Court will be well within its rights under Articles 141 and 142 of The Indian Constitution to resort to, in consultation with progressive Islamic scholars, a neoteric interpretation of the terms "Talaq" and "Shariat" mentioned in section (2) of The Muslim Personal Law (Shariat) Application Act, 1937, and lay down the procedure of divorce in accordance with the egalitarian and gender-just principles of the Quran.

In pursuance of this, the Constitution Bench may, without putting the Muslim personal law to the test of Article 13 (1), further clarify, elaborate and enlarge the scope of the Shamim Ara judgment and make the Koranic procedure of divorce ratified in that ruling common to both men and women. This would render the law gender-just by eliminating

the need for khula, wherein Muslim women seeking divorce are required to get the concurrence of their husbands or the Qazi to get the marriage dissolved.

The good news is, even outfits such as the BMMA which have been vociferously calling for a ban on Triple Talaq seem to have realised the untenability of their views. The BMMA's co-founder and intervener in the PIL before the Supreme Court, Zakia Soman, has now submitted to the Supreme Court (in her affidavit filed on March 3, 2017): "the courts in India have by a purely interpretative exercise held that Talaq-I-Bidat or instantaneous Talaq is illegal, ineffective and has no force of law. If the same declaration is given by this Hon'ble Court by a process of interpretation of personal law, then the question of going into the constitutionality of personal law does not arise."

The change in the BMMA's attitude towards Muslim personal law deserves to be welcomed and must be considered seriously by the apex court.

Justifiability of Triple Talaq

The Supreme Court began hearing arguments in Shayara Bano v. Union of India[19], which has popularly come to be known as the "Triple Talaq case". This case, in which the constitutional validity of certain practices of Muslim personal law such as 'Triple Talaq', 'Polygamy', and 'Nikah Halala' has been challenged, has created political controversy across the spectrum. The All India Muslim Personal Law Board (AIMPLB) has warned secular authorities against interfering with religious law. On the other hand, Prime Minister Narendra Modi has lent his support to the Muslim women fighting against the practice of Triple Talaq.

One would expect the judges of the Supreme Court to adjudicate the constitutional validity of Triple Talaq (and, if they choose, of the other practices under question as well) detached from the political debate, and strictly in accordance with law. A closer look reveals, however, that the court cannot decide this case without engaging in a series of complex and difficult choices. In particular, the court will have to decide first whether to adjudicate the case in a narrow manner, which stops at assessing the relationship between Triple Talaq and Muslim personal law, of whether to undertake a broader approach, and ask whether personal law can be subject to the Constitution at all.

The narrow view

Proponents of the first view which include some of the interveners before the court invite the judges to hold that Triple Talaq is

invalid because it has no sanction in Muslim personal law. In response to the AIMPLB's claim that the state has no right to interfere in the personal, religious domain, they respond that the religious domain, properly understood, does not, and has never, allowed for triple Talaq. They draw a distinction between instantaneous Talaq, or Talaq-i-bidat (where divorce is complete when "Talaq" is uttered three times in succession) 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.

Relying upon the Supreme Court's own judgments, they point out that only those features of a religion are constitutionally protected which are "Integral" or "Essential" parts of it. There is no evidence to show that Talaq-i-bidat constitutes an integral part of the Islamic faith and, consequently, it does not deserve constitutional protection. On this view, the Supreme Court need not go into tangled and messy questions involving personal law and the Constitution; it can decide the question on its own terms. Although this would involve secular judges laying down the law on what Islam does or does not consider an essential religious practice, the Supreme Court has been engaging in such religious inquiry at least since 1966, and it is too late in the day to now say that it cannot, or should not. In fact, the Supreme Court itself, in a number of cases, has either doubted the validity of instantaneous Triple Talaq, or gone so far as to say that it is not a part of Muslim personal law.

Such an outcome would be an easy one for the court to achieve, and of a piece with decades of consistent jurisprudence. Historically, the Supreme Court has often "Interpreted" or "Modified" elements of religion to conform to a modernist, progressive world view, while holding that such its interpretation is the true understanding of what the religion actually commands. Such judicial intervention has primarily but by no means exclusively been in the domain of Hindu law. In the words of one scholar, instead of subjecting religion to external norms (such as those prescribed by the Constitution), the court has attempted to reform religion from within. Of course, there is a very basic question here about the court's competence and legitimacy to undertake such a task. However, while the narrow view would be the easy and natural path for the court to take, it would also entail missing a significant opportunity.

Justifiability of Triple Talaq an update:

JS Khehar, CJI of Supreme Court: There are schools of thought which say that Triple Talaq is legal, but it is the worst and not a desirable form of dissolution of marriages among Muslims.

Former Union Minister Arif Mohammad Khan kept his view that: Triple Talaq is far from being fundamental and very far from being sacramental to Islam. It violates every good thing which Islam prescribes. What we are seeing in the form of Triple Talaq is similar to the pre-Islamic era practice where female infants were buried alive... Marriage is the only aspect which is extensively dealt in holy Quran that lays down the procedure for divorce and various schools of thought have distorted the tents of the holy book to their liking... Everything you need is in the Quran. If you need more, then look at the life of the Prophet and if you still need more, then use your own good sense. We can change the law, but not the habits of the society. Untouchability was banished by the Constitution, but it stays with us.

Attorney General Mukul Rohatgi denied that: Personal law is law, it will have to be tested under Articles 13, 14 and 15 of the Indian constitution. Articles 13 asserts the supremacy of the Indian Constitution. Article 14 and 15 provide for equality before the law and prohibit discrimination on the grounds of religion, race, caste, sex or place of birth.

Responding to the petitioner's contention that Triple Talaq is not Islamic and is against the mandate of the Quran, Justice Kurian Joseph asked "What if it is not part of personal law?" Mukul Rohatgi responded answered, "That your Lordships will have to decide", and further stated Matters of personal law should be in conformity with the Constitution. As far as Hindus are concerned, various steps were taken to bring personal law in conformity with the Constitution. As far as Muslims are concerned, only the Acts of 1937 and 1939 are there, and a small change after the Shah Bano judgment[20].

After the government made its submissions, Kapil Sibal began his arguments for the All India Muslim Personal Law Board. Kapil Sibal, Counsel, said (All India Muslim Personal Law Board) The issue is not Triple Talaq, it is patriarchy and it is there in every religion. All patriarchal societies are discriminatory. Even many Hindu laws are discriminatory. The headline of the day was the government's offer to enact a new law to govern marriages and divorces among Muslims.

Attorney General Mukul Rohatgi has conclude that: If the practice of instant divorce (Triple Talaq) is struck down by the court, then Centre will bring a law to regulate marriage and divorce among the Muslim community.

On 18 May, the Supreme Court reserved its judgment on Triple Talaq after six days of continuous hearings on a batch of petitions challenging the constitutional validity of Triple Talaq. On the final day, the counsels of several aggrieved women petitioners and women's rights organisations including Anand Grover, Arif Mohammad Khan and Indira Jaising-demanded Triple Talaq be declared illegal.

Before concluding his arguments, Kapil Sibal told the Supreme Court that the All India Muslim Personal Law Board had decided to issue a circular to all qazis while finalising the nikahnama to advise husbands not to indulge in triple talaq unless under compelling circumstances.

This was in response to the court asking the AIMPLB to include in the marriage contract a provision enabling all Muslim women to say no to Triple Talaq. Responding to the Supreme Court's question on whether triple talaq was bad and sinful, Kapil Sibal said, "It may be bad, it may be sinful, but women accept it". Interestingly, a large number of women lawyers appearing for aggrieved women petitioners protested loudly saying "No! No! No!"

Shayara Bano v. Union of India[21], etc. (Supreme Court of India): Judgment on Constitutionalism of Triple ?alaq, In a 3:2 decision, the Supreme Court of India declared triple Talaq unconstitutional and gave India's parliament six months "to consider legislation" for handling triple Talaq. In its opinion, the Court cited global advances in Islamic family law (in India, called Muslim personal law) in "even theocratic Islamic states" as evidence of the need for reform. The Court also noted that The Muslim Personal Law (Shariat) Application Act of 1937, which protects the religious freedom of Muslims in India, does not constitutionally protect practices deemed "Anti-Qur'anic." Asserting that Triple Talaq is such a practice, the Court held that it could not be protected under the Indian Constitution.

Justices RF Nariman and UU Lalit [Majority- Judgment written by RF Nariman] 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. Also, as understood by the Privy Council in Rashid Ahmad (supra), such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after Shamim Ara (supra). This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the 393 fundamental right

contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of The Muslim Personal Law (Shariat) Application Act of 1937 to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.[22]

Thus the decision of supreme court in the relevant case has broad the Muslim custom and rituals and empowered them to pronounce the Triple Talaq which is not allowed by their religion because of that the earlier situations were not favorable for Muslim women . On August 22, 2017 the Supreme Court struck down Triple Talaq, calling the practice unconstitutional and in violation of Article 14 of the Constitution, which provides for equality before the law. The honorable supreme court give direction to the central government to draft a bill in this reference. The central government draft 'Muslim Women Protection of Rights on Marriage Bill' was sent by the Centre to the States as the practice continued despite the Supreme Court striking it down. The draft was prepared by an inter-ministerial group headed by Home Minister Rajnath Singh. The proposed law would only be applicable on instant Triple Talaq or 'Talaq-E-Biddat' and it would give power to the victim to approach a magistrate seeking "subsistence allowance" for herself and minor children. The woman can also seek the custody of her minor children from the magistrate who will take a final call on the issue. Under the draft law, Triple Talaq in any form spoken, in writing or by electronic means such as Email, SMS and WhatsApp would be bad or illegal and void.

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