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CRIMINALISATION OF INSTANT TRIPLE TALAQ AND EMPOWERMENT OF MUSLIM WOMEN: A CRITICAL APPRAISAL*

ABSTRACT:

The issue of “Instant Triple Talaq” is that it becomes irrevocable immediately when it is pronounced thrice consecutively irrespective of iddat. Therefore, under this form of talaq, once a definite complete separation has taken place parties so separated cannot remarry without the formality of the woman marrying another man (Halala) and being divorced from him. It is regarded as arbitrary, discriminatory and oppressive to the Muslim women. It was a recognised but disapproved form of divorce among the Hanafis sects of Muslims and is considered Talaq-e-Biddah (innovative form of divorce) by Islamic Jurists. It commands neither the sanction of Holy Qur'an nor the approval of the holy Prophet (PBUH).

This paper explains the different modes of divorce under Islamic law and what checks and restraints have been imposed by Islam over the exercise of husband's power of *talaq* against the wife. This paper analyses the Supreme Court's judgement in *Shayara Bano v. Union Of India* that set aside triple talaq and also examines *The Muslim Women (Protection of Rights on Marriage) Bill, 2018* to determine whether the ordinance is empowering the Muslim women and promoting cordiality in marriage or it will increase the irreconcilable differences between the spouses and break down of marriages. This paper also suggests alternative remedies to prevent triple divorce and necessary steps to protect the rights of Muslim women and to empower them.

Key Words: Triple Talaq, Criminalisation of Triple Talaq, Women Empowerment.

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1. INTRODUCTION

It is a popular fallacy that a Muslim male enjoys under the Qur'anic Law an unbridled authority to liquidate the marriage. The whole Qur'an expressly forbids a man to seek pretexts for divorcing his wife so long as she remains faithful and obedient to him. Indeed a deeper study of the subject discloses a surprisingly rationale, realistic and modern law of divorce.

Justice V.R. Krishna Iyer

Talaq is a generic name for all kinds of divorce but is especially used for the repudiation of marriage by the husband, which may be classified into three forms namely; Talaq-e-Ahsan, Talaq-e-Hasan and Talaq-e-Biddah. Among these three the third one i.e., talaq-e-biddah also popularly known as *triple talaq* is a disapproved but recognised mode of divorce by the Hanafi sect of Islam. Triple talaq is controversial because of its instant and irrevocable effect which is in contradiction to the guidance of Qur'an and traditions of Prophet. As there is no scope of reconciliation, it is considered arbitrary and violative of the rights of married Muslim women. On 22nd August, 2017, the 5 Judges bench of the Supreme Court of India in the case of **Shayara Bano versus Union of India**¹ set aside triple talaq by a majority of 3:2 to protect the rights of married Muslim women. After that, the Government introduced ***The Muslim Women (Protection of Rights on Marriage) Bill, 2018*** to penalize triple talaq as a cognizable and non-bailable offence and imposing a punishment on the Muslim man who pronounced triple talaq upon his wife with imprisonment of three years and also fine. Bill is The Bill is passed in Lok Sabha, though the opposition parties opposed it and demanded to send it to Joint Selection Committee. Now the Bill is the controversial topic of discussion.

2. TALAQ

2.1. Meaning of Talaq

'Talaq' is an Arabic word. In its literal sense means "taking off any tie or restraint," and in law it signifies the dissolution of marriage.² It is a generic name for all kinds of divorce; but is particularly applied to the repudiation by or on behalf of husband. A talaq may be effected either orally, by spoken words, or by a written document called *talaqnama*.

2.2. Modes Of Talaq

¹ (2017) 9 SCC 1

² V.P. Bhartiya (rev.), Syed Khalid Rashid, Muslim Law, 5th ed. 2009, p. 106

Talaq may be effected by the husband in accordance with the following modes:

- i. Talaq-us-Sunnah;
- ii. Talaq-ul-Biddah.

It is worth to note that the power of dissolution of Muslim marriage is not available only to the husband. It may also be dissolved by the wife through the following modes:

- i. Talaq-e-Tafwid (delegated divorce)
- ii. Khula (redemption)
- iii. Mubarat (mutual freeing)
- iv. Lian (mutual imprecation)
- v. Faskh (judicial annulment)

Here, discussion will be restricted only to *Talaq* or divorce by husband i.e., Talaq-us-Sunnah and Talaq-ul-Biddah.

2.2.1 Talaq-ul- sunnah - It is a talaq which is effected in accordance with the traditions of Prophet(PBUH). It may be in the most approved form, i.e., *ahsan*; or *hasan*, i.e., simply an approved form.

- i. ***Ahsan, (Best mode of talaq)*** – in Arabic, ‘*Ahsan*’ means ‘*best*’ and *Wilson* puts it as ‘*very proper*’.³ In this form of divorce, husband repudiates his wife by a single pronouncement of talaq in a period of *tuhr* (purity, i.e., when the wife is free from her menstrual courses), during which he has not had intercourse with her and abstain himself for three months or 90 days when she is observing her *iddat* (waiting Period). The divorce is revocable during the *iddat*, and the parties retain the right of inheritance. According to *Hedaya*, this method of divorce is the most laudable and most approved form of divorce because the companions of the prophet approved of it, and second, because remains revocable during *iddat*, which is three months or till delivery. Revocation may be either by express words, or impliedly by cohabitation within the *iddat* period. On such revocation, wife does not have to undergo intermediary marriage, the husband can simply say ‘I have retained you.’ If the *iddat* period lapse without revocation, the talaq becomes final and irrevocable.

³ Prof. I.A. Khan (rev.), Aqil Ahmad, MOHAMMEDAN LAW, ed. 23rd 2009, p.170.

The Holy Qur'an says:

“O Prophet! When you divorce women, divorce them at their ‘*Iddah* (prescribed periods) and count (accurately) their ‘*Iddah* (periods). And fear Allah your Lord (O Muslims). And turn them not out of (their husband’s) homes nor shall they (themselves) leave, except in case they are guilty of some open illegal sexual intercourse. And those are the set limits of Allah. And whosoever transgresses the set limits of Allah, then indeed he has wronged himself. You (the one who divorces his wife) know not it may be that Allah will afterwards bring some new things to pass (i.e. to return her back to you if that was the first or second divorce).”⁴ (**Chapter 65, verse no.1**)

- ii. ***Hasan (Good mode of Talaq)*** – in Arabic Hasan means ‘good’ and Wilson translates it as ‘proper’.⁵ A talaq pronounced in this form is of lesser worth than the one pronounced in Ahsan form. In this form of talaq, the husband successively pronounce talaq three times during consecutive period of purity (tuhr) and where the wife is not subjected to menstrual courses, an interval of 30 days is required between each successive repudiation. It is, therefore, “a divorce upon a divorce”, where the first and second pronouncements are revoked and followed by a third, only then talaq becomes irrevocable. It is also essential that no intercourse should have taken place during that particular period of purity in which the pronouncement has been made.

Talaq hasan has tried to put an end to a barbarous pre-Islamic practice to divorce a wife and take her back several times in order to ill-treat her. Through this method of talaq, the husband has been given two chances of divorcing and then taking the wife back, but the third time he does so, the talaq becomes irrevocable. In this way, the process of divorcing and repudiating can not be continued indefinitely. Thus, it is a kind of relief to the wife from the harassment and tension on account of uncertainty that the Arabs could cause her by repeated talaq and revocations without limit. The prophet restrained them to the limit of three repetitions. Further shackle on the overbearing males was by way of the requirements of intermediary marriage, its consummation and divorce before remarriage with such wife.

2.2.2. Talaq-ul-Biddat (Disapproved mode of Talaq) - It is instant and irrevocable. It is a sinful and irregular mode of talaq introduced by Omeyyads in order to escape the restrictions imposed by the Prophet (PBUH). It is a divorce where the husband repudiates wife by three divorces in one

⁴ Dr. Muhammad Mohsin Khan and Dr. Mohammad Taqi-Ud-Din Al-Hilali, THE NOBLE QUR'AN, 2007, p.757-758

⁵ Prof. I.A. Khan (rev.), Aqil Ahmad, MOHAMMEDAN LAW, ed. 23rd 2009, p. 171

sentence, eg., “I divorce you thrice” or where he repeats the sentence, separately, thrice, eg., “I divorce you, I divorce you, I divorce You” within *tuhr*. This talaq is known as talaq-ul-bain as it becomes irrevocable immediately when it is pronounced irrespective of iddat. Therefore, under this form of talaq, once a definite complete separation has taken place parties so separated cannot remarry without the formality of the woman marrying another man (Halala) and being divorced from him. It may also be in *writing* if he shows his intention of irrevocable divorce.

The burning issue of talaq is related to Instant Triple talaq (Talaq-e-Biddat). It is a recognised but disapproved form of divorce among the Hanafis and is considered by the Islamic Jurists as an innovation within the fold of Shariat. It commands neither the sanction of Holy Qur'an nor the approval of the holy Prophet (PBUH). It was not in practice during the lifetime of first Caliph Abu Bakr and also for more than two years during the second Caliph Umar's time. Later on Hazrat Umar permitted it on account of certain peculiar situation. When the Arabs conquered Syria, Egypt, Persia, etc. they found women there much better in appearance than the Arabian women and hence they wanted to marry them. But the Egyptians and Syrian women insisted that in order to marry them, they should divorce their existing wife simultaneously by pronouncing three divorce in one sitting. The condition was readily acceptable to Arabs because they knew that in Islam divorce is permissible only twice in two separate periods of *tuhr* and its repetition at one sitting is unislamic, void and shall not be effective. In this way, they could not only marry these women but also retain their existing wives. This fact was reported to second Caliph Umar the in order to prevent the misuse of the religion by the unscrupulous husbands decreed that even repetition of the word *talaq, talaq, talaq* at one sitting would dissolve the marriage irrevocably. It was, however a mere administrative measure of Caliph Umar to meet an emergency situation and not to make it a law permanently.⁶

3. JUDGEMENT OF SHAYARA BANO V. UNION OF INDIA

On 22nd August, 2017, the 5 Judges bench of Supreme Court of India in landmark case of **Shayara Bano v. Union Of India**⁷, set aside the practice of instantaneous triple talaq by a majority of 3:2 but without a majority of their intellectual reasoning to arrive at the conclusion (2:1). The majority of three judges who set aside instant triple had separate reasoning for their conclusion. *Judgement of Justices Rohinton Nariman and Justice Lalit* held that triple talaq was unconstitutional on the grounds of “arbitrariness” under Art.14 of the constitution and *Judgement of Justice Kurien Joseph* held that Instant Triple Talaq was “not an integral part of Islam” under Art.25 of the constitution. While the Minority Judgement of the then *Chief Justice, J.S. Khehar (for himself and Justice Abdul Nazeer)* held that triple talaq which is a part of personal law is protected by Art.25 of the constitution. So there's no clear majority for consequential legal proposition in this case. The case had three separate judgements with different reasoning so it was split into 2:1:2.

⁶ Prof. I.A. Khan (rev.), Aqil Ahmad, MOHAMMEDAN LAW, ed. 23rd 2009, p. 174-175

⁷ (2017) 9 SCC 1

The judgment invalidating triple talaq was done through the 1937 Act and the essential religious practices test

Lacunae in the Judgement

Judgement of Justices Rohinton Nariman and Justice Lalit: They held triple talaq invalid because it violates fundamental right to equality under article Article 14 of the Constitution for being manifestly arbitrary.

But triple talaq can't be scrutinized whether it violates fundamental right to equality or not because it is not a law for the purpose of Art.13 of the constitution. Article 13(1) requires "laws in force" to be subjected to fundamental rights but Triple talaq is not a not a codified personal law enforce by statute. The court itself upheld this fact in this case by a majority of three judges holding that triple talaq is not a codified Muslim Personal Law. Therefore triple talaq remains outside the scope of law under Article 13 of the constitution rendering it not to be examined its inconsistency with the fundamental rights.

In **Narasu Appa Mali v. State of Bombay** it was upheld by the Supreme Court the Bombay high courts judgement that uncoded personal law can't be scrutinized under fundamental rights. Therefore, the court in the Triple Talaq Case holding triple talaq to be violative of fundamental right to equality under article 14 of the constitution without overruling the correctness of the decision in Narasu Appa Mali is technically a flawed one.

Thus, under the existing jurisprudence, triple talaq could not be tested on the anvil of article 14 or any other fundamental rights under part III of the constitution.

Judgement of Justice Kurien Joseph: He held triple talaq invalid because it is not an essential or integral part of Islam and therefore not protected under article 25 of the constitution.

But triple talaq is protected under Article 26 of the constitution. Triple talaq may not be an essential practice of Islam but of a sect of Islam that is **Hanafi**. Article 26 assures to every religious denomination or any sect thereof various rights including the rights to manage its own affairs in matters of religion. It was never a case of Islam but a case of Hanafi sect who adopt other sources of shariat more than Qur'an and Sunnah. In India, about 90% of muslims are Sunni muslim belonging to hanafi schools which recognize the practice of triple talaq and is protected by article 26 of the constitution.

4. CRIMINALISATION OF TRIPLE TALAQ

Talaq-e-Biddah, popularly known as *triple talaq* which results in instant and irrevocable divorce is made illegal and a cognizable offence by **The Muslim Women (Protection of Rights on Marriage) Bill, 2018**. It was introduced by the Minister of Law and Justice, Mr. Ravi Shankar

Prasad in Lok Sabha on December 17, 2018. The opposition was against the Bill and demanded to refer it to a Joint Select Committee. It was passed in Lok Sabha on Dec 27, 2018, though the opposition stage walkout. The Bill replaces an Ordinance promulgated on September 19, 2018. Note that on December 28, 2017, a Muslim Women (Protection of Rights on Marriage) Bill, 2017 was introduced and passed in Lok Sabha. The 2017 Bill is now listed for withdrawal.

Section 3 of the Bill provides that any pronouncement of talaq by a Muslim husband upon his wife, by words either spoken or written or in electronic form or in any other manner whatsoever shall be void and illegal.

Section 4 imposes on the Muslim husband who pronounces triple talaq a punishment with imprisonment for a term of three years and also fine.

4.1. DEFECTS IN THE BILL

The Statement of Objects and Reasons of the Bill says the Supreme Court has held in the matter of **Shayara Bano**⁸ that the practice of triple talaq as unconstitutional, but the fact is that the court only set aside the practice by a majority of 3:2 judges with three different judgements splitting into 2:1:2.⁹

The Bill (by section 3) to declare instant triple talaq void afresh was not necessary when the Supreme Court has already made it irrelevant by setting it aside under Art.141 of the constitution in the **Shayara Bano Case**. The decision of Supreme Court is a law as per Art 141 of the Constitution. So, declaring a settled position of law again serves no purpose.

It is also inappropriate to bring a matter like divorce which falls into a “civil jurisdiction” to a “criminal jurisdiction” by making it a punishable offence (sec.4). Also marriage in Islam is purely a civil contract.¹⁰ Triple talaq does not qualify any of the tests of crime. It is also relevant to note that the government had not taken the necessary steps to provide a civil remedy to prevent instant triple talaq before making it a crime. They must have proved that all the civil remedy have failed except by criminalising it. If punishment is really necessary, it could be done under civil law too. For instance, in Protection of Women from Domestic Violence Act, 2005, though it’s a civil law, there is a provision for punishment if the husband violates court orders.¹¹ Moreover, *triple talaq* has no legal consequence of pronouncing talaq three times. So, it is absurd, irrational and arbitrary to penalize a Muslim husband for no offence. Thus, triple talaq may be considered nothing more than the civil contempt of Supreme Court.

⁸ (2017) 9 SCC 1

⁹ Ibid.

¹⁰ Justice Mahmood observed in Abdul Kadir v. Salima, (1886) 8 All. 149.

¹¹ Sec.31 (1) of PWDV ACT, 2005.

Apparently, three years imprisonment for husband is excessive and disproportionate. The government had ignored the fundamental principle of proportionality. It is evident from the kinds of crimes which attract 3 years imprisonment under Indian Penal Code like, Sedition,¹² Rioting and armed with deadly weapon,¹³ Promoting enmity between different groups,¹⁴ Sexual Harassment¹⁵ etc. These crimes are far graver than the instantaneous talaq and imposition of same amount of punishment for uttering three words instantly which doesn't even have a legal effect is gross and arbitrary, particularly when the same pronouncement can be lawfully made within a period of three months without attracting any penal consequences whatsoever. The extreme disproportionality of the punishment is further evident from the fact that many other crimes which are more serious than triple talaq gets even lesser punishment under IPC like Causing death by rash or negligent act,¹⁶ Rioting,¹⁷ are punishable by 2 years jail term or fine or both. And offence like Negligent act likely to spread infection of disease dangerous to life,¹⁸ Causing hurt by act endangering life or personal safety of others¹⁹ are punishable by 6 months in jail or fine or both.

Section 5 provides for subsistence allowance of a married Muslim woman upon whom *talaq* is pronounced from her husband. The amount of the allowance is left to be determined by the Magistrate. It does not mention any measures for financial security and protection to the divorced woman when the husband is sent to jail.

Section 6 of the Bill talks about the custody of a minor child by the Muslim married woman upon whom triple talaq is pronounced. This section is contradictory and confusing. Talking about a post-divorce situation of custody of children is contradictory to the position that triple talaq is void. Moreover, it has completely ignored the welfare and interest of the children which is of paramount importance in deciding the custody of children.

Section 7 made instant triple talaq a cognisable and non-bailable offence, enabling the police to arrest a Muslim man and lodge an FIR against him on the information of his wife or her relatives that he has pronounced triple talaq without any preliminary investigation like in the serious crime of Murder, dacoity etc. Making the pronouncement of instantaneous *Talaq* non-bailable is excessive when graver offences like, causing death by negligence under S.304A of IPC,

¹² S.124 A, Indian Penal Code, 1860

¹³ S.148, Indian Penal Code, 1860

¹⁴ S.153A, Indian Penal Code, 1860

¹⁵ S.354A, Indian penal Code, 1860

¹⁶ S.304A Indian Penal Code, 1860

¹⁷ S.147 Indian Penal Code, 1860

¹⁸ S.269, Indian Penal Code, 1860

¹⁹ S.337, Indian Penal Code, 1860

Kidnapping under S.363 of IPC, and others²⁰ are bailable. The Bill made triple talaq a non-bailable offence except after hearing the wife. Such a provision may be rampantly misused, even if not, there may be cases where the Muslim woman is unable to appear before the Magistrate. In such cases, the detained husband will suffer for no fault even when reasonable grounds for grant of bail exist. Such a procedure is not just, fair and reasonable to withstand the test of Article 21.

The most confusing part of the Bill is its name i.e., ***The Muslim Women (Protection of Rights on Marriage) Bill, 2018***. The issue is related to divorce of Muslim Women and triple talaq. The problem is not about marriage but divorce. The Bill neither deals to protect the married women from the sufferings or the problems faced by married women which are assault, physical and mental harassment, domestic violence etc. nor the Bill seems to be interested to acknowledge the institution of divorce.

5. EMPOWERMENT OR VICTIMIZATION OF MARRIED MUSLIM WOMEN

As discussed, following **Shayara Bano**, saying triple talaq can no longer break the marriage or harm the wife, therefore, it is inconsequential. But the Bill punished the husband of Muslim married women for saying triple talaq with imprisonment of three years and fine. Muslim divorce is completed, if not revoked expressly or impliedly after the 3 months of the pronouncement of talaq when iddat expires. So it is obvious that the marriage will end when the husband is sent to jail for 3 years. The controversy on triple talaq was that it does not provide a chance of reconciliation between the spouses because of its immediate and irrevocable effect which problem was settled by the Supreme Court in **Shayara bano** to protect the Muslim married women from the consequence of triple talaq. But the bill revives the same problems of triple talaq i.e., leaving no scope for reconciliation to the disadvantage of the Muslim married women by sending her husband to jail. The imprisonment of husband especially because of the complaint of the wife or her relatives for three years creates a situation in which enmity and irreconcilable differences between the husband and wife will be increased and the cordiality between them will be diminished that the probability of revoking his talaq will be almost impossible. Thus the Bill instead of empowering the married Muslim women, it will victimize her by creating a hopeless situation for her to save her marriage.

Further, it will adversely affect the husbands in terms of losing jobs, opportunities, prospects of growth, his image and status in the society which will apart from increasing the enmity between the husband and wife or lessening the probability of the wife to go back to him, it will also make it difficult to receive maintenance from him even for the period of *iddat and pregnancy*. The Bill allows the married Muslim married woman upon whom, triple talaq was pronounced to seek allowance for herself and her dependent children from her husband. But it is important to

²⁰ Concealment of birth by Secret Disposal of Body (Section 318 of IPC), rash driving or riding on a public way (Section 279 of IPC), Bigamy (Section 494 of IPC), Marriage ceremony fraudulently gone through without lawful marriage (Section 496 of IPC).

understand the problem that how he will provide her subsistence when he will remain in jail without working or earning. The Bill does not provide any means or measures to ensure her allowance and financial security. Hence, the Bill will not protect and benefit the women whose husband is a daily wager or does not have any estate or property from which allowance can be given. If the government wants to empower Muslim married women, they should have enhance the benefits and protections granted by the *Muslim Women (Protection of Rights on Divorce) Act 1986*, section 125 of *CrPC*, or they could include *triple talaq* under domestic violence by amending PWDV Act, 2005 to enable Muslim married women to claim additional maintenance under section 20(1) (d) of *Domestic Violence Act*,²¹ instead of introducing a Bill to penalize it.

It can't be ignored that the onus of proof, both *actus reus* and *mens rea* is on the wife. When the instant *triple talaq* is made orally and the man denies it, she will have a little evidence to prove it. Even if she can prove the *actus reus*, proving *mens rea* will not be easy when the husband denies any intention. Wife has to prove her case without a doubt otherwise man will get the benefit of doubt since criminal statutes are to be strictly construed. Husband will get the benefit of doubt in most of the cases therefore this section is not workable. If the husband will be sent to jail merely for saying *talaq* without any intention; or just in the heat of extreme anger, when the reason take a back seat, not knowing the nature of his act is in a mental state called Insanity (under S. 84 of IPC) which is an exception of criminal liability, then it will be an imposition of strict liability. After evaluation of the Bill, it can be said that the Bill will not empower Muslim married women but it will surely victimize and inflict injustice on both Muslim married women and men.

6. CONCLUSION AND SUGGESTIONS

The Bill will not empower Muslim married women as there is no safeguard which the Supreme Court has provided in the **Shayara Bano** by declaring *triple talaq* void to provide a chance of reconciliation between the spouses. But penalization of the husband for 3 years imprisonment beyond *iddat period* by the Bill, has removed the reconciliation chances. Therefore, the Bill will cause more irremediable breakdown of marriages and families rather than their preservation. Such an excessive punishment of husband, particularly due to the complaint of the wife or relatives merely for saying *talaq* which have no legal consequences would also increase irreconcilable differences between the spouses that even if the husband is compelled to live with the wife after the expiration of *iddat*, it will leave no cordiality in marriage but distress and abandonment of wife, moreover by the fact that desertion has not been criminalised yet. Thus the Bill will cause victimization and infliction of injustice on both married Muslim men and women. In short, the Bill is irrational, useless and unnecessary. In fact, it is arbitrary, discriminatory, excessive and unconstitutional under art. 14, 15, 29 and 21 of the constitution.

²¹ Section 20 (1)(d) of PWDV Act, 2005

The first step to women empowerment, whether for Muslim women or other, is to acknowledge and respect her rights by putting an end to the culture of suppression and subduing her in the society; and that can be achieved only by transforming and improving the society through education, discussion and creating awareness in the society. So for the empowerment of Muslim women, it is suggested to educate and aware Muslim Community about her rights and status granted by Islam, the Constitution and the law of this Country.

It is suggested to launch a programme to educate and aware the Muslim Community and married spouses about the best form of talaq i.e., ***talaq-e-ahsan*** and other approved form of divorce to provide fair, reasonable protection and justice to the married Muslim women than penalizing their husband excessively to their disadvantage.

