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Piyush Tyagi & Naman Khatri

Amity Law School, Delhi (IP University)

TRIPLE TALAQ DOWN, CREATES NEW DAWN FOR MUSLIM WOMEN

ABSTRACT

"Even though India recognizes itself as a secular state, But religion plays an integral part in our democracy .That's why many religious practices has been recognized and codified in various laws and statutes passed by the parliament.

The recent verdict of striking down the practice of Triple Talaq has opened new door for Muslim women's rights in our country and to give effect to the judgement passed by the constitutional bench consisting of five judged belonging to all the five major religions of India, The Triple Talaq Bill is pending in the parliament to criminalize this practice and to safeguards the rights of the women. There are various concerns of the Muslim community which needs to be look upon and which has been critically analyzed in the paper.

Since the turn off the 21st century the want for the women right's have been all time high and the apex court has passed various judgement in favour of it and has once again stood to the occasion by deeming the practice of Triple Talaq unconstitutional .

The judges went on to decide the constitutional validity of the judgement by scrutinizing the religious aspects as well as constitutionality of the Shariat Act , 1937 and whether there is a need for such practices or not .

The Supreme Court should have interpreted Talaq-e-biddat on the basis of existing laws prevalent in our country, but the court went into the religious aspect of it. Triple Talaq doesn't flow from the operation of Shariat Act, but nevertheless, the Supreme Court went on to examine the validity of the practice in Quranic law. That was a very surprising exercise which they undertook, as it broke the tradition of judicially reviewing the laws on the basis of the Constitution of the country.

The job of the judiciary is not to sit in judgement of validity of laws and customs with respect to the Quran or any other religious text for that matter. The judges, as per the mandate of the

Indian constitutional law, can only examine the validity of a law or a custom with respect to the Constitution and no other document."

INTRODUCTION

Simone de Beauvior said, "*This humanity is male and man defines women she not herself, but as relative to him; she is not regarded as an autonomous being. She is defined and differentiated with reference to man and not be with reference to her; she is the incidental, the inessential as opposed to the essential. He is the subject, he is the absolute – she is the other*"[1]

This has been rightly quoted by Mr. Beauvior and can be applied to define the typical patriarchal society which is prevalent in India. It is the man who pronounces the divorce on the women, with the women having no say in the matter thus putting an end to their nuptials. There was an influx of cases regarding the issue of Triple Talaq where many of the aggrieved women were demanding justice regarding termination of their marriage by using this archaic law, of which there is no mention in the Islamic law, and for it to be made redundant and stop men from using it.

Growing concerns over the demands of gender justice and equality in India has put pressure on the courts to answer to these new challenges and the Supreme court rose up to the occasion to address the matter of Triple Talaq and give answers with respect to its constitutional validity in the case of Shayara Bano v Union of India[2] where the five judge constitutional bench gave the answer in the negative and stopped the practice of Triple Talaq by deeming it unconstitutional.

THEOLOGY OF TRIPLE TALAQ

In Islamic law or Shariah, the answer to any question, solution to conflicting instincts, or resolution to an issue is provided for in the Holy Quran, that is, the final word and rule of Shariah. There is nothing more to be done. When there is no clear guidance in the Holy Quran, theologians must look to the traditions of the Prophet or Sunnah as recorded in the

[1] H.M. Parshley (Tr.), S. Beauvior, The Second Sex page 86 (Alfred Knopf, New York 1983).
[2] (2017) 9 SCC 1

Hadith. If no guidance is found even there, then we must refer to a general consensus of opinion or ijma (which the ulema might arrive at after closely studying the first two). If the resolution is found by ijma then that would become a rule of Islamic law. Because of this, Islamic law, like any other, is an ever changing, evolving and living body of law. However, it must remain rooted in the original sources of the faith.

In pre-Islamic Arabia, as indeed in parts of the western civilization, women were considered chattel or property of men with no right to inheritance or to own any property. The reforms introduced by Islam included the end of female infanticide prevalent in pre-Islamic Arabia, recognition of equal legal position in the law of contracts and property, as manifested in the requirement of women's consent for marriage and mehar amount as consideration, recognition of women's right to inherit/own property in their own name separate from their husbands', right to maintenance, right to seek unilateral divorce if the husband was abusive, and to remarry upon divorce or demise of husband. Many of these rights did not exist even in the West till the late nineteenth or early twentieth centuries. For instance, married women's right to own and control property was recognized by English common law only in 1882. Thus, in many ways, Islamic societies were ahead of many others in recognizing a fundamental equality of genders. Among the pre-Islamic Arab tribes, the right to divorce possessed by the husband was unlimited and was frequently and arbitrarily exercised without any regard to any marital obligations or responsibilities on behalf of the husband. Such social evils were well known to the Prophet Mohammad. In proclaiming the words of Allah in the Holy Quran, as well as through his teachings in his lifetime, he sought to right many of these wrongs and frame rules and laws under which the bond of matrimony would be held sacred and the position of the wife greatly elevated. Prophet Mohammad restrained the power of divorce possessed by the husbands; he gave to the women the right of obtaining separation on reasonable grounds; and towards the dawn of his life he went so far as to forbid this exercise by the men without the intervention of arbiters or a judge. He pronounced, talak to be the most detestable before the Almighty God of all permitted things[3] for it prevented conjugal happiness and interfered with bringing up children properly. It is significant that the Prophet himself never divorced any of his wives and mostly married widows.

But after the death of the Prophet Mohammad the Muslim faction split up into two factions that is the Sunni and the Shia with each having many schools of thought. As already stated,

[3] Syed Amir Ali, Mahommedan Law, 5th Edition (Kitab Bhavan)

the Holy Quran nor the teachings of the Prophet in any way talked about the practice of Triple Talaq, it recognized divorce but not Triple Talaq. This practice of instant divorcing came about due to a kind of innovation of Islamic law called Zindiq. Zindiq is where one goes so far into innovated and deviant beliefs and philosophizing, etc., without sticking to the truth found in the Quran and the Sunnah to such an extreme extent that they leave Islam altogether.

But if it is outside the scope of Quran and having such extreme ideology then how did it zindiq come into practice in our society? From an anthropological perspective, this gap between law and local practice can be attributed to the historical development of Islamic society, wherein Islam slowly came to exist side by side in societies with other systems of belief. That is why we find that some people lived their lives closer to the Islamic ideal than others. Moreover, as time goes by, people eventually start following the custom or usage and start attaching different meanings to it. Therefore, such a custom or usage that may not have anything to do with the scripture and the law and may still have been in acceptance because of sheer accretion; yet, it may have been accepted to this extent by society, that it came to be wrongly perceived as a part of the religious/legal system. So, saint worship may have developed due to any reason or even superstition and may well be a part of religion by some Muslims who practice it. However, such practices are eventually seen as giving way to the Islamic ideal as laid down by the basic tenants. Thus, many anthropologists are of the view that all such forms of customs and practices, like worshipping of saints, traces of caste, etc. are mere temporary anomalies, which would eventually be eliminated. For those scholars who see law to stand above the society as a standard of perfection, the desire to follow the true path is so strong that with the spread of the knowledge of Islamic law.

STATUS OF TRIPLE TALAQ IN ISLAMIC STATES

In order to adjudicate the case, the Supreme Court placed their reliance upon the practice of Triple Talaq in Islamic states across the world. In most Muslim countries, domestic law no longer recognizes Triple Talaq as a valid form of divorce. They treat three pronouncements as one single declaration. A survey of the following provisions in various legislations of such states shows that the Islamic world has increasingly come to realize that Triple Talaq does not have any foundation in the teachings of Islam; and certainly not any place in the modern world under Islamic law. In most of these countries, three pronouncements are taken as one single pronouncement of talaq,The following survey of the major Muslim countries of the

world shows that the laws in these nations support the proposition that Triple Talaq has no place and is not a practice which Islam encourage:

1. **EGYPT:** (The seat of Al Azhar University, which is considered one of the top centres of Islamic learning): Articles 356 and 557 of Law No. 25 (1929), as amended by Law No. 100 of 1985 Concerning Certain Provisions on Personal Status in Egypt, expressly provides that Triple Talaq will be considered as one.

2. **IRAQ:** (A majority of the population is Shia but was long ruled by a Sunni head of State): Article 37(2) of Law No. 188 of 1959, The Law of Personal Status of Iraq states that "three verbal or gestural repudiations pronounced at once will count as only one divorce".

3. **SUDAN:** Section 360 of Sudanese Manshur-i-Qadi al-Qudat provides that Triple Talaq shall be considered as one. Article 3, Shariah Circular No. 41/1935 of Sudan states that pronouncement of all divorces by the husband is revocable except the third one, along with a divorce before consummation of marriage, and a divorce for consideration.

4. **PAKISTAN:** (Majority being Sunnis of the Hanafi school): Section 7 of Muslim Family Law Ordinance 1961 provides that the traditional form of divorce is not in force in its original form.

5. **SYRIA:** Under Article 92 of Law No. 34 of the Law of Personal Status of Syria of 1953, if a divorce is coupled with a number, 33 expressly or implied, not more than one divorce shall take place and every divorce shall be revocable except a third divorce, a divorce before consummation, and a divorce with consideration. Further, such a divorce would be considered irrevocable.

6. **MOROCCO, AFGHANISTAN, LIBYA, KUWAIT, YEMEN:** These countries adopted similar laws in 1958, 1977, 1984, 1984, and 1992 respectively: Article 51 Book Two of the Mudawwana of 1957 and 1958 of Morocco. Sections 145 and 146 of the Civil Law of 4 January 1977 of Afghanistan. Section 33(d) of Law No. 10 of 1984, Concerning the Specific Provisions on Marriage and Divorce and their Consequences in Libya. Section 109 of Law No. 51 of 1984 regarding al-Ahwal al-

Shakhsiyah (Personal Law) in Kuwait. Article 64 of the Republican Decree Law No. 20 of 1992, Concerning Personal Status of Yemen.

7. **UAE, QATAR, BAHRAIN:** Despite the impression of these countries being overtly orthodox, they have adopted similar measures under their Personal Law statutes. Section 103(1) of Qanun al-Ahwal al-Shakhsiya (Personal Law) of UAE No. 28 of 2005. Section 108 of Qanun al-Usrah (Family Law) of Qatar, No. 22 of 2006. Section 88(C) of Law No. 19 of 2009 regarding Qanun Ahkam al-Usrah of Bahrain.[4]

The Supreme Court several times, during the pendency of the proceedings, enquired about the stance of Saudi Arabia on Triple Talaq showing that they discussed the foreign state's practice so that they could be better equipped to answer the questions pertaining to Islamic personal law.

INDIAN COURTS AND MUSLIM PERSONAL LAWS

The courts in India had dealt with the concept of Triple Talaq as early as 1905, in the matter of Sara Bai v. Rabia Bai[5] wherein the Bombay High Court recognized Triple Talaq as irrevocable. In Saiyid Rashid Ahmad v. Mussammat Anisa Khatun[6] the Privy Council held that three talaqs pronounced at one time would be valid and effective. The Court stated that the parties therein were Sunni Muhammedans and were thus "governed by the ordinary Hanafi law".

Such rulings were often driven by the understanding of the judiciary in British India that Muslims believed their laws to have divine source and thus were afraid of interfering with them to a great extent. However, in time judicial pronouncements began to more carefully consider the application of Islamic law and the writings of those that questioned the unbridled and arbitrary nature of an irrevocable divorce pronounced thrice in one sitting.

In the case of Shamim Ara v. State of Uttar Pradesh & Another[7] judgment settled the law that no form of Muslim talaq can be considered valid if it is not proved with clarity that it was for a reasonable cause and all the preceding attempts at resolving and reconciling differences were carried out before the pronouncement was made. Further, the pronouncement itself as well as its communication to the wife required convincing proof. Subsequent assertions in

[4] Khurshid, Salman. Triple Talaq: Examining Faith
[5] ILR (1905) 30 BOM 537
[6] 1932 (34) BOM LR 475
[7] (2002) 7 SCC 518

pleadings of a divorce pronounced in the past as it were, was unacceptable. This ruling was by itself a guard against a spur-of-the-moment divorce. It laid to rest the position taken by some schools that even an instantaneous talaq proclaimed in a state of intoxication, anger, or in jest was valid.

The concept of Triple Talaq was challenged again in 2008 when Badar Durrez Ahmed, J. in the case of Masroor Ahmed v. State (NCT of Delhi) [8] came to the conclusion that "Triple Talaq (talaq-e-bidaat), even for sunni muslims be regarded as one revocable talaq". He came to this conclusion based on the reasoning that this form of talaq did not fulfil the requirements for an effective divorce under the teachings of the Quran.

As recently as December 2016, the High Court of Kerala, in Nazeer v. Shemeema[9], stated that:

"8. It is to be noted that Qur'an nowhere approves Triple Talaq in one utterance and on the other hand promotes conciliation as best method to resolve the marital discord. The method and procedure of divorce as [mentioned] above has been referred to by all leading Islamic scholars. They also have frowned upon Triple Talaq in single utterance to effect divorce saying that it revolts against Allah's law. One of the eminent Islamic scholars Sheikh Yusuf al Qaradawi in his book 'The Lawful and the Prohibited in Islam' refers to method of divorce and holds that Triple Talaq in single utterance is against God's law."

HOW DID IT COME ABOUT

On October 16, 2015, the Supreme Court addressed whether Muslim personal law practices of marriage and talaq decreases the status of women. In an exceptional move, it registered a suo motu public interest litigation petition titled 'In Re: Muslim Women's Quest for Equality' to examine whether Triple Talaq, polygamy and nikah halala violates women's dignity and status.

The court lamented missing the opportunity to address the issue of gender equality in both the Shah Bano and Daniel Latifi cases. In the Shah Bano case, the court essentially impelled the legislature (government) to frame the Uniform Civil Code. In the Daniel Latifi case, it kept

[8] 2008 (103) DRJ 137
[9] 2017 (1) KLJ 1

up the benefit of Muslim women to maintenance till re-marriage. Various Muslim women and groups supported the court's initiative. In the end, a Constitution Bench restricted itself to analyzing Triple Talaq and not polygamy and nikah halala.

THE TRIPLE TALAQ VERDICT

The constitutional bench of the Supreme Court held Triple Talaq to be violative of our fundamental rights under Art. 14 of the constitution of India with the majority of 3:2. The dissenting judges were CJI himself (as he was then) and S. Abdul Nazeer. The majority opinion was announced by Rohinton Nariman, Kurian Joseph and U.U. Lalit.

THE JUDGEMENT CAN BE DIVIDED INTO THREE PARTS.

1. Legislature should draft the law within 6 months
2. Triple Talaq Invalid
3. Triple Talaq is unconstitutional

1. *Legislature should draft the law within 6 months*

The first part is part of the judgement given by the dissenting judges (CJI J. S. Khehar & S. Abdul Nazeer)

CJI remarked in para 190 in the judgement of Shayaro Bano Vs. U.O.I [10]that "*It would not be appropriate for this Court, to record a finding, whether the practice of 'Talaq-e-Bidat ' is, or is not, affirmed by 'Hadiths', in view of the enormous contradictions in the 'Hadiths', relied upon by the rival parties."*

Hereby means chief justice J.S. Khehar said it would not be right for the courts to examine the validity of 'Talaq-e-Bidat' as there are contradictions in Hadiths. Also, Triple Talaq is integral to the religious denomination of Sunnis belonging to the Hanafi school. Therefore, it has become a part of their faith which has been followed by them for more than 1400 years of age and therefore it has to be accepted as part of 'Personal Law'.

[10](2017) 9 SCC 1

The CJI also rejected the contention by the petitioner that Questions/ Subjects covered by the Shariat Act 1937 are now statutory law and are not Personal Law. He opined that Triple Talaq doesn't derive its validity from the Shariat Act, 1937 which is just an eight-decade old law. This law is very central for applying Muslim personal law in India and only because of this pre-independence law. Sharia'h law is recognized as Muslim personal law. Henceforth the personal law also gets the guarantee of the fundamental rights conferred in part III, article 25 of the constitution announcing the above mentioned the CJI remarked, "*The practice of 'talaq-e-biddat' being a constituent of 'personal law' has a stature equal to other fundamental rights, conferred in Part III of the Constitution. The practice cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention.*"[11]

Therefore, CJI held that Triple Talaq being a personal law have the protection of fundamental rights and also it is not open to judicial intervention. On the question of Triple Talaq being violative of article 14, 15, 21 CJI held that fundamental rights enshrined in the constitution are subject to state actions only and not between the private person. As Triple Talaq is between husband and wife therefore it is not protected under fundamental rights. In concluding his (CJI) judgement. He held that till such time as legislation in the matter is considered, we are satisfied in injunction Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The injunction, shall in the first instance, be operative for a period of six months. Failing which, the injunction shall cease to operate.

Thereby meaning Triple Talaq barred for a period of six months during which the government is to draft a law, falling which the injunction would lapse

However, it must be noted that this is just a minority opinion, the majority opinion of Justice Nariman and Kurian Joseph will be the final word.

2. Triple Talaq Invalid (held by Justice Kurian Joseph*)*

Justice Kurian held that triple talaq is bad in theology and therefore bad in law and lacks legal sanctity. He agreed with the view taken by CJI that Triple Talaq fell in the domain of

[11] (2017) 9 SCC 1

personal law, but he relied on the Shamim Ara vs. State of U.P[12] in which the supreme court held that Triple Talaq was not integral to Islam, which meant that after the introduction of the Shariat act 1937 , any practice which is against the Quran is not permissible in the Islam. Henceforth Triple Talaq is not protected under the constitution and is invalid.

On the issue of directing the legislature to form the law as taken by the CJI J.S. Khehar (as he was then) Justice K. Joseph stated that there is no need for the courts to ask the legislature to frame the law as was held by CJI. Justice K. Joseph concede to the need for harmonizing religion and constitutional rights.

***3.Triple Talaq is unconstitutional (*Justice Rohinton Nariman & UU Lalit)**

The judgement announced by Justice Nariman can be called as the most modern view as he has held that Triple Talaq is unconstitutional. Pronouncing his judgement he held in the following words , *"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."*[13]which meant Holy Quran doesn't have any provisions relating to the irrevocable Talaq. It only recognizes those Talaq which are for a reasonable cause and preceded by the attempts of reconciliation Between husband and wife.

Further announcing the judgement, he went on to say that 'Triple Talaq is arbitrary in the sense that marital ties can be broken capriciously and whimsically by the Muslim man but not by the women and therefore it is violative of article 14 of the constitution.

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 deemed as being void to the extent that it recognizes and enforces Triple Talaq in India.

CONCLUSION

As Quran is Islam and Islam is Quran. Quran is the authority to look upon for the followers of Islam. Both Islam and Quran go hand in hand, but with time people starts following what suits them the most. As there was no mention of Triple Talaq in the holy book of Quran. In

[12] (2002) 7 SCC 518
[13] (2017) 9 SCC 1

fact Prophet Mohammad denounced talaq to be the most detestable. 'Triple Talaq' was never there in Quran but it came into existence only around 1400 years back. Henceforth Triple Talaq is a custom which evolved with time but has no sanction in the Holy Quran and not even in Hadiths.

In various Islamic countries which are said to be more orthodox than India most of them have abolished 'Triple Talaq' as mentioned in the paper. In India validity of 'Triple Talaq' was first time challenged in 1905 but at that time court were not in favour of announcing Triple Talaq to be invalid as it was a part of personal laws and in Islam personal laws are considered having the sanctity of Allah. Then there were many cases Shamim Ara vs. State of UP [14], Masroor Ahmed v. State (NCT of Delhi)[15], Nazeer v. Shemeema[16]which can be said as the evolution of ending 'Triple Talaq' in India.

In Shayara Bano vs U.O.I[17] the apex court took a very unprecedented step to file a Suo motto public interest litigation and constituted a 5 judge constitutional bench to examine the validity of Triple Talaq , Nikah Halala, and Polygamy. But in the end the Hon'ble supreme court only examined the validity of Triple Talaq and held it to be invalid by majority of 3:2 .

Also while hearing the case this was the first time that judges went on to examine the islamic laws with reference to the religious text which is very unexpected of judges. As judges have to examine the law on the basis of the constitution, on the basis of laws and statutes passed by the parliament and not the religious texts.

[14] Supra Note. 7
[15] Supra Note. 8
[16] Supra Note. 9
[17] Supra Note. 10