

THE CRIMINALISATION OF TRIPLE TALAQ IN INDIA: A COMPREHENSIVE STUDY

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Abstract: The majority of Indian marriage rules are based on customs and religion. Since the Muslim community makes up a sizable portion of the population, it is necessary to change the unwelcome traditions. The Muslim Women (Protection of Rights on Marriage) Act, 2019, proclaimed immediate triple talaq to be unlawful and void and stipulated that any husband engaging in such behavior would be subject to a sentence of up to three years in jail. The topics of maintenance and custody are also addressed. The Act's criminalization component, despite the fact that it is primarily civil in purpose, has been the source of much controversy. The process is analytical, taking into account both Indian law and Islamic law as well as any supporting examples in order to draw a decision. Analyzing and interpreting the criminalization of civil disputes in the presence of civil legislation is another important task.

Keyword: Triple talaq, Muslim women (protection of rights on marriage) Act, 2019, Ordinance, criminalization of marriage law.

1.0 Introduction:

According to the Prophet Mohammed, divorce is not an option and that "the one who does not marry is not amongst me" is the rule about marriage. Only when there is no other option should it be employed. He claims that among all things that are legal, divorce is the one that Allah detests the most. This begs the question: Does the Quran sanction this behavior? The term "talaq," which meaning "release," is impure. Under Islamic law, there are several different kinds of talaq. The most condemned type of talaq is triple talaq, also known as talaq-e-biddat, which is instantaneous and irrevocable. Since triple talaq is the most frowned upon type of talaq, it has always been a problem under Islamic law. It was a procedure that the Sharia law had approved. Due to the fact that the Quran never regarded it as an acceptable practice, it is claimed to be an unapproved type of talaq. Prophet denounced this behavior. The concept of triple talaq, also known as talaq-i-biddat, illustrates the patriarchal effect on Islamic jurisprudence. The Muslim women protested this practice. Since there are talaq concerns in the faith that affect more than two lakh women in India, groups for women like Bhartiya Muslim Mahila Andolan have taken action. The Muslim Personal Law (Shariat) Application Act, 1937, has come under fire for being out of date and out of line with Islam, according to those who oppose it. The Sunni community practices this prohibited kind of divorce, whereas the Shia society does not. Shia schools of Islamic law uphold the legislation that originates from the Prophet's home. Shias do not engage in this activity since it is not a product of the Prophet's household.

2.0 Different forms of Talaq

The only legislation in India that permits both judicial and extrajudicial divorce is Islamic law. Every other faith recognizes legal divorce. Both husband and wife may have grounds for divorce, according to the law. For the husband, there are two types of talaq: talaq-i-biddat and talaq-i-sunnat. The other two types are ila and zihar, in which the husband compares his wife to his mother or sister and swears not to have any sexual relations with her for four months if he succeeds. The husband's purpose to end the marriage relationship must be evident in both Ila and Zihar. The husband has an option; in the case of Ila, he may choose to reconcile by engaging in sexual activity, but in the case of Zihar, he must carry out the penance prescribed by the Koran.

Talaq-I-Sunnat Is Once More Split Into Two Categories: Hassan (proper) and ahsan (most proper). Where talaq-i-sunnat is a recognized method of divorce because it allows the couple time to think things over. Ahsan is the most appropriate form of talaq since the depraved word is only said once. The pair has the option to change their minds

throughout the iddat time. In hasan, there is a one-month period of reflection following each declaration of talaq. The third proclamation makes talaq irrevocable. When a lady is in her tuhr, or time of purity, it is when the talaq should be delivered. The topic of debate in this essay is talaq-i-biddat, which the prophet did not approve of yet which is being used today.

Lian and Talaq-i-Tawfeez are the options for girls. In the delegated version of talaq, the husband grants his wife or any other involved party the authority to pronounce talaq. When the husband falsely accuses the wife of infidelity, the woman in lian has the right to file for divorce. Khula and Mubarrat are available for divorce by mutual agreement. The first legal system to acknowledge divorce by mutual consent was Islamic law. Additionally, it has added arbitration to talaq. The Hanabali school and the Shia community do not support triple talaq. Although there are variations of opinion among the schools, all forms of talaq are legitimate.

2.1 Origin of Triple Talaq or Talaq-I- Biddah : It was said that the pre-Islamic Arabian kingdom was a time of ignorance, anarchy, and uncertainty. During this time, man never led a moral life. The situation didn't alter until the prophet began to preach. A guy may have as many wives as he wanted at this time. A woman might wed as many spouses as she wanted. Both men and women had the option of divorcing. The Prophet established the law of marriage and divorce. He put an end to the custom that was followed in the Arabian kingdom before Islam. Prophet would thus never be in favor of the instantaneous and irrevocable triple talaq procedure. It is an innovative method of divorce that was not established by the Prophet because biddat is Arabic meaning invention. The problem has gotten worse as a result of contemporary technologies and the communication of triple talaq.

Triple talaq is a custom that dates back to the Arab conquest of Syria, Egypt, and the Persian Empire. The Syrian and Egyptian women's communities drew the attention of the males. Only if they gave their spouses at home three sittings of talaq would the Syrian and Egyptian ladies be willing to accept them. The Muslim men were aware of the talaq custom and were aware that this particular kind of talaq was invalid. They so anticipated being able to marry the ladies and retain their current husbands. They consented to divorce their spouses with the proclamation of triple talaq since they anticipated this. This is where the custom began. During the reign of the second Caliph Umar, this took place. When he learned that the men were abusing the talaq, he made the talaq binding so that the males would not be able to enjoy two women at once. This was only a short-term solution used to punish the men who had betrayed their families. But with time, it turned into a permanent habit, creating an irrational condition.

2.2 Islamic jurisprudence on Triple Talaq : The Quran is considered to be the most genuine source for Islamic law, with the Sunnah serving as its major and some subsidiary sources. Ibn Taymiyyah claims in his Fatwah (3:22) that Muttalib was saddened by the choice to divorce his wife. He had three times in one sitting divorced his wife. Prophet asserted that he still had time to return her. since just one sitting has been completed. Consequently, he returned her.i

Surah Al-Baqarah 2:229 states that divorce can be declared twice, after which you might choose to keep the woman or mercifully release her. Reclaiming anything that was given to her out of love at the time of marriage is not a good idea.

2:230 states that if he divorces her a third time after having already done so twice, she will no longer be legally his wife. If she marries another guy, he files for divorce, she can reconcile with the first spouse without committing a sinii.

Talaq was thus only permissible based on the aforementioned premises and not by any other practice created by mankind. Except for Imam Ahmad bin Hanbal, the founder of the Hanabali school, who was against the practice, most sunni sects practiced triple talaq. None of the other Sunni schools of Islamic law's other founders have ever voiced opposition to such a practice. Imam Ahmad bin Hanbal supported talaq, which allows for a window of opportunity for reconciliation by taking the wife back. In essence, the Quran supports recourse, a cooling down period, or a period of reflection. Every talaq declaration is therefore made during the tuhr period, and an opportunity for reflection is given throughout the iddat period. The kind of marriage that takes place after the talaq is known as a nikah halala. When husbands declare the talaq without thinking, forcing them to leave their first wives, it is similar to punishing them. She must then wed someone else, and the second union must be consummated. She can only return to her original spouse once the second husband freely divorces her. He loses her due to talaq since she won't stay the same as she was before.

2.3 Judicial history on Triple Talaq : When considering the legal history of triple talaq, this is not the first time it has caused a problem. Due to the government's efforts to enact a law, the triple talaq problem is now considered history. Triple talaq is currently being utilized as a political tool. Analysis of the pre-independence era is seen in

Sara Bai v. Rabia Baiiii the earliest triple talaq case, in which the widow of a Cutchi Memon Muslim files a maintenance claim against the husband's assets, which belongs to the daughter. The deceased's daughter is the other descendent, but she rejects her mother's request for support because she was divorced by her father before he passed away via triple talaq. Because the widow claimed to be unaware of the divorce, the question in the case was whether the lady was genuinely divorced. Whether she is eligible for support depends on whether the divorce is deemed genuine. Talaq is verified since the triple talaq was performed while she was away, yet the talaqnama was signed by Kazi and two witnesses. They tried communicating it to the widow but communication was not effective enough. She was not permitted to inherit since the divorce was seen as legal. She was also not permitted to claim the iddat funds due to a delay on her part in doing so. In 1909, as a result of Fulchand v. Nammal Aliiv It was decided that the wife's presence or absence at the moment of triple talaq is irrelevant.

Further Asha Bibi v. Qadir Ibrahimv supports Fulchand's ruling, and it was decided that if the talaq protocols have been performed, the presence of the wife is not required. The legitimacy of the talaq, which was delivered three times while addressing her father and without her present, was at dispute in this instance. The wife need not have been present when the talaq was conducted. Moving ahead in Kathiyumma v. Urathel Marakkervi additionally, the Madras High Court affirmed that the wife's absence is not necessary for performing a talaq. It needs to be told to her since as soon as she knows about the act, it's valid. If the father destroys the talaqnama without telling the daughter, the talaq won't take effect until it is told to her. The next significant case before independence is Saiyid Rashid Ahmed v. Mst Aneesa Khatoonvii a case from 1932 in which the same problem as the Sarabai case concerned property inheritance. The deceased's brother and sister were the appellants in this case, while the widow and his children were the respondents. Following the triple talaq, the husband reconnected with Anisa Khatun and they enjoyed fifteen years of blissful marriage and childbirth. The union was viewed as unlawful. The births were regarded as illegitimate. Anisa Khatun should have wed a third party in accordance with Islamic law since it is usual for women to do so before they may remarry their deceased husbands. As a result, the triple talaq was seen as a genuine talaq and the reunion was forbidden. Post-independence in Ahmed Giri v. Mst Meghviii, The Jammu and Kashmir High Court resolved this case in which the husband abandoned his wife after they had ten children together, and when she sought support, he said that they had divorced years earlier. India's legalization of triple talaq causes injustice to women. In Yusuf v. Sowrammaix Justice Krishna Iyer condemned both the influence that the male society has over women as well as the practice of triple talaq under Islamic law. However, the case was distinct in that both spouses were married to separate individuals while the lawsuit was pending. Some of the similar judgements like above is Rahmatulla V. State of UP and othersx where the court harshly denounced the triple talaq practice.

Further there are cases like Shamim Ara v. State of UPxi when the husband claimed that the wife was divorced and that maintenance was not given to her. The wife was not told about the divorce. The problem was whether a husband's written statement should be interpreted as talaq. The marriage still exists, the talaq was not proven, and the woman is entitled to support, according to Justice Lahoti. Similar judgements are Mohd Ibrahim v. Mehrunissa Begumxii and Iqbal Bano v. State of UPxiii Written divorce declarations are only valid if the necessary steps are taken and adhered to.

The modern judgement that reversed all the above decisions was the historical judgement of Shayara Bano vs. Union of India,xiv when the woman's husband obtained a triple talaq divorce on her behalf. At the young age of 15, she was married. She brought a lawsuit alleging that the triple talaq, polygamy, and the Islamic custom of nikah halala remarriage were illegal and in violation of articles 14, 15, 21, and 25 of the constitution. The Supreme Court declared triple talaq unlawful with a 3:2 majority.

2.0 Muslim Women (protection of rights on marriage) Bill, 2018

Following the verdict in Shayara Bano v. Union of India on August 22, 2017, the minority opinion in this case directed the legislature to write a bill in this regard. The Muslim Women (Protection of Rights on Marriage) Bill, 2017, was subsequently adopted by the Lok Sabha. According to the bill, it was decided that the practice was invalid and illegal. The Triple Talaq Proclamation is now a criminal punishable by a three-year maximum term, according to the amendment. While the Bill was still on the agenda, the Rajya Sabha session came to a conclusion. The Bill was subsequently turned into an ordinance on multiple occasions. Despite persistent resistance and calls to refer the Bill to the Rajya Sabha Select Committee, both Houses eventually approved the Bill on July 30, 2019. The triple talaq bill, which was approved by both chambers of parliament and received the president's approval, will become law on July 31, 2019, making the practise of quick divorce among Muslims a criminal offence.

4.0 The Muslim Women (Protection Of Rights On Marriage) Act, 2019

This law was passed to safeguard the rights of Muslim married women, forbid husbands from divorcing them by issuing a talaq, and to address any issues that may arise in connection with or as a result of the act.

The Act's eight sections are broken down into three chapters in total. The Act's first chapter addresses the bill's application. All of India will be affected, with the exception of Jammu and Kashmir. Definitions for terms like "talaq," "electronic form," and "magistrate" are covered under Section 2 of the Act.

Electronic form shall be understood to mean any information generated, sent, received, or stored in media, including magnetic and optical media, computer memory, microfilm, computer-generated microfiche, or similar devices, as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act of 2000. As a result, the definition is finished and does not need to be explained anymore.

The term "talaq" is thus defined as "triple talaq" or "talaq-e-biddat" in Islamic terminology. This term includes all forms of such arbitrary conduct since it should not be possible to introduce any other kind of instant or irrevocable divorce.

Two sections make up Chapter 2 of the Act, which is titled "Declaration of Talaq to be Void and Illegal." According to Section 3 of the Act, any form of triple talaq by the husband is invalid and prohibited. When a divorce is invalid, the marriage is clearly still intact.

The husband who declares such a divorce is subject to a maximum three-year sentence of jail under Section 4 of the Act. Fine could also go along with it. Only after receiving a report from the victim or her blood relations would action be initiated.

The last chapter of the Act is titled as protection of rights of married Muslim women. The very first section that is Section 5 begins with maintenance. It begins with, "Without prejudice to the generality of the provisions contained in any other law for the time being in force." Which means that this provision shall be given priority over any other law for the time being in force? This provision shall not affect other laws. Even though other laws include maintenance provisions, they will only be taken into account once the provisions of this act have been taken into account. The clause makes it plain that divorced women and their children must receive support, which the magistrate will determine based on the circumstances of the case. It neither specifies a clear minimum maintenance amount nor a maximum maintenance amount. The clause provides the magistrate authority to make a decision based on the circumstances and the facts.

In spite of any other laws that may be in effect, the custody of young children shall belong to the mother, and shall be determined by the magistrate, according to Section 6 of the Act, which opens with the notwithstanding clause.

Additionally, Section 7 states that if the married woman or a member of her family gives the police officer the information, the infraction under this act is cognizable. If the victimized woman requests it, the offense may be made worse. The magistrate will make the decision and follow whatever guidelines he has established. This offense is not subject to bail. However, after hearing from the ladies, the magistrate may decide to grant bail and set the terms.

It is specifically stated that the ordinance that was in place before to the passage of this law is abolished with the inclusion of Section 8. Before this legislation became operative, any action done in support of the ordinance shall be deemed to have been taken in accordance with this Act.

As a result, married Muslim women, who are still regarded as the most vulnerable category of women in India, are given a lot of attention under this Act. It is a law that puts women and their dependents first and provides total protection for them. With the passage of this Act, quick divorce, one of the patriarchal practices that oppress women, will no longer be practiced. The practice is not supported by religion per se, and it might have been halted entirely. Since religion did not offer relief, the state was forced to step in and put an end to this arbitrary practice with the aid of this Act. The answer to the issue of whether this Act would benefit women is yes. Married Muslim women are granted extensive influence, yet this can also be abused by the women. For justice to triumph, the magistrate handling such cases needs to be cautious enough to double-check the presented evidence. This law shouldn't end up being used by women against men as a weapon, violating the goal for which it was designed, like the Protection of Women from Domestic Violence Act, 2005. As a result, unfairness is often the case.

5.0 Can Civil Laws Be Merged with Criminal Laws

A circumstance where the criminalization of civil offenses occurs is created by S.3 of the Act. Civil law governs marriage. Mens rea, or intent, is a necessary component of criminal behavior. It is not required that there be a purpose when the triple talaq is uttered because it might be said carelessly, as in the case of Sher Mohammed v.

Nazma Biwixvi when the husband gave the talaq while intoxicated, but afterwards realized his error and returned to living with his wife and three children.

This clause functions like strict liability since the law does not take mens rea into account and because it is challenging to determine mens rea. The only defense that can be made is that it could serve as a deterrent. As a result, there will be fewer triple talaqs in India. Criminalizing a civil conduct is justifiable when civil laws are unable to put an end to certain unfair practices or when people choose not to follow the rules that have been established.

6.0 Triple Talaq and the Indian Constitution

Article 25 of the Constitution guarantees religious freedom as Freedom of Practice and Propagation of Religion.

Like all other Fundamental Rights, it is subject to restrictions and does not protect religious practices that can negatively affect the welfare of citizens.

Hence, Article 25 is overridden by Article 14, which guarantees the Right to Equality as triple talaq denies a Muslim woman's equality before the law.

Article 25 is also subject to Article 15 (1) which states that the State "shall not discriminate against any citizen on grounds only of religion, race, caste, sex..." Since triple talaq does not work in the favour of women, it violates Article 15 (1) of the Constitution.

However, section 2 of the Muslim Personal Law (Shariat) Application Act of 1937 recognises triple talaq as a statutory right, bringing it under the ambit of Article 13 of the Constitution. Article 13 defines 'law' and says that all laws, framed before or after the Constitution, shall not be violative of the fundamental rights.

7.0 Conclusion

Islam is a religion that emphasizes practicality a lot. The institution of marriage is valued, but it is also acknowledged that there are some situations and circumstances in which the bond between the participants to a marriage could become so strained that it is difficult for them to continue. Despite being permitted in Islam, divorce is repugnant and should only be utilized in extreme circumstances, as is permitted under the irrevocable breakdown hypothesis of the modern era. The Prophet (PBUH) also delivered the best statement in favor of women's rights on his last hajj. He believed that husbands should treat their wives with respect and kindness. Men need to understand that their wives are their partners. Islam emphasizes that the female is the "Heart" and the male is the "Head" of the family because it recognizes the responsibilities and tasks of both partners. Both are crucial and valuable in various ways.

The teachings of the Prophet (PBUH) and the genuine spirit of Islamic law, which offered women the same position and rights as males in all sectors of human existence, including social, political, economic, and familial life, have been utterly lost by modern Muslims.

It is rightly put in Shayara Bano's case by Justice Kurian Joseph, "Can something found to be sinful by God be validated by men through law?"

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^{vi} (1931) 133 IC 375: AIR 1931 Mad 647

^{vii} (1932) 34 Bom LR 475

^{viii} AIR 1955 J & K 1.

^{ix} AIR 1971 Ker 261

^x II (1994) DMC 64

^{xi} JT 2002 (7) SC 520.

^{xii} AIR 2004 Kant 261

^{xiii} (2007) 6 SCC 785.

^{xiv} 22nd August 2017

^{xv} this expression is used in a clause where there is to be no priority given over another clause. It tells the reader that the clause in which the expression appears does not affect the clause to which it refers.

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