

TRIPLE TALAQ ACT, 2019: LEGISLATIVE BOON OR BANE

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1. INTRODUCTION

Triple *talaq*, also known as *talaq-e-biddat*, instant divorce¹ and *talaq-e-mughallazah* (irrevocable divorce).² a form of Islamic divorce used by Muslims in India, especially adherents of Hanafi Sunni Islamic schools of jurisprudence,³ allowing any Muslim man to legally divorce his wife by uttering the word *talaq* (the Arabic word for "divorce") three times in oral, written or, more recently, electronic form. The Quran established means to avoid hasty divorce.⁴ It prescribes two waiting periods of three months before the divorce is final in order to give the husband time to reconsider his decision.^[12] Abu Hanifa and Malik ibn Anas considered it irrevocable despite its illegality. Al-Shafi'i considered it permissible but Ahmad ibn Hanbal considered it to be invalid.⁵

Triple *talaq* in India had been a subject of controversy and debate due to justice, gender equality, human rights and secularism. The debate involved the Government of India, Supreme Court of India wrt Article 44 in India.⁶ On 22 August 2017, the Indian Supreme Court with three of the five judges deemed instant triple *talaq* (*talaq-e-biddah*) unconstitutional.⁷ The remaining two declared it constitutional while simultaneously asking the government to ban the practice by enacting a law.⁸ 23 countries have banned triple

¹ "Triple Talaq verdict: What exactly is instant divorce practice banned by court". Hindustan Times. 22 August 2017. Retrieved 18 September 2017.

² Mohammed Siddique Patel. "The different methods of Islamic separation – Part 2: The different types of Talaq". www.familylaw.co.uk. Retrieved 29 May 2017.

³ "Hanafi jurisprudence sanctions triple talaq".

⁴ ^ Jump up to:^a ^b Harald Motzki (2006). "Marriage and divorce". In Jane Dammen McAuliffe (ed.). *Encyclopaedia of the Qur'ān*. **3**. Brill. p. 279.

⁵ *Issues in Islamic Law*, Volume 2.

⁶ Jump up to:^a ^b "Triple Talaq". The Times of India. 13 May 2017. Retrieved 13 May 2017.

⁷ "The Triple Talaq Case - Supreme Court Observer". Supreme Court Observer. Retrieved 27 February 2018. Also, "Supreme Court scraps instant triple talaq: Here's what you should know about the practice". Hindustan Times. 22 August 2017. Retrieved 18 September 2017.

Also, Pratap Bhanu Mehta (23 August 2017). "Small step, no giant leap". The Indian Express. Retrieved 18 September 2017.

⁸ "Triple talaq verdict LIVE updates: Jaitley says SC judgment a great victory and welcome step". The Indian Express.

talaq.⁹ On 30 July 2019, Parliament of India declared the practice of Triple Talaq as illegal, unconstitutional and made it punishable act from 1 August 2019 which is deemed to be in effect retrospectively from 19 September 2018.

Muslim family affairs in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937 ("Muslim Personal Law"). Triple talaq is a form of divorce that was practised in Islam, whereby a Muslim man could legally divorce his wife by pronouncing *talaq* (the Arabic word for divorce) three times. The pronouncement could be oral or written, or, in recent times, delivered by electronic means such as telephone, SMS, email or social media. The man did not need to cite any cause for the divorce and the wife need not have been present at the time of pronouncement. After a period of *iddat*, during which it was ascertained whether the wife is pregnant, the divorce became irrevocable.¹⁰ In the recommended practice, a waiting period was required before each pronouncement of *talaq*, during which reconciliation was attempted. However, it had become common to make all three pronouncements in one sitting. While the practice was frowned upon, it was not prohibited.¹¹ A divorced woman could not remarry her divorced husband unless she first married another man, a practice called *nikah halala*. Until she remarried, she retained the custody of male toddlers and prepubescent female children. Beyond those restrictions, the children came under the guardianship of the father.¹² This practice came around the period of Caliph Umar, more than 1400 years ago.¹³ The Supreme Court described it as "manifestly arbitrary" and said that it allows a man to "break down [a] marriage whimsically and capriciously".¹⁴

Triple talaq is not mentioned in the Quran. It is also largely disapproved by Muslim legal scholars. Many Islamic nations have barred the practice, including Pakistan and Bangladesh, although it is technically legal in Sunni Islamic jurisprudence. Triple talaq, in Islamic law, is based upon the belief that the husband has the right to reject or dismiss his wife with good grounds.¹⁵

⁹ "India's Muslim neighbours among 23 countries that have banned triple talaq". Hindustan Times. 19 September 2018. Retrieved 16 August 2019.

¹⁰ Choudhury, (Mis)Appropriated Liberty (2008), pp. 72–73.

¹¹ Ibid. p. 95.

¹² Rao, Kinship, Descent Systems and State – South Asia (2003), p. 341.

¹³ "Shayara Bano v Union of India" (PDF).

Also, ^ "SC strikes down 1400-year-old Islamic practice of Triple talaq". Outlook. 22 August 2017.

¹⁴ "'Not part of Islam': 5 quotes from verdict banning Triple talaq". NDTV.

¹⁵ "What is Triple talaq divorce? India rules against instant termination of marriage in win for women's rights". Newsweek.

2. OPPOSITION TO THE PRACTISE: A petition, titled 'Muslim Women's Quest for Equality', was filed by the Bharatiya Muslim Mahila Andolan (BMMA) alongwith **Shayara Bano, Ishrat Jahan, Gulshan Parween, Aafreen Rehman, Atiya Sabri as crusaders of the movement.** The BMMA argued that Allah says men and women are equal. Zakia Soman of the BMMA said, "We have reproduced verses from the Quran about *talaq*, negotiations and how it should happen over a minimum period of 90 days. The second argument is about gender justice. There is no ambiguity in the Constitution of India about all citizens having equal rights."¹⁶ The practice faced opposition from Muslim women,¹⁷ some of whom filed a public interest litigation in the Supreme Court against the practice, terming it "regressive".¹⁸ The petitioners asked for Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, to be scrapped, describing it as being against Article 14 of the Constitution (equality before the law).¹⁹ In 2017, during the hearings before final judgment, the Supreme Court described instant triple talaq as the "worst form of marriage dissolution" observing in a ruling that the practice of instant triple talaq was unconstitutional and violated the rights of Muslim women.²⁰ In March 2017, over 1 million Indian Muslims, a majority of whom were women, signed a petition to end instant triple talaq. The petition was started by the Muslim Rashtriya Manch, an Islamic organisation affiliated to the right wing Hindu nationalist organisation Rashtriya Swayamsevak Sangh.²¹ The petitioners against instant triple talaq have given evidence showing how instant triple talaq is simply an innovation that does not have much to do with Quranic beliefs. This is supported by the interpretation of Quranic text by many Islamic scholars, historical evidence and legal precedent.²² On 10 May 2017, senior cleric Maulana Syed Shahabuddin Salafi Firdausi denounced triple talaq

Also Stacey, Kiran (22 August 2017). "India supreme court bans Islamic 'instant divorce'". Financial Times.

¹⁶ All India | Edited by Nidhi Sethi | Updated: August 22, 2017 14:44 IST retrieved at <https://www.ndtv.com/india-news/here-are-the-women-who-took-their-fight-against-triple-talaq-to-supreme-court-1740412>

¹⁷ Dutt, Barkha (5 May 2017). "What India's liberals get wrong about women and sharia law". The Washington Post.

¹⁸ "Lucknow: Muslim Personal Law Board to discuss Ayodhya dispute, triple talaq on Saturday", Hindustan Times, 14 April 2017, retrieved 22 August 2019.

¹⁹ Thakur, Pradeep (23 January 2017). "Triple Talaq: Law panel studies practices of Muslim nations". The Times of India.

²⁰ "Allahabad High Court calls triple talaq unconstitutional, says no personal law board is above Constitution". India Today. 8 December 2016. Retrieved 21 April 2017. Also, Rashid, Omar (8 December 2016). "'Triple talaq' a cruel and most demeaning form of divorce practised by Muslim community: HC". The Hindu. Retrieved 21 April 2017.

²¹ Suri, Manveena (17 March 2017). "Triple talaq: 1 million Indian Muslims sign petition against divorce practice". CNN. Retrieved 22 May 2017.

²² "The case against Triple talaq". Livemint. 16 May 2017.

and *nikah halala*, calling them un-Islamic practices and instruments to oppress women.²³ The practice was also opposed by Hindu nationalists and Muslim liberals.²⁴ Congress leader Kapil Sibal tweeted: "Absence of consensus in Court makes it more difficult to forge consensus within communities." ²⁵

IN SUPPORT OF THE PRACTISE: Triple talaq has been supported by the All-India Muslim Personal Law Board (AIMPLB), a non-governmental body that supervises the application of Muslim personal law. It believes that the State does not have the right to intervene in religious matters. The AIMPLB's lawyer Kapil Sibal had said that though instant talaq can be thought of as a sin by some, but that "setting the validity of customs and practices of a community is a slippery slope".²⁶ The All India Muslim Personal Law Board (AIMPLB) defends the practice.^[38] contending that women could also pronounce triple talaq, and could execute *nikahnamas* that stipulated conditions so that the husbands could not pronounce triple talaq.²⁷ According to AIMPLB, "Sharia grants right to divorce to husbands because Islam grants men a greater power of decision-making."²⁸

In April 2017, citing a report prepared by Muslim Mahila Research Kendra in co-ordination with Shariah Committee for Women, AIMPLB has claimed that Muslims have a lower rate of divorce compared to other religious communities, countering the argument that Muslims have the highest number of divorces in the country due to the practice of triple talaq. It also claimed that it had received forms from 35 million Muslim women across the country, supporting shariat and triple talaq.²⁹

²³ "Muslim scholars support ban on triple talaq, polygamy". DNA. 10 May 2017. Retrieved 6 June 2017.

Also, "Cleric: Triple talaq is a mockery of Islam". The Times of India. 10 May 2017. Retrieved 6 June 2017.

²⁴ "India bans a Muslim practice of instant divorce". The Economist. 26 August 2017.

²⁵ Ghosh, Pallavi (23 August 2017). "Kapil Sibal epitomises oppositions dilemma on Triple talaq verdict". News18. Retrieved 22 August 2019.

Also, Sibal, Kapil [@KapilSibal] (23 August 2017). "Absence of consensus in Court makes it more difficult to forge consensus within communities. Glad that Court set aside a 'sinful' practice" (Tweet). Retrieved 22 August 2019 – via Twitter.

²⁶ Prabhu, Sunil (22 August 2017). Dutta Roy, Divyanshu (ed.). "Kapil Sibal In Court Opposed Ending Triple Talaq. His Reaction To The Ban". NDTV.

²⁷ "India supreme court bans Islamic 'instant divorce'". *Financial Times*.

²⁸ "Women can say Triple talaq, Muslim law board tells Supreme Court". *Times of India*. 17 May 2017.

²⁹ Khan, Shueb (10 April 2017). "Muslims have lower divorce rate than other groups". The Times of India. Retrieved 21 April 2017.

Also, PTI (10 April 2017). "Muslim community has a low rate of divorce". The Hindu. Retrieved 21 April 2017.

Also, "Divorce rate among Muslims low compared to other communities". India Today. 8 April 2017. Retrieved 21 April 2017.

3. LEGISLATION: The case was called *Shayara Bano v. Union of India & Others*.³⁰ The bench that heard the controversial triple talaq case in 2017 was made up of multifaith members. The five judges from five different communities are Chief Justice JS Khehar (a Sikh), and Justices Kurian Joseph (a Christian), RF Nariman (a Parsi), UU Lalit (a Hindu) and Abdul Nazeer (a Muslim).³¹

The Supreme Court examined whether Triple talaq has the protection of the constitution—if this practice is safeguarded by Article 25(1) in the constitution that guarantees all the fundamental right to "profess, practice and propagate religion". The Court wanted to establish whether or not triple talaq is an essential feature of Islamic belief and practice.³²

In a 397-page ruling, though two judges upheld validity of instant triple talaq (*talaq-e-biddat*), the three other judges held that it was unconstitutional, thus barring the practice by a 3–2 majority.³³ The bench asked the central government to promulgate legislation within six months to govern marriage and divorce in the Muslim community.³⁴ The court said that until the government formulates a law regarding instant triple talaq, there would be an injunction against husbands pronouncing instant triple talaq on their wives.³⁵

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³⁰ <https://indiankanoon.org/doc/115701246/>

³¹ "Triple talaq validity case: All you need to know". The Times of India. 22 August 2017.

³² "Triple talaq verdict has not gone the entire distance". Livemint. 25 August 2017.

³³ "Recent court rulings in India suggest justice is improving". The Economist. 31 August 2017.

Also, "Triple Talaq declared invalid by Supreme Court – Lexspeak". Lexspeak. 23 August 2017. Retrieved 23 August 2017.

³⁴ Mahapatra, Dhananjay (22 August 2017). "Supreme Court declares triple talaq unconstitutional, strikes it down by 3:2 majority". The Times of India.

³⁵ "Injunction on husbands pronouncing triple talaq until law is made: SC advocate". Business Standard. 22 August 2017.

Also, "This Is What Supreme Court Said in Triple Talaq Judgment". LiveLaw.in. 22 August 2017.

³⁶ <https://indiankanoon.org/doc/115701246/>

³⁷ "Triple talaq validity case: All you need to know". The Times of India. 22 August 2017.

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The Narendra Modi Government formulated and introduced **The Muslim Women (Protection of Rights on Marriage) Bill, 2017** in the Parliament.⁴² On 28 December 2017, the Lok Sabha passed the Bill, 2017⁴³ making it illegal and void, with up to three years in jail for the husband. 19 amendments were moved in the Lok Sabha but all were rejected. On the grounds that practice of instant triple talaq was continuing unabated despite the SC striking it, the government issued **The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018** to make the practice illegal and void.⁴⁴ which was cleared by the President on 19 September 2018.⁴⁵ As the triple talaq ordinance of 2018 was to expire on 22 January 2019, the government introduced a fresh bill, **The Muslim Women (Protection of Rights on Marriage) Bill, 2018** in the Lok Sabha on 17 December 2018 to replace the ordinance⁴⁶ which was passed on 27 December 2018.^[15] However, the bill remained stuck in the Rajya

³⁸ "Triple talaq verdict has not gone the entire distance". Livemint. 25 August 2017.

³⁹ "Recent court rulings in India suggest justice is improving". *The Economist*. 31 August 2017.

Also, "Triple Talaq declared invalid by Supreme Court – Lexspeak". Lexspeak. 23 August 2017. Retrieved 23 August 2017.

⁴⁰ Mahapatra, Dhananjay (22 August 2017). "Supreme Court declares triple talaq unconstitutional, strikes it down by 3:2 majority". *The Times of India*.

⁴¹ "Injunction on husbands pronouncing triple talaq until law is made: SC advocate". *Business Standard*. 22 August 2017.

Also, "This Is What Supreme Court Said in Triple Talaq Judgment". LiveLaw.in. 22 August 2017.

⁴² "'100 cases of instant triple talaq in the country since the SC judgement'". 28 December 2017.

⁴³ Phukan, Sandeep (28 December 2017). "Lok Sabha passes triple talaq bill".

⁴⁴ "President Promulgates Triple Talaq Ordinance[Read Ordinance]". LiveLaw.in. 20 September 2018. Retrieved 30 December 2018.

⁴⁵ "President signs instant triple talaq ordinance". *Times of India Website*. 19 September 2018. Retrieved 30 December 2018.

⁴⁶ Kaushal, Pradeep (18 December 2018). "Fresh triple talaq Bill introduced in Lok Sabha". *Indian Express Website*. Retrieved 12 January 2019.

Also, "THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL, 2018"(PDF). Lok Sabha India Website. Retrieved 30 December 2018.

Sabha due to the opposition's demand to send it to a select committee.⁴⁷ **The Muslim Women (Protection of Rights on Marriage) Ordinance, 2019.** Finally, as the Ordinance, 2018 was to expire on 22 January 2019 and Bill, 2018 could not be passed in the parliament session, the government repromulgated the ordinance on 10 January 2019.⁴⁸ On 12 January 2019, the president of India approved the ordinance of 2019 and The Women (Protection of Rights on Marriage) Act, 2019 became law on 31 July 2019, replacing the earlier ordinance⁴⁹ based on the following reasons :

The Triple Talaq was held to be violative of Article 14 (the right to equality), which is held by the Supreme Court from Shah Bano case 1986 to Shayara Bano case in 2017. The law has been placed as a deterrent to eradicate social evils. Triple Talaq is banned in more than 20 Islamic countries including Pakistan. Terming Triple Talaq as unconstitutional as a step towards establishing uniform civil code (Enshrined in Article 44 of Directive Principle of State policy).

4. CRITICAL ANALYSIS ON CRIMINALIZATION OF THE ACT

FEATURES OF THE ACT	ISSUES IN THE ACT.
Any pronouncement of “talaq” by a Muslim husband to his wife in any manner, spoken or written, will be void and illegal.	The Supreme Court by holding that Triple Talaq is unconstitutional implied that mere utterance of Talaq thrice does not result in the dissolution of marriage, rather it remains intact.
The Supreme Court held it as invalid act and called for a legislation for it but not mentioned anywhere about criminalizing the act.	The Supreme Court declared Triple Talaq as invalid and did not ask the government to make it a penal offence. Hence criminalizing the act goes against the spirit of the Supreme Court judgement.
Any Muslim husband who communicates	Divorce is a civil matter and making Triple

⁴⁷ "Triple talaq bill in Rajya Sabha on Monday; Congress, others set to oppose". The Times of India. 30 December 2018. Retrieved 30 December 2018.

Also, "Triple talaq bill stuck in Rajya Sabha". The Times of India. 9 January 2019. Retrieved 12 January 2019.

⁴⁸ "Cabinet approves re-promulgation of triple talaq Ordinance- Economic Times". The Economic Times. 10 January 2019. Retrieved 12 January 2019. Also, "Cabinet approves re-promulgation of triple talaq Ordinance". News18. 10 January 2019. Retrieved 12 January 2019.

⁴⁹ "Lok Sabha passes instant triple talaq bill". Economic Times. 26 July 2019. Retrieved 26 July 2019.

Also, "Triple talaq bill passed in Rajya Sabha". India Today. 30 July 2019. Retrieved 30 July 2019.

Also, "Fresh triple talaq Bill introduced in Lok Sabha". Indian Express Website. 21 June 2019. Retrieved 31 July 2019.

Also, "THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE)BILL, 2019"(PDF). Lok Sabha India Website. Retrieved 30 July 2019.

the “talaq” orally or in writing may face punishment up to three years in jail. The punishment may be also extended.	Talaq a criminal offence is disproportionate to criminal jurisprudence.
If a Muslim man pronounces “talaq” to his wife, then the woman and her children are entitled to receive an allowance for subsistence. Such an amount can be determined by a Judicial Magistrate of the First Class.	Further, if the husband is imprisoned, how he can pay maintenance allowance to wives and children.
A Muslim woman is entitled to the custody of her minor children even if her husband has pronounced “talaq” to her.	With custody of children upon the wife who has sought imprisonment for her husband results in issues of maintaining the children in case of no means of livelihood or property at disposal, causing more trauma to the woman.
The offence is also compoundable (i.e. the parties may arrive at a compromise), if the Muslim woman insists for the same and the Magistrates allows certain terms and conditions which he may determine.	Compounding gives in a scenario of taking undue advantage and making misuse of the law where upon settlement a woman could allege charges for financial benefits. Also similar to misuse of Indian Penal Code section 498A (Dowry Harassment) which led to harassment of the affected men, the penal provision in Triple Talaq can be subject to such harassment.
A person accused of this offence cannot be granted bail unless an application is filed by the accused after a hearing in the presence of the Muslim woman (on whom talaq is pronounced) is conducted and the Magistrate is satisfied with the reasonable grounds for granting bail.	Against the Golden Rule of the Indian Constitution: Bail not Jail.

CONCLUSION & SUGGESTIONS:

1) Criminalizing Triple Talaq goes against the ethos of Fundamental rights i.e. article 25 and 26 the freedom of religion. Although instant Triple Talaq leads to the subjugation of Muslim women its solution must come through coexistence rather than coercion as the person of women, irrespective the religion contributes immensely in the marriage for the husband and it should at all times be respected. In case any party to marriage, seeks exit then such exit should be exit with dignity and not leaving a woman in a judgmental lurch.

2) The Muslim law on dissolution is best as it ends marriage within stipulated time in a well prescribed practical manner. The well-being of the woman who ceases to be the wife lies upon her guardian or in case of none available then the Wakf. However, irrespective of the financial conditions of the wife, in case talaq is sought by the husband then he should be gracefully exiting the lady with a quantum of alimony so as to enable her to live a dignified life rather than being dumped as thrash. This approach shall prove to be a boon in cases where the woman will be at liberty with dignity to spend their remaining life without stigma and no element in the society would be in a position of taking undue advantage of such woman.