



REVOCAION OF TRIPLE TALAQ IN INDIA VIS A VIS GENDER JUSTICE

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ABSTRACT

In a democracy, the legislature has the power and obligation to make laws. Yet, gender inequity is perpetuated by acts like polygamy, Triple Talaq, and Nikah Halala. Ever since the origin of civilizations witnessed by India, women have been struggling to fit in the society fighting for the equal laws. But as the society in India is governed by the patriarchal laws since ancient times, there have been various gender-biased rituals and customs which have taken place within the personal laws. Triple Talaq, also called talaq-e-biddat, before being declared unconstitutional by Hon'ble Supreme Court of India, was a form of instantaneous talaq pronounced three times in one go by a male partner to his spouse which instantly violated the fundamental rights of the female partner as provided by the Constitution of India, making her life miserable to survive. How could anyone imagine achieving gender equity in the truest sense when the evil gender based practices like Triple Talaq existed as a component of personal law? A number of Islamic nations already outlawed and declared illegal the idea of instant divorce, even before it got outlawed in India. Big thanks to the Indian judiciary, which, after taking a while, finally ruled that the evil custom of triple talaq was unconstitutional, clearing the door for gender justice.

Keywords: Gender inequity, gender-bias, Indian judiciary, personal laws, fundamental rights.

INTRODUCTION

Various societal issues have been raising concern since past recent years with respect to the equal entitlement of the civil rights on the basis of gender. One of these social issues was the long-standing customary practice of Triple Talaq, which finally got abrogated by Hon'ble Supreme Court of India, which undoubtedly contributed towards gender justice holding important implications for the women's empowerment. In order to provide equal rights for both men and women in the society, such social issues must be eradicated completely. Since ancient times, such customs have consumed the society as a whole in terms of its progress, integrity and everything else

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that makes a nation worth living ultimately leading to the destruction of the social structure. These customs have received recognition by the personal laws which have caused a major issue of inequality with regard to enjoyment of civil rights by people practicing different religious beliefs and faith. Voices begin to be raised by the sufferers for the relinquishment of such customs when their fundamental rights get infringed. Such a revolt ignites a spark within the ones who feel offended and some go on to set up a chain to resist against such social evils which eventually find success by eradicating such atrocities. Customs therefore have been one of the evils in India which infringe the fundamental rights of the people. The patriarchal notion of the society since ancient times holds the responsibility towards the creation of gender biased customs. Muslim males (particularly the followers of the Hanafi Sunni Islamic school of jurisprudence), before the landmark decision by the Supreme Court of India came, frequently engaged in a social vice of “triple talaq” also called talaq-e-biddat and talaq-e-mughallazah (irrevocable divorce), especially those who adhere to the Hanafi Sunni Islamic school of jurisprudence.²

EXISTENCE OF PERSONAL LAWS IN INDIAN SOCIETY

Since its inception, India has been home to numerous civilizations and religious sects. With time, these religious groups began to be controlled by their own rules and traditions, which extended beyond strictly religious issues to cover civil matters like marriage, divorce, adoption, inheritance, succession, and so forth. These laws, which vary from religion to religion and are administered inequitably, are their own personal laws. The vast majority of people believe that this country lacks unified civil laws. All civil laws are, in fact, the same, with the exception of personal law, which varies depending on one's connection with a religion. Personal law deals with issues like marriage, divorce, testatorship, inheritance, support, and other civil concerns. Tradition demands that personal law be treated as a sort of religion even though religion has nothing to do with it. In order to preserve traditional masculine privileges, personal laws have long been utilized to institutionalize discriminatory features and gendered interpretations of significant religious traditions. This means that all personal laws based on religion doctrines were created through patriarchal interpretations of religious texts and customs, harshly discriminating women, especially in civil matters involving matrimony.

The differences between the provisions of personal laws addressing civil affairs have resulted in an unequal entitlement of the people's civil rights to the point that the issues related to the same have been taxing the courts. Since personal laws were created with the society's patriarchal attitude in mind, women suffer the most. Muslim women have long fought for equal rights under Islamic law, which governs marriage, divorce, and property rights. One significant issue was the Triple Talaq situation, which violated Muslim women's rights, particularly the right to a life of dignity. Yet, attempts to change the personal laws of the Muslim community were generally rejected because they were believed to go against the core beliefs of the faith.³

² Flavia Agnes, *The Politics behind Criminalising Triple Talaq*, 53 (1) Economic and Political Weekly.

³ Subrata K. Mitra and Alexander Fischer, “Sacred laws and the secular state: An analytical narrative of the controversy over personal laws in India,” 1 *India Review* 99–130 (2002).

With relation to the Triple Talaq controversy, neither the Indian Constitution nor the Quran expressly endorse this sort of divorce. Such conduct violates the fundamental principles of gender justice and fairness, morality, and a strong reinforcement of women's importance in their Islamic society. However, the court held back from making a decision because it considered the Triple Talaq debate to be more of a fundamental rights issue than a legislative one. Their conflict is not about wanting to remain as a unit; rather, it is about glaring unfairness and basic decency. Without a doubt, all personal laws must be just and equitable to both men and women; as a result, personal laws must be supported for their beneficial elements while ignoring their negative ones. The universal code will therefore need to be separate from the personal laws of all faith groups if and when it is enacted. It must be created using contemporary values like liberty, equality, rationality, equity, and compassion for people of all genders. All of the religious groups will also need to concur on it.⁴

CONCEPT OF TRIPLE TALAQ AND THE ISSUE OF GENDER JUSTICE

According to Muslim law, the marriage may be annulled using a procedure known as "Triple Talaq," which involves saying the word "talaq" three times, either verbally, in writing, or electronically, in the presence of two persons. During this time, the wife was not required to be present, nor was a good reason for the talaq regarded necessary. Triple Talaq has been a widespread practice in India since antiquity. Although they varied based on the legal school, ancient divorce rules established the standard for how the Sharia is typically understood by the jurisprudence of Islam. While personal status (family) law was codified in modern times, Islamic law remained largely in charge despite the state taking over management of divorce rules from traditional jurists.

A 1400-year-old Sunni Islam tradition, known as the Triple Talaq, did not find any mentioning in either Quran or Sharia law. Rather, according to the Quran, relationships between couples should ideally be based on love, and important choices that have an impact on marriage should always be made with both partners' consent. Nonetheless, the practice of Triple Talaq developed and eventually made its way into the patriarchal elements persisted.

Because of its prevalence and established legal status, triple talaq has become a sensitive topic in India. The practice of triple talaq was seen as a social evil, especially in the eyes of Muslim women, who were made to feel "weak and unequal" in comparison to men from their communities and women from other groups or from outside India. So, this social practice brought up questions of gender justice, non-discrimination, individual liberties, and atheism. These problems involved the legislative, executive, and judicial branches as well as the Uniform Civil Code. One such instance that exemplified conventional ideas and patriarchal views about the place of women in the community they live in was the practice of triple talaq. Every woman has the right to enjoy a dignified life and to feel confident in her own self as well as in her social standing. The customary evil social practice was gender-biased as it did not give any right to the Muslim wife to give her own views or permission with regard to the same.

⁴ Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, Oxford ; New York, 2016).

Marriage is a relationship between a male and a female and both the spouses share equal rights. None of them holds a higher position from the counter-part, rather they share every aspect of life equally. But the right to renounce marriage being given only in the hands of a man makes such rule arbitrary as a woman too has a right to be asked or give her own views. And such custom of pronouncing the word “talaq” triple times without having an audacity of even asking a wife to renounce marriage instantly lowered the respect and dignity of woman in the society. It led the woman to live her life miserably causing a big mental trauma for her. Not just triple talaq, there exist other social evils too in the society such as nikah-halala, polygamy and so on wherein the women are sufferers and not the men. This clearly shows that such customary practices are totally based on the patriarchal mindset rather than the concept of gender justice.

With regard to the issue of Triple Talaq, there were protests against the practice, and eventually the Triple Talaq was abolished as a result of the persistent efforts of Muslim women who had experienced injustice, as well as women's councils, women's commissions, human rights commissions, and NGOs too stretched their supportive hands for the same. Indeed, it wasn't simple to outlaw it, but it was not impossible.

TRIPLE TALAQ AND ITS INFLUENCE UPON MUSLIM MARRIAGES

If marital harmony cannot be achieved, the Quran both allows and advises the spouse to end the marriage. Such a decision shouldn't be taken lightly; rather, the neighborhood should step in by gathering representative households to act as mediators in an effort to find a solution. The Quran adds two more requirements to prevent quick divorces. It initially calls for two three-month holding periods to provide the husband the option to change his mind before the divorce is finalized. The second is that it provides a guy with a four-month window to break his promise to stop having relationships with his wife, which would lead to an automatic divorce. Yet, the inappropriate rapid talaq practise, which involves a man uttering "talaq" to his wife three times in a row without thinking it necessary to weigh his wife's opinion or her absence, can cause a marriage to end badly. This denied the spouse's right to self-esteem as well as her married existence.

A petition calling for the prohibition of the Triple Talaq practice because it violates the sacredness of marriage received the support of 50,000 Muslim women and men. The proposal, which sought to declare aspects of Muslim personal law, including Triple Talaq, polygamy, nikah halala (the prohibition against remarrying a divorced husband without first getting married to another man), and disparities of intestate succession (person's succession who died without making a will), received support from NISA, a women's organization in Kozhikode. Moreover, there had been movements opposed to Triple Talaq. It had to end because it infringed on the rights to democracy that India's Constitution guarantees. It's true that making it illegal wasn't easy. Seven women voiced their disapproval of the procedure. A woman by the name of Zakia Soman began the movement for Muslim women's rights. During her first marriage, she endured mental, social, and bodily pain, which gave her the strength to fight for Muslim rapid divorce rights. Shayra Bano, Noor Jehan, Afreen Rehman, Ishrat Jahan, Gulshan Parveen, and Noor Jehan are some alternate names. The gorgeous lady Shayra Bano, the Triple Talaq crusader, emerged as the

central protagonist in the legal battle against the patriarchal practise of triple talaq. She filed the initial petition for the case and was inspired by her own personal experience to oppose triple talaq. After they were married in 2001, her husband and in-laws beat and physically tormented her. Finally, the respondent spouse announced his divorce from her in a letter, issuing an instant Triple Talaq. Once all the thrush holds had been broken, she made the decision to fight Triple Talaq. It was never an easy assignment since Shayra Bano and other bitter women who opposed it were despised in the male-dominated Islam culture. She filed a writ suit because she claimed that mental harassment was her biggest challenge. Last but not least, the Triple Talaq was declared unlawful by the judgment from 2002 and subsequent orders from many High Courts. This did not, however, put an end to it; rather, people's ignorance of the rules or their acceptance of them under pressure from hard-line groups persisted. Several ladies who were evicted from their houses went through terrible trauma. But until success was eventually gained, persistent campaigns to ban socially harmful practises from the personal law persisted.

TRIPLE TALAQ: CONSTITUTIONAL PERSPECTIVE

India is a secular country, but due to discrimination and a pervasive sense of religious superiority, several articles were added to the constitution to promote the peaceful and harmonious coexistence of all religions. This gave rise to the constitutional vision of equality for all people and the freedom to freely acknowledge, practise, and spread one's religion. There have been several instances where the transformative intent of the Constitution and the Courts has been disregarded as a result of the quest for religious freedom and equality for everyone. Upgrading society from a religious standpoint is one of the most difficult jobs that still has to be accomplished. One excellent example is the Triple Talaq Judgment. The fundamental right to freedom of religion is guaranteed by the secular Indian Constitution, which is subject and susceptible to other fundamental rights, including the rights to justice, nondiscrimination, and a life that is respectable. As a result, Triple Talaq breaches the equity right, which prevails above the religion right. The 1937 Legislation does not recognize the practice of triple talaq as a means of divorce because it was not permitted by the Quran. The ability of Muslim males to divorce without good reason and without the wife's consent was a blatant violation of the fundamental rights to equity and nondiscrimination.

Before to Independence, the Muslim Personal Law (Shariat) Application Act, 1937, was passed; it acknowledged the Triple Talaq principle. Due to the Triple Talaq practice's instability and volatility in marriage, it was deemed to be illogical and arbitrary in character and to have violated the fundamental right to equality. As a result, it was declared invalid under the "laws in force" of the Indian Constitution. Even though this practise had been around for a while, it was invalid since it lacked legal legitimacy.

The fast changing society needs strong and unbreakable legislation to protect the voices that are suppressed for bringing forth moral and righteous reform. People's opinions, philosophies, and guiding principles have undergone tremendous change since the Indian Constitution was established. In order to serve our country wisely, meet new problems, and implement reforms for the new era of India, the Constitution must be interpreted broadly and

liberally, and it must be flexible enough to allow for numerous emerging concerns to be handled within the confines of the legal provisions.

As a result, the concept of transformative constitutionalism has become increasingly important, meaning that any laws that disagree with the social revolution must be replaced with new ones that take the most cutting-edge ideas into account. This can be accomplished by changing the current legislation or, if required, by passing new legislation. The intention is to eliminate the long-standing injustices that have crept into religion and acquired institutional significance.

ROLE OF INDIAN JUDICIARY IN RELINQUISHMENT OF TRIPLE TALAQ

The court's decision in a pertinent case where Shah Bano, a 62-year-old petitioner, was granted the right to alimony from her spouse under a provision of the Code of 1973, a piece of legislation governing the amount that spouse should pay his divorced wife as maintenance, was the first step in the revocation of the Triple Talaq issue. Nonetheless, the Union government passed a law in 1986 pertaining to Muslim women's rights to divorce. It was perceived as an effort to lessen the significance of the Shah Bano case decision.⁵ After twenty years, in 2001, the Supreme Court upheld the legitimacy of the Shah Bano case ruling supporting the rights of women from the Muslim community by a pertinent ruling. Then, in June 2016, the Apex Court ruled that it would investigate whether Islamic laws governing matrimony and proprietary matters violated the fundamental rights of women and determine how far it could take to amend the current laws. The Apex Court only outlined two issues to resolve Triple Talaq, concluding that the instances of polygamy and nikah halala must be examined separately. First, determine whether the instant Triple Talaq (a variation of talaq-e-biddat) is an essential Islamic ritual. Second, if the Triple Talaq practice nullifies the essential rights stated in Part III of the Indian Constitution that are both justiciable and enforceable.

On the first day of debate (May 11, 2017), the Act of 1937 was contested on the grounds that Triple Talaq isn't legally recognized because it lacks Quranic support. The Quran makes opportunity for reconciliation as well as allowing divorce when it is justified. And the freedom of Muslim men to divorce their wives without their consent is a flagrant example of a basic right being violated under the Indian Constitution. Furthermore, it was argued that other Part III laws pertain to the right under the Indian Constitution to practice one's faith. As a result, the contested activities were not covered by the basic protections for religious freedom.

According to Mr. Kapil Sibal, Senior Advocate, who spoke on behalf of the Religion Board, the Constitution of India would protect the customs and private laws of all communities until the Uniform Civil Code is made applicable to every civil right. He claimed that despite codified laws, some religious rites are still protected, and he gave examples of matriarchal groups and particular customs in different parts of the nation.

⁵ *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945

Ultimately, the Triple Talaq controversy was resolved by the Apex Court on August 22, 2017, after arguments and submissions, determining that the practice was unlawful by 3:5 ratio. Whilst Judge Rohinton Fali Nariman and Justice U.U. Lalit supported the repeal of the Triple Talaq law, Justice Kurian Joseph offered his concurring thoughts, and Chief Justice of India J.S. Khehar and Justice Abdul Nazeer expressed their opposition. Justices Rohinton Fali Nariman and U.U. Lalit held that the Act of 1937 regulates talaq-e-biddat and declared the practice unconstitutional because it was obviously arbitrary. Justice Kurian Joseph, in his concurring opinions, focused on the fact that triple talaq is an additional Quranic practice that is not permitted by law. He said that what is considered evil theologically is likewise evil in law and that what is considered dreadful in the holy Quran cannot possibly be beneficial in Shariat. However, the act of triple talaq is protected by the fundamental right to practice one's religion because it is an inherent part of private law rather than being subject to the Shariat Act of 1937, according to the dissenting minority opinion of Chief Justice of India Justice Khehar and Justice Abdul Nazeer. Also, it was determined that the best method to stop the gender-discriminatory practice of talaq-e-biddat is through regulation rather than a constitutionality issue. According to them, Triple Talaq ought to be made a requirement by law for six months after the judgement, during which time the Parliament ought to pass legislation governing Triple Talaq.⁶ Triple talaq, however, was the subject of the majority ruling, and Parliament was specifically instructed to enact laws designating Triple talaq as a criminal. Consequently, following this significant victory for Shayra Bano and the entire female community following the Supreme Court's decision in August 2017, the Muslim Women (Protection of Rights on Marriage) Act 2019 was passed in July 2019, repealing the triple talaq ordinance that had been enacted in February 2019. It states unequivocally that instantaneous Triple Talaq in either format—spoken/typed or transmitted electronically via texts/emails—is void and forbidden, penalized by a three-year prison sentence for the husband. A mother who feels wronged has right to request support for her dependent children under this new statute. Retroactively, this Act went into effect on September 19, 2018.

CONCLUSION AND SUGGESTIONS

Although, the customary practice of Triple Talaq had a long origin but it did not make sense to declare it valid as it impacted the fundamental rights of women in such a way that it led to the loss of women's status, their right to make decisions and to live their lives respectfully. In addition, it posed the basic question of whether religion may be used as justification for denying women the equality and dignity guaranteed by the Constitution of India in a secular democracy. It is contrary to the language and spirit of the constitutional principles to provide a social position based on patriarchal principles or one that is dependent on men.

At the federal, state, and local (Panchayat) levels, there are policies on women's empowerment in various topics including gender-based abuse, economic freedom, health, education, and political participation. Sadly, there are gaping holes between formation of policy and actual community action. Therefore, closing this gap between legal theory and practice should be the state's and all other law-making authorities' primary goal. They ought to make an

⁶ *Shayara Bano v. Union of India*, (2017) 9 SCC 1

effort to repeal any legislation that goes against the spirit of the Constitution (such as triple talaq and polygamy). The freedom to freely exercise and spread one's religion, to own property, to build houses of worship, and to control educational institutions is guaranteed by the Constitution for minorities. This constitutional safeguard is supported by a liberal democratic framework. Likewise, the constitutional guarantee to equality cannot be superseded by religious rules in a secular democracy.

The moment has arrived to take serious steps to update and change the current legislation. The Parliament should intervene with proposals for a secular code based on fundamental ideas of individual liberty, human rights, and national justice. And the Uniform Civil Code should be executed as it will certainly prove to be a wisest decision in this regard. It is important to promote the idea of a Uniform Civil Code, which will help foster national cohesion by resolving tensions produced by beliefs and traditions. Also, it will improve the nation's unity and integrity while assisting in the eradication of several evils, unfair, and unreasonable practices that are pervasive across the communities. And since most personal rules reflect societal hierarchical notions and give women a lesser standing, we therefore require simple laws based solely on gender. Because it must be the same for all communities, the gender justice code will also be uniform. Uniformity must be based on gender fairness; mindless uniformity may wind up being especially unfair to women. The traditional views of religious lecturers must yield to the equality of both genders in terms of their basic rights. Saying a resounding "no" to polygamy and triple talaq will accomplish this. Personal legal issues must be viewed in the perspective of patriarchy, and laws that give women a lesser status must be changed. And most importantly, the laws that infringe the democratic rights that people are given by the Constitution of India must be subjected to strict penalties.⁷

Hence, it makes sense that the battle against societal orthodoxies is challenging but not impossible. We currently reside in a so-called worldwide nation where the evolution of a nation is heavily influenced by privileged women, children, and secular citizens. In a nation, gender justice can be fulfilled in a real sense when the issues with regard to such evil customs which have spread their roots in the whole society will be fully removed. The more the society is enshrined, the more respectable and equal the woman is. Therefore, as a developed nation, we face daily challenges to women's dignity stemming from issues like gender inequality, human trafficking, and even something as simple as polygamy. As a result, both the general public and Parliament must take these issues seriously in order to pass legislation that will directly address these issues. The judiciary is also expected to play a proactive role in this process.

⁷ Werner Menski, "The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda," 9 *German Law Journal* 211–50 (2008).