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Legality of triple talaq or Talaq-E-Biddat in India: An analytical study

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Abstract

Today, the issues of women rights in Muslim personal Law is highly controversial. Specially, Muslim women rights relating to triple talaq divorce, inheritance, maintenance has got much attention now a days. Instant Talaq or "Triple Talaq" or "Talaq-e-Biddat" is an Islamic practice that allows men to divorce their wives immediately by uttering the word "talaq" (divorce) three times. The Hon'ble Supreme Court of India, in its recent landmark judgment of Sayara bano Vs. Union of India pronounced on August 22, 2017, has set aside the practice of Talaq-e-Biddat or "Triple Talaq" with the majority Ration of 3:2. The Judgment by the minority bench further directed the Government of Union of India to lay a proper legislation in order to regularize the proceedings of divorce as per shariat law. In this research paper the researcher attempted to analyse various legal orientations of "Talaq-e-Biddat".

Keywords: Talaq-e-Biddat, triple talaq, Quran, personal law, sharia, constitution, judiciary

Introduction

Since the issue under consideration is the dissolution of marriage by 'talaq', under the Islamic law of divorce, it is imperative, to understand the concept of 'talaq'. In this behalf, it is relevant to mention, that under the Islamic law, divorce is classified into three categories. Talaq understood simply, is a means of divorce, at the instance of the husband. 'Khula', is another mode of divorce, this divorce is at the instance of the wife. The third category of divorce is 'mubaraat' – divorce by mutual consent^[1].

'Talaq', namely, divorce at the instance of the husband, is also of three kinds – 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'. The petitioner's contention before this Court is, that 'talaq-e-ahsan', and 'talaq-e-hasan' are both approved by the 'Quran' and 'hadith'. 'Talaq-e-ahsan', is considered as the 'most reasonable' form of divorce, whereas, 'talaq-e-hasan' is also considered as 'reasonable'. It was submitted, that 'talaq-e-biddat' is neither recognized by the 'Quran' nor by 'hadith', and as such, is to be considered as sacrosanct to Muslim religion. The controversy which has arisen for consideration before this Court, is with referenc to 'talaq-e-biddat'^[2].

It is submitted that as the pronouncement of 'talaq-e-biddat' by a Muslim husband upon his wife had already been declared void and illegal, no circumstance, whatsoever, existed in the first place requiring the enactment of the Impugned Act. It is relevant to mention that though Hon'ble Supreme Court did not express any opinion to criminalize the pronouncement of talaq by a Muslim husband. However, the Impugned Act criminalizes the act of pronouncement of talaq by a Muslim husband and makes it a cognizable offence, without appreciating that such pronouncement had already been declared unconstitutional and amounted to nullity in the eyes of law. Needless to say, that the Act criminalizes the pronouncement despite the fact that the marriage subsists even after the said pronouncement^[3].

Nature of Triple Talaq or talaq-e-biddat

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. 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.

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While the practice was frowned upon, it was not prohibited. A divorced woman could not remarry her divorced husband unless she first married another man, a practice called *nikah halala*^[4].

Talaq-ul-biddat also known as talaq-ul-bain, Biddat came from biddah (innovation), which means that this form of talaq was devised later. There is no notion of arbitrary or one-time instant triple talaq in the Quran. The book traces the origin of triple to the time of Caliph Umar in the 7th century, years after Prophet Muhammad's demise^[5].

There was no prevalence of such a practice during the prophet's time. There is an oft-repeated narrative that Umar ordered instant triple talaq to be valid to tackle exigencies of some urgent situations. The book claims the caliph's administrative decision was meant to prevent men from cheating and mistreating their wives. "Though caliph Umar made triple talaq valid, he put in a condition. The instant divorce would be accepted, but the man giving instant talaq would be publicly flogged. It is this condition which modern-day maulanas have conveniently ignored, even as they declare triple talaq a valid way of divorcing one's wife"^[6].

This form of divorce is for 'instant divorce'. It is neither recognized by 'Quran' nor by 'hadith'. It is an irrevocable form of divorce, also known as 'Triple talaq' in which the husband pronounces the word 'Talaq' repeatedly three times and hence dissolves the marriage. In this type of divorce, the wife has no right to question the reason or motive behind the talaq. Women are left with broken ties and are given no explanations. The question of maintenance is not even raised in this type of talaq. Therefore, it is considered against equality and justice^[7].

A peculiar feature of this talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. Major Islamic countries have also abolished this practice on the ground of it being discriminatory on the part of women. In India also it was only recognized by Sunni schools^[8].

Even the prophets and Quran argues that Talaq-ul-Biddat is a sinful form of divorce but, still it is being practiced from ages merely because it exists. Something that was relevant 1400 years ago not necessarily needs to be continued. With changing times things have to amend for the betterment of society and instant Triple Talaq is something that was not relevant even then, so, how would it work now? It is sinful since the time of origin, so there is no point in continuing its practice^[9].

Talaq-ul-Biddat, that is giving an irrevocable divorce at once or at one sitting or by pronouncing it in a tuhr once in an irrevocable manner without allowing the period of waiting for reconciliation or without allowing the will of Allah to bring about reunion, by removing differences or cause, of differences and helping the two in solving their differences, runs counter to the mandate of Holy Quran and has been regarded as, by all under Islam-Sunnat, to be sinful^[10].

Judicial Analysis of Triple Talaq or Talaq-e-Biddat

It is a sinful form of divorce. It is an irregular mode of Talaq introduced by Omeyyads in order to escape the strictness of the law. In *Sarabhai v. Rabia Bai*^[11], it was said that Talaq-ul-Biddat is theologically improper. It has been maintained that this form of Talaq is improper from the moral point of view^[12].

Mohd. Ahmad Khan v. Shah Bano Begum^[13] is a landmark lawsuit which has dealt with the problem of "Triple Talaq

Verdict". This case is normally mentioned as "Shah Bano Case". It is considered to be a very debatable and problematic legal contest in India. This lawsuit has substantiated to be a milestone in the struggle of rights, freedom for the Muslim women.

It is all about Shah Bano fearless and valiant struggle against the system of Triple Talaq. Instead of creating a history or story of suppressed women she faced the embarrassments of the community and her husband. Even though she was facing such a drastic situation in her life she elected to struggled against her husband and faced the the world where everyone was in favor of her husband, and above all she bravely decided to fight against the male-dominated society. She fought against the system of Triple Talaq and at last her efforts not went in vain, she was able to achieve what she wanted and has altered the system eternally.

In *Shayara Bano v. Union of India*^[14], the Ho'nable Supreme Court very prudently Held "Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in *Rashid Ahmad v. Anisa Khatun*^[15], such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds well after *Shamim Ara v. State of U.P*^[16]. This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him".

The Muslim Women (Protection of Rights on Marriage) Act, 2019 Act No. 20 OF 2019, 31st July, 2019

An Act to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide formatters connected therewith or incidental thereto^[17]. This Act may be called the Muslim Women (Protection of Rights on Marriage) Act, 2019. It shall extend to the whole of India except the State of Jammu and Kashmir Vide Notification No. S.O. 3912 (E), dated 30th October, 2019, this Act is made applicable to the Union territory of Jammu and Kashmir and the Union territory of Ladakh. It shall be deemed to have come into force on the 19th day of September, 2018.^[18]

In this Act, unless the context otherwise requires^[19],— (a) "electronic form" shall have the same meaning as assigned to it in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000); (b) "Magistrate" means a Judicial Magistrate of the first class exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974), in the area where the married Muslim woman resides; and (c) "talaq" means talaq-e-biddat or any other similar form of talaq having the effect of instantaneous

and irrevocable divorce pronounced by a Muslim husband. Any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal [20]. Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine [21]. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate [22]. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate [23].

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) [24],- (a) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom talaq is pronounced or any person related to her by blood or marriage; (b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom talaq is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine; (c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person

Conclusion

The question remains that whether declaring the practice of triple talaq unconstitutional would ameliorate the condition of Muslim women more than the invalidation has done. Further such a move would pit the rights of a Muslim woman against her social and cultural beliefs. The Judgment is historic for women empowerment in the country granting equality to Muslim women. The court has opened a golden window for all communities to push for progressive reform in personal laws that impact all women, men and children and other reforms like the Uniform Civil Code (UCC).

The Muslim Personal law is in an urgent need for codification and hence must now be undertaken seriously by some legal experts or scholars or organisations or liberal ulema. Gender-unjust laws must be removed and gender equality must be followed. Also the Muslim women community and organizations must come out in support for the change

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