**SHAYERA BANO V. UNION OF INDIA [2017]**

**(TRIPLE TALAQ CASE)**

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**TRIPLE TALAQ CASE AND ITS CONSEQUENCES ON MUSLIM**

**COMMUNITY**

**PANORAMA OF THE CASE**

The Muslim Law segregates ‘Divorce’ into the numerous ways by which it can be obtained but this case precisely talks about one way by which husband can free himself from the nuptial rites i.e. by ‘Talak-ul-Biddat’ (commonly known as Triple Talaq), which is the cause of controversy in this case before The Supreme Court. Talak-ul-Biddat is however a taboo in *Shias*and is considered sinful in Hanafi School but is still practiced by hefty Muslim community who follow Hanafi School. This practice was a way enroot by the Islamic patriarchal society to rescue from the marriage by neither following approved form of Talaq i.e. Talak-ul-sunnat nor waiting for *iddat* periodand moreover not even abstaining from the sexual relationship.

Shayera Bano, the petitioner accompanied by many more women victims falling prey to the same demonic practice filed the petition in the apex court when her husbanddivorced her by uttering the three words ‘Talaq, Talaq, Talaq’. These three words can be pronounced at once in oral, written or otherwise in electronic form by the virtue of Islamic practice that allows men to arbitrarily and unilaterally effect instant and irrevocable divorce. The petitioner opposed this demonic practice before The Supreme Court and argued upon the constitutionality of the same, Ms. Bano claimed that this practice violated numerous Fundamental rights provided under the Constitution of India specifically Article 14 (which grants equality before the law), 15(1) (prohibition of discrimination on the grounds including sex and caste), 21 (Right to Life) and 25 (Freedom of Religion)[[1]](#footnote-2).The 5 judges bench had an in-depth study of the religious practice and Islamic Law with the reference of their holy book ‘Quoran’ then they come to a conclusion of its constitutional validity.

**INDIAN LAW IN COMPARISION WITH THAT OF OTHER NATIONS LAW RELATING TO THE TRIPLE TALAQ PRACTICE**

After studying the Constitutional provisions of Islamic Nations who follow all the essential religious practices of the Muslim Law, it was found that this Talaq-ul-Biddat was banned in almost all the Islamic countries and were held unconstitutional as the practice was against the basic tenets of Quoran and whatsoever contradicts the Quoran is also against the Shariat therefore it is considered that, *what is bad in theology cannot be good in law.*In India only Hanafi School practices it even after considering it sinful and by this we can understand that this was not at all an essential religious practice to be followed and moreover the bench observed that merely because the practice is followed by the large number of people it cannot be held as an essential practice, if it would be so than sati would never be banned in India as it also had the widespread following but it was against the human rights and therefore it had to be eradicated from the roots.

**FACTS OF THE CASE**

Shayera Bano was divorced in 2016 through Talaq-e-Biddat (triple Talaq) after the 15 years of her marriage. She moved to the apex court for the justice from this demonic practice which was followed by her husband to give her divorce by just reciting talaq-talaq-talaq; Ms. Bano allegedly pointed out that this triple Talaq practice is in violation of the fundamental rights given by the Constitution of India under Article 14, 15(1), 21 and 25. The equality before law u/a 14 is the most stressed fundamental right upheld in this case, which is being infringed here of a women, as this practice is dominated only by the males of the Muslim Community and woman cannot take any action against the same and divorce is enacted against their will. Her petition underscored how protection against these practice has profound consequences for ensuring a life of dignity. Furthermore, it contends that failure to eliminate de jure (formal) and de facto (substantive) injustice against women including by non-state actors, either directly or indirectly, violates not only the most basic human rights of women but also infringes their civil, economic, social and cultural rights as confront in international treaties and covenants.

**PETITIONER’S ARGUMENT**

1. Article 14 of the Indian Constitution has been violated because there is no *intelligible differentia[[2]](#footnote-3)*here as to why the male are allowed to give divorce by just reciting talaq-talaq-talaq to their wives and why not the female can do the same. More importantly it’s not the essential practice of the Muslim community which has to be followed by overshadowing the fundamental rights.
2. Article 15 (1) has been violated as it is clearly mentioned in it that the state shall not discriminate against any citizen on the ground of religion, caste or sex, and here the woman sex of the Muslim Community and caste has been discriminated against by the consequences of the demonic practice of triple talaq.
3. Article 21 has been violated because Constitution provides every citizen with protection of life and personal liberty and life does not mean just a normal living but, it means the ‘right to live a dignified life’ which is inconsistent with the Muslim woman here.
4. Article 13 (1) has to applied here in this practice which says that all the ‘laws in force’ in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of the fundamental rights, shall, to the extent of such inconsistency, be void.

**RESPONDENT’S ARGUMENT**

1. The legislation is the only law making body which understands the people’s need and make the law in accordance with it, and judiciary is the one who interprets the law made by legislative body that whether it is consistent with the part III of the constitution and it only declares the ‘law in force’ void under article 13 (1) when it is inconsistent with or in derogation of the fundamental rights and not otherwise.
2. The practice being banned in most of the Islamic countries does not pave the way for India too to ban it, if it is an essential religious practice followed by large number of Muslims who follow Hanafi School.
3. It was further argued that, however bad the practice be, if it is an essential religious practice it cannot be struck down and it has to be valued.
4. Vagueness is not an appropriate reason to consider the practice unconstitutionalif it is eligible and unarbitrary.

**ISSUES IN THE CASE**

1. Whether the talaq-ul-biddat practice is an essential religious practice of Islam?
2. Whether the practice of talaq-ul-biddat violates any fundamental right and is unconstitutional?

**MUSLIM PERSONAL LAWS IN INDIA**

India being a secular state and the follower of the Unity in Diversity, considers giving every religion equal status and thereby maintains a personal law system, through which certain family and property related matters such as **Marriage, Maintenance, Guardianship, Divorce, Inheritance, Succession and Adoption** can be supervised by their personal laws namely **Hindu, Muslim, Parsi, Christian and Jews[[3]](#footnote-4).** India has this feature of **Uniform Civil Code** (UCC)[[4]](#footnote-5)since 1949 under article 44 of the Indian Constitutionbut India has failed to implement it till date, rather while safeguarding the plurilegal system as such, the several different personal laws have been reconstructed or altered to varying scale via legislation and judicial interpretation.

On the gender basis, every personal laws (not only Muslim) have some inherent inequalities between male and female which favors any one gender and leaves other gender to fight for their rights in the court of law regarding any of the inequality caused such as (polygamy, inheritance rights, divorce grounds, guardianship rights or child adoption)[[5]](#footnote-6). Restructuring these personal laws in order to bridge a gap between men and women in some or the other way is the only long been agenda of Indian women’s rights movement. Coming to the present case there has been a several Muslim women rights activists and organizations which have been actively participating in this Muslim personal law reforms thereby forming part of broader Islamic feminist movements.

The key statute in the case at hand is ***Muslim Personal Law (Shariat) Application Act of 1937[[6]](#footnote-7)****,* under *section 2* of the act it is declared that this law is applicable only between Muslims, while negating “customs and usages” the act in specific refers to “provisions of personal law, marriage, dissolution of marriage (talaq)”. The talaq can be enforced in several modes described in Quoran and more clearly categorized in Islamic Legal Scholarship, Talaq can be initiated by husband in three modes *i.e. talaq-e-ehsan, talaq-e-hasan,* and the one in discussion here *talaq-e-biddat or triple talaq.* Unlike the other two methods the one discussed here is of more brutal nature which discriminates with Muslim woman’s and does not give them equivalent right as the Muslim husbands who can divorce their wives by reciting talaq-talaq-talaq in one sitting, which once said is irrevocable and is effective forthwith. And moreover it’s so problematic for the woman’s as they can be divorced any time without any planning or arrangement of where to go, how to live and particularly what about the ones with the children? This has been worse for the women when done by use of modern technology such as Skype, WhatsApp or Facebook and the court has experienced such cases, notably, talaq-e-biddat is not approved or recognized by all Muslims as ShiaMuslims and significant schools of SunniMuslims have denied to accept it and are against the same.

**CONSTITUTIONAL PROVISIONS AND VALIDITY OF THE PRACTICE**

Examining this practice with the constitutional provisions is interesting and thought provoking- Article 13 (1) says that the laws inconsistent with or derogation of the fundamental rights shall to the extent of such inconsistency, be void. The Fundamental Rights in part III of the Constitution consist of the right to equality, sanctified in Article 14 (equality before the law) and 15 (no discrimination on grounds of religion, race, caste, sex or place of birth) additionally the right to life, assured under Article 21 (broadly interpreted with personal liberty and dignified life[[7]](#footnote-8)). Interestingly, it was held by the Bombay High Court that “personal laws were not included in the expression ‘laws in force’ used in Article13(1)” in the case of *Narasu Appa Mali, 1952[[8]](#footnote-9).* Ergo, the court adhered that (uncodified) personal laws were not void even when they came into conflicts with the provision of equality under the constitution. At the same time The Supreme Court of India has never tried to directly overrule this judgement, it did in the case of *Masilamani Mudaliar, 1996[[9]](#footnote-10)*by enouncing a contradicting view point through stating: “the personal laws conferring inferior status on woman is anathema to equality. Personal laws are derived not from the constitution but from the religious scriptures. The laws thus derived must be consistent with the constitution lest they become void under Article 13 if they are in derogation of Fundamental Rights.

Asymmetrically, the right to freedom of religion is also guaranteed under Article 25 which gives the freedom to its people of conscience & of profession, practice and propagation of religion. The clause (1) of the same clause is subject to public order, morality and health and to the other provisions of the part III, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and with this right given there is also an reasonable restriction in clause (2) (a) which further restricts the economic, financial, political or other secular activity which may be associated with religious practice and which is affecting and contradicting the existing laws or is preventing the state from making any law. Article 25[[10]](#footnote-11) protects only “essential religious practices” in accordance with Jurisprudence. ***Whether or not the triple talaq is essential religious practice was a central issue of the case at hand.***

**GENDER DISPARITY**

This practice of triple talaq has been challenged in the courts of law around jillion of times but has not made any significant impact on the courts to consider it of this importance which is been given today in this Shayera Bano case which has challenged this practice of divorce on the ground that it violates their fundamental rights assured by the Constitution. Although the bench did not address ‘gender discrimination’ scrupulously, it is enlightening to note that even the differing judgement noted “…that all concerned are unequivocal, that besides being arbitrary the practice of ‘triple talaq’ is gender discriminatory.”

Hereby, we have some statistics as a result of study done in 2015 by The Bhartiya Muslim Mahila Andolan (BMMA)[[11]](#footnote-12)who found that almost 1 in 11 Muslim Women were the sufferers and survivors of the Talaq-ul-Biddat practice and majority of them does not receive any compensation or alimony. This demonic practice has left countless women impecunious, with many having no homes to protect their children. This religious practices having their personal laws often incorporate discrimination against women. It is noted by one commander in all personal laws that women are not considered equal to men and this reality subvert the intelligence of women to realize and recognize their other human rights, including in relation to daily housing chores, property and resources in common. The gender-based bigotry in laws, customs and practices results in several inequalities in woman’s capacity to access and control several resources and limit their participation in decision making in important matters. This case is of great relevance because it addressed the practice within the ambit of personal laws through the lens of gender equality and within the shell of fundamental rights.

This case has witnessed several groups who are in support of woman’s rights and social justice and the organizations which advances the significant constitutional values of equality, secularism and dignity. These groups and organizations are namely **Bhartiya Muslim Mahila Andolan**, **Bebaak Collective** and **National Women’s Commission.**

**A GLIMPSE OF THE JUDGEMENT**

On August 22, 2017, the five judges bench of The Supreme Court namely **Rohinton Nariman J., U.U. Lalit, Kurian Joseph J., CJI J.S Khekar and Abdul Nazeer J.**in the ratio of 3:2 delivered the judgement in the Triple Talaq Case, concluding that the practice of “*talaq-ul-biddat*” is **unconstitutional** and not an essential religious practice to be followed. The majority bench of Rohinton Nariman and U.U. Lalit held that *Talaq-e-Biddat* is governed by the Muslim Personal Law (Shariat) Application Act, 1937. They concluded that practice is unconstitutional because it is arbitrary in the concept and nature both and Justice Joseph Kurian additionally, in his concurring view point, noted that this practice is contradictory to the Quran, and thereby lacks legal sanction. He further added “what is held to be bad in the holy book of Quran cannot be good in Shariat and, what is bad in theology is bad in law as well.”

**CRITICAL OVERVIEW OF THE JUDGEMENT**

The Talaq-e-Biddat judgment is broadly being acknowledged throughout the jurisdictions as a security shield against social evil such as this triple talaq which is arbitrary in nature and unconstitutional. This practice was rigorously criticized by the majority bench and the samewas also argued upon as why the government has not yet made relevant laws in prevention of such an absurd practice. This demonic irrelevant practice empowered the Muslim husbands to take the atrocious steps by ending the marital tie with their wives and thereby leaving them to starve by their own with their innocent children to live a hell life. Muslim women’s since donkey’s yearsare demanding freedom from this hell life but no one gave them an ear, apart from the apex court which finally freed them from this vulnerable practice in which they can’t even put their assent to divorce and are divorced in a snap of a time without any iddat period[[12]](#footnote-13)of roughly three months.

There is no suspicion left that the triple talaq practice was an essential religious practice or not since considerable number of Islamic nations do not follow this practice and has banned it, and in India also only Hanafi School follows it rest of the Muslims are against it and has banned it. Hence, it could not be by any means concluded that it was an essential religious practice. Justice Nariman in the beginning itself proposed that if he would find that this practice violates the fundamental rights of the citizens than he would scrap it off. Therefore, the majority of the bench that is 3 out of 5 found that the said practice was in contravention of Article 14 as well as of the exceptions laid in Article 25 (1) and henceforth, the triple talaq was struck down.

The minority bench judgement written Chief Justice Kehar on the behalf of Justice Nazeer and himself was fallacious in each facet. The minority bench failed to recognize the atrocities that are committed by the triple talaq. It is the responsibility of the courts to hand out justice and they should not be deterred by mere technicalities in allocating justice. The minority judgement is ***per incuriam***as the justices said that however bad the practice be, if it is an essential religious practice it cannot be struck down, this renders the whole judgement of minority bench irrational, unjust and unfair. If the minority bench would also have supported the majority bench the impact would be en masse different. The minority judges should have considered the following facts:

* An essential religious practice of the particular community (Islam here) would not have been forbidden by that very religion itself (banned by Islamic nations).
* An essential religious practice cannot be termed as sinful by the religion itself.
* Barely because one community of the religion follows it, then such anathematized practice cannot be termed as an essential religious practice.

The Justice Kurian Joseph judgment lays a stupefying reliance on the petitioner’s argument in finalizing that triple talaq is unislamic in nature. This is specifically engaging as it does not dwell upon the constitutionality of the triple talaq, but instead focuses only upon if it is a part of Islam or not. One may question that being a legal expert how can you (Justice Kurian) conclude that it is unislamic as only the Quranic expert can make the clear conclusion if the practice is Islamic or not but thereby Justice Kurian justifies his decision by citing the precedent judgements in ***Shamim Ara, Masroor Ahmed and Jiauddin Khan v. Anwara Begum by Nazarul Islam J[[13]](#footnote-14)***

Without imitating the rulings of the above mentioned cases, an effort is made to answer the question using non-judicial sources.

In ascertaining the origins of Triple Talaq, Maulana Usmani in his book focuses on the Quoran verse 2:229-30 which talks precisely about the term, “Al-talaqu marratan”, i.e., talaq may be pronounced twice. He explains the reason behind it that since a person cannot visit someone’s place twice unless there has been some time interval between two visits; in the similar way the word ‘twice’ cannot be interpreted to mean in quick succession.

**THE MUSLIM WOMAN (PROTECTION OF RIGHTS ON MARRIAGE) ORDIANCE, 2018**

Even after declaring the Triple Talaq practice unconstitutional and illegal it was still prevailing in some areas and was continuing despite this judgement therefore the government issued an ordinance to make the practice **illegal and void.**

The provisions of the ordinance are:

* Instant triple talaq will remain cognizable with a maximum of 3 years’ imprisonment and with a fine.
* The offence is non-bailable that means police cannot grant the bail and only a Magistrate can do so and that too only after hearing from the wife.
* The complaint of the offence should be registered only by the wife or her blood relatives only then it will be recognized.
* Custody of the minor children from the marriage will go to mother and not father.
* The allowance for the maintenance of the wife is decided by the Magistrate. On 19th Sept 2018 Magistrate cleared the ordinance.

**CONCLUSION**

Principally, in a state where codified law prevails and where the case is such that the personal laws of the religion are inconsistent with the Constitution (highest law of land), the latter shall prevail in such circumstances and not the religious personal laws. Gender equality and women rights are the part and parcel of the supreme law of land (constitution) and therefore one cannot safeguard their arbitrary practices in the name of ‘Religion’. Thereafter filing plethora of cases, a petition filed by ***Shayera Bano, Ishrat Jahan, Aafreen Rehman, and Gulshan Parveen*** was successful in receiving justice on behalf of several unheard voices of India. This ruling of Triple Talaq proved to be a turning point as the court did not only banned the illegal practice but also penalized the offenders. Just because the plentiful people follows the demonic practice does not mean that the demonic practice is valid, it has to be banned and it is banned. No husband can now abandon his wife by breaking the marital tie on his whims and fancies, the court ultimately did justice to the victims of Triple Talaq, the majority decision restored the people’s faith on judiciary.

**SUGGESTIONS**

As we came forward the fact that the justice was finally delivered after plethora of cases and petitions filed by the hundreds of women’s falling prey to this demonic practice, but this justice should have been given years back to the women’s, suffering from this non-essential religious practices which in the name of Islam was being prevailing in the society. Since, lord Sri Ram’s age when it used to be a utopian society we have heard that ‘*justice delayed is justice denied”*andhere in this case also several women’s were denied of justice as the courts did not give enough attention to this petitions earlier, so we need to look after the improvement of our judicial system where the deprived of fundamental rights does not have to suffer due to the late justice.

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**BRIEF INTRODUCTION OF THE AUTHOR**

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2. Constitution of India, 1949 Art.14 [↑](#footnote-ref-3)
3. Hindu Marriage Act of 1955, Section 2(1)(b). [↑](#footnote-ref-4)
4. Flavia Agnes*, ‘*International Journal of Law, Policy and the Family [2016] 30(3). [↑](#footnote-ref-5)
5. Flavia Agnes, ‘Family Law Volume I: Family Laws and Constitutional Claims’ [2011]. [↑](#footnote-ref-6)
6. Dissolution of Muslim Marriages Act*,* 1939. [↑](#footnote-ref-7)
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9. *C.Masilamani Mudaliar and Others vs. The Idol of Sri Swaminathswami Thirukoli and Others*, [1996] 8 SCC 525. [↑](#footnote-ref-10)
10. *The Commissioner of Police & Ors vs Acharya Jagdishwarananda* [ 2004]. [↑](#footnote-ref-11)
11. Bmmaindia.com [↑](#footnote-ref-12)
12. *Masoor Ahmed v. State* (NCT of Delhi), [2008] (103) DRJ 137, para 27. [↑](#footnote-ref-13)
13. *Shamim Ara vs State of U.P. & Anr*. [2002] 7 SCC 518. [↑](#footnote-ref-14)