

THE TYRANNY OF TRIPLE TALAQ

Kanishtha Mehta & Asmita Hegde

Government Law College, Mumbai

This paper analyses the circumstances in which the custom of Triple Talaq was promulgated, the controversies surrounding the tradition and the judicial stance on its constitutional validity. On one hand, the paper takes into account alleged cases of human rights violations and on the other hand, it attempts to present the Army's perspective on the same. This paper aims to study the various aspects of this controversial practice and arrive at an impartial and feasible denouement. In writing this report we have perused a plethora of articles from various news engines, government websites and papers and official reports of International Organizations.

HISTORY

The regressive practice employed by Muslim men to divorce their wives instantly or impulsively without their consent, by uttering the word 'talaq' thrice has been in practice in India for many years now. Several Muslim women were forced to accept the discriminatory triple talaq Sharia law owing to pressure from certain elements from within the society. Over the past many years several cases have been reported, where women have undergone severe trauma after being abandoned and thrown out of homes by their husbands. Women are aggrieved due to this age old practice of giving all the power to a man to get rid of the woman without giving her any explanation or having to justify his act in front of a court or gathering of people.

The dominant views on the issue are either by the likes of the All India Muslim Personal Law Board ("AIMPLB") or the Muslim women themselves. It signifies two extreme positions; continuation of status quo versus voices for reform and gender justice. Unfortunately in India, this archaic custom of triple talaq is still in existence due to religious, theological and political reasons. It still remains effective in India where communities following this religious law are protected. The AIMPLB is a non-government organization constituted to adopt suitable strategies for the protection and continued applicability of Muslim Personal Law in India, most importantly, the Muslim Personal Law (Shariat) Application Act of 1937, providing for the application of the Islamic Law Code of Shariat to Muslims in India in personal affairs.

The AIMPLB has, time and again, opposed the abolition of triple talaq in India by arguing that it is based on Sharia law. The AIMPLB has been overtly criticized by women's rights activists, the judiciary and the government over its determination to oppose the ban of triple talaq which is being sought. A wary AIMPLB and Muslim scholars see the demand for banning triple talaq as a first step towards paving the way for a Uniform Civil Code. One

of the reasons the Muslim clergy are adamant they will not allow any interference with their religion is that they believe issues are being cherry-picked. They say there are many instances where laws of the land are misused; the solution is not to overturn the law, but to introduce social reform. Whenever the demand for a Uniform Civil Code has been raised, it has been in the context of something related to Muslims and Islamic law, and that is why Muslims assume it will affect them alone, even though it will affect many Indians and the country as a whole. The AIMPLB oppose Uniform Civil Code because it believes that a unified code will take away all the religious freedom rendered by the Constitution. The Constitution allows religions to follow their own personal laws in matters of marriage, divorce, inheritance and adoption.¹ Unlike Hindu personal laws that underwent a series of reforms in the mid-1950s despite the stiff resistance from the Hindu right, Muslim Personal Law has not seen such changes.

The Muslim clergy's view is that Muslims follow the criminal laws as per the Constitution, at least they should be given the right to live their personal lives based on their religious teachings.

There have been in-numerous instances where the practice of triple talaq has left the Muslim woman in a state of agony and helplessness. However the judicial system in India has done everything in its capacity to side with the Muslim woman and provide them with the benefit of the doubt, as they are the end victim of this atrocity in most of these cases.

Shamim Ara

In the judgment of Shamim Ara², decided by Supreme Court the wife was subject to desertion and cruelty by her husband and when she moved to the Court under *S.125* of the Criminal Procedure Code, the husband put in an additional plea of divorce which ceased all their rights and obligations as spouses. The Court then held that 'oral talaq' or 'talaq in writing (Talaqnama)' would operate as a full operational talaq which is unjust and blatantly against a woman as to her conjugal rights and in the very words of the Supreme Court:

"If a man says to his wife that she has been divorced yesterday or earlier, it leads to a divorce between them, even if there be no proof of a divorce on the previous day or earlier."

However, since there was no proof regarding the husband's plea of divorce on the said date and the talaq not being pronounced, the Supreme Court took a rather liberal view and held that the marriage was neither dissolved nor could the husband escape his liability to maintain the wife.

It would be a simple lawyer-like argument to say that if Shamim Ara or another such judgment exists, there is no need to call for abolition of triple talaq. Such a position overlooks certain facts and ground realities that exist in the lives of ordinary women. For one, these judgments have not prevented triple talaq from taking place in our society. But

¹ INDIA CONST. art. 25.

² Shamim Ara vs State of U.P. & Anr [(2002)7 SCC 518].

how just and fair would it be to expect that every woman who receives triple talaq must go to court to seek justice, whereas the man can just utter 'talaq talaq talaq' and move on with his life.

The Bombay High Court, in a similar triple talaq case³, held that the factum of evidence is necessary in a case of talaq if disputed by the wife, a mere document or deed in writing would not be sufficient. Again this is a liberal view held by the Court that the conjugal rights would not cease without proving such a divorce to make it fully operational. But the sad part is that a divorce by triple pronouncement is still relevant among the Muslim community and the most liberal and equity based construction was taken in the following Allahabad High Court case which was majorly responsible for many petitions on the same topic to be effectually heard by the Supreme Court wherein the verdict has been reserved as of today;

Constitutional Validity

In a recent case⁴ decided by the Allahabad High Court, in April 2017, a complaint was filed under *S.498A, 323, 504, 506* of the Indian Penal Code and *S.3/4* of the Dowry Prohibition Act, where the husband's counsel came up with the defence that the spouses were already divorced by triple pronouncement and "fatwa" had already been obtained. However, the Court rightly held that this is in clear violation of the esteemed Preamble of the Constitution which guarantees liberty, equality and fraternity to all citizens of India. It is also in violation of Article 14 providing for equality of law and equal protection of laws, Article 15 which provides that there will be no discrimination on the grounds of religion, race, caste and sex and Article 21 which is the right to life and personal liberty.⁵

Pursuing such view, the Allahabad High Court held that such triple pronouncement of talaq is arbitrary and against the very idea embodied in the Constitution, thus the complaints made under the above sections are valid and cannot be dismissed, thus the judgment of the Additional Chief Judicial Magistrate, Court no.10 of Agra was upheld by the High Court on appeal by the husband.

The AIMPLB holds the view that an instant triple talaq, in which the husband says 'talaq' thrice in quick succession, is "wrong", but is still a valid way to end a marriage. It is bad in character but right in theology. The Board however, also said that Muslims who "misuse" instant triple talaq would face a "social boycott" from the community. A code of conduct was issued by AIMPLB on divorces and marital disputes which sought to counter the perception that Sharia-based Muslim personal law is prejudiced against women. However this goes on to say that the AIMPB is okay with a wrong practice and is trying to hush it up by stipulating that Muslims had a lower rate of divorce than non-Muslims.

³ Dagdu S/O Chotu Pathan, Latur vs Rahimbi Dagdu Pathan, Ashabi - [2003 BomCR (Cri) 251].

⁴ Smt. Sumaila vs. Aaqil Jamil and Ors - [2017 SCC OnLine All 1325].

⁵ INDIA CONST. art. 14, art. 15, art. 21.

The paradox is so abnormal that the view taken by the AIMPLB is different from that followed in as many as 22 Islamic 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 recognize a divorce pronounced outside a court of law; and Iran, where triple talaq does not have validity under its Shia law. The tyranny of triple talaq is confined to the Sunnis alone, mostly in India and around the world. However, the AIMPLB's position is in sharp contrast to the dominant trend worldwide.⁶

It has often been reiterated in India that religious minorities of any country are relatively resistant to change. They live in orthodoxy and 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. Sri Lanka's Marriage and Divorce (Muslim) Act, 1951, as amended up to 2006, doesn't recognize 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. It is a rather lengthy process unlike the one deemed to be right and religious in India.

The irony is that India being a 'secular' state, triple talaq is still considered as a relevant practice, legally, according to their religion and personal law which has now become partly political ever since big Islamic countries like Istanbul and Turkey have completely abolished this practice.

Prime Minister Narendra Modi had urged the Muslim community leaders to not politicize the issue of triple talaq. Modi, while holding a meet with the members of *Jamiat Ulama-i-Hind*, one of the leading Islamic organizations in India, urged the leaders to take responsibility for initiating reform over the issue. Prime Minister's comment came during a meeting with 25 leaders from the Muslim community, under the umbrella of the Jamiat Ulama-i-Hind.

ROOTS

The main question which arises is that if triple talaq is an essential to the religion of Islam? What the religion as seen from its sacred written source, the *Quran*, has to say?

The Quran puts down the Principle of "*Istihsan*" which is a rational approach and should be followed in keeping with modern times when any law is arbitrary and against the basic

⁶ Ajaz Ashraf, Position in other countries, April 18, 2016, 8:00 AM IST.
[https://scroll.in/article/806299/if-pakistan-and-21-other-counties-have-abolished-triple-talaq-why-shouldnt-india%](https://scroll.in/article/806299/if-pakistan-and-21-other-counties-have-abolished-triple-talaq-why-shouldnt-india%20)

rights of a person. *Istihsan*⁷ is an Arabic term for juristic "preference". In its literal sense it means "to consider something good". Muslim scholars use it to express their preference for particular judgments in Islamic law over other possibilities. It is one of the principles of legal thought underlying personal interpretation or *ijtihad*. It also applies to mean something towards which one is inclined or which one prefers, even if it is not approved by others.

An imperative interpretation is that an *Istihsan* is when one takes a decision on a certain case different from that on which similar cases have been decided on the basis of its precedents, for a reason which is stronger than one found in similar cases and which requires departure from those cases. Also to understand the Islamic law one must understand that the idea of marriage, though a 'Nikah' in Muslims is a social contract, it is not to be construed as a contract for consideration as in the Indian Contracts Act, 1872. It is a noble institution and sacred for matters of respect and dignity. So the most debated argument is; Why polygamy?

The answer goes back to the olden days when the population of women was higher especially where the Prophet travelled and propagated Islam, the Prophet too had as many as 13 wives; he had only 1 wife till the age of 50 but later on he took multiple wives who were mostly divorced or widows to maintain them and save them from the shackles of poverty and slavery. However later this practice continued becoming a part of Shariat, the law followed by Muslims. But one must adhere to the Quran which prescribes "*Istihsan*" that is to follow juristic preference according to equity and good conscience in changing times.⁸

'Talaq' is allowed by successive triple pronouncement only among Sunnis, this practice is condemned by Shias all over the World and not followed by them. It is mainly of two kinds. First comes *Talaq-us-sunnat* (talaq as given by the Prophet's precedent) which has two forms

Talaq Hasan and *Talaq Ahasan*, distinguished by single or triple pronouncements and both demand abstinence till completion of *iddat* or during the three *tuhr* intervals. Second is *Talaq-ul-biddat* (talaq followed by Sunnis) which came into being after the division of Muslims into Sunnis and Shias which was on political basis. It has emerged in quite recent times and is only followed by Sunnis, it has two forms of single pronouncement during menstruation and triple pronouncements consequently; it is shunned for its arbitrary nature.⁹

⁷ The editors of Encyclopaedia Britannica, *Istihsan*, March 09, 2016.

<https://www.britannica.com/topic/istihsan>

⁸ Sayyid Muhammad Rizvi, Polygamy.

<https://www.al-islam.org/articles/concept-polygamy-and-prophets-marriages-sayyid-muhammad-rizvi->

⁹ Pragati Ghosh, Kinds of Talaq.

The word 'talaq' itself is considered bad in Islam, with the Quran as well as the Hadith referring to incidents that show how the religion views divorce in poor light even though the option is available. Islam has given divorce as the last option only if nothing else works out and there is no way the marriage can survive, but it is not the preferred route. Thus neither the Quran nor the Sunnat propagates following an arbitrary practice, it is the making of man in the name of religion which makes this case rather political.

STATUS QUO

An ongoing Supreme Court case might lead to the abolishment of this unjust practice once and for all. Earlier in 2016, a middle-class Muslim woman from a small town showed the courage to demand the scrapping of unilateral pronouncement of divorce in one sitting (triple talaq). This is the case which again stirred up the triple-talaq-controversy. A 37 year-old Shayara Bano has taken her triple talaq case to the Supreme Court through a PIL and citing it as an unfair practice she has demanded it be abolished in India. A 15 years old marriage was dissolved unilaterally with her husband dispatching a 'Talaqnama' to her and duping her into accepting that post while she was at her parent's place in recuperating from an illness.

Shayara alleges she went through a harrowing time in the last 15 years of marriage. She was mentally tortured by demands of dowry initially. After she had two children, all subsequent pregnancies were forcefully aborted by her husband. Despite all this, she never protested, just so that she could save her home and not bring disrepute to her family.

Member of the AIMPLB, Kamal Farooqi said that the Board has filed a rejoinder to Shayara's petition. According to him, "Personal laws cannot be tampered with or changed for one case alone. Today they will want to change talaq laws, tomorrow they will intrude into other aspects like inheritance. This is unacceptable." The AIMPLB is not alone in its opposition. No political party is willing to push for changes in personal laws. So much so that even the BJP that has been vocal on uniform civil code skirted the issue.¹⁰ Days after the court reserved the case for judgment, the AIMPLB filed an affidavit saying that it would issue a public advisory to Qazis to advise bridegrooms against instant talaq and also add a condition in the Nikahnama to exclude instant talaq. The AIMPLB even threatened social boycott of Muslim men who resort to instant talaq. The hearings also saw the court toy with the idea of making the Muslim Dissolution of Marriage Act of 1939 being applicable only to Muslim women gender neutral. Another possibility is that the court may interpret the pronouncement of instant talaq as a single pronouncement of talaq.

<http://www.shareyouressays.com/117523/what-are-the-kinds-of-talaq-under-muslim-law-in-india->

¹⁰ Parthshri Arora, Shaira Bano: The face of the fight against triple talaq, June 01, 2016 03:13 PM IST. ^[1]<http://indiatoday.intoday.in/story/shaira-bano-face-of-fight-against-triple-talaq/1/682424.html>

The AIMPLB in Shayara's case has taken a stand that triple talaq is a dying practice and challenging its constitutional validity could lead to a backlash in the Muslim community, which might see its rights as being infringed upon and therefore resort to supporting practices like polygamy and oral divorce. As it is, triple talaq is practiced by a "minuscule portion" of the Muslim community. According to the AIMPLB, the woman can also negotiate in the Nikahnama and include provisions therein consistent with Islamic law to contractually stipulate that her husband does not resort to triple talaq, she has right to pronounce triple talaq in all forms, and ask for very high '*mehr*' amount in case of talaq and impose such other conditions as are available to her in order to protect her dignity. The constitutional validity of the practice of triple talaq is being heard in the Supreme Court by a five-judge Constitution bench headed by CJI Khehar. The top court is to determine whether triple talaq is part of the fundamental right to religion of the Muslim community. It's hearing a clutch of petitions challenging the practice as a whole.¹¹

CONCLUSION

As mentioned in the abstract, our primary objective was to critically analyze the concept of triple talaq and the related controversies. Muslim women in large numbers are showing support to the abolition of triple talaq which shows that it is the need of the hour. Then why can't the judiciary decide on something that is related to human right? Most Muslim countries have also done away with triple talaq, why can't we? Triple talaq, happens not because of religion but, patriarchy and powerplay masquerading as religion. It is important that ordinary Muslim women and men are educated about the Quranic principles of justice and fairness concerning divorce. The whole triple talaq issue is repugnant to Islam and those who say it legitimizes Islam are doing a great disservice to Islam.

Patriarchal misinterpretations and distortions rule our lives. Any talk of reform in personal law is brushed aside as interference in religious matters. Islam is going through a turbulent phase world over and this issue can be used as an excuse to create discord between communities giving rise to a communal situation. We need to empathize and try to understand the plight of victims left in the wake of this draconian practice. The personal law boards and the government should take a step unanimously, if not towards a unified code then towards the reformation of unjust Islamic laws.

¹¹ Who is Shayara Bano - the woman behind triple talaq case in Supreme Court? May 11, 2017 2:34 PM IST. <http://www.financialexpress.com/india-news/who-is-shayara-bano-the-woman-behind-triple-talaq-case-in-supreme-court/663645/>