

ISSN 2582 – 211X

**LEX RESEARCH HUB JOURNAL ON LAW
AND MULTIDISCIPLINARY ISSUES**

VOLUME I, ISSUE I

Year: 2019

EDITED BY:

**Editorial Board of Lex Research Hub
Journal On Law And Multidisciplinary
Issues**

**LEX RESEARCH HUB JOURNAL ON LAW AND MULTIDISCIPLINARY ISSUES
[VOLUME I ISSUE I]**

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**TRIPLE TALAQ – ANTITHETICAL TO THE SPIRIT OF
THE QUR’AN.**

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ABSTRACT

Personal laws are believed to evolve from religion and religious beliefs of a person, these customs evolve as laws, which are then followed by the society. However, the foremost requirement of such customs to become law is their conformity with the Suprema Lex of the Land, that is the Constitution. The Muslim Law in India flows from Shariat, the main purpose behind this paper is to recognize the conformity of the act of talaq-ul-biddat or what is widely known as triple talaq in light of both Muslim personal laws as practiced by various sects in India along with that of Constitution of India. The paper takes into account the various observations made by the Indian judiciary beginning from Shah Bano Case to the Shayra Bano judgment and identifying its impact on various components of the Society.

Keywords: Talaq, Talaq-ul-biddat, Shariat, Mahr, Nikah, Muslim Woman

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INTRODUCTION

"I feel the judgement will be in my favour. Time has changed and a law will certainly be made."¹
— Shayara Bano

There was a time when customs were treated above law, but with the application of Section 125 of Criminal Procedure Code, it was established that in situations where it is necessary, the Court intervenes in the personal laws to provide people justice, exercising their *parens patriae* jurisdiction. As Nariman, J., said, "It is not possible for the court to fold his hands when petitioners come to court. Court has to declare whether practice is legal or not".²

The institution of marriage is one of the most sacred one, and every religion believes in the importance and sanctity of it. However, we need to accept, that to err is to human, and in life, there are no erasers, there are only whiteners to cover up your mistake. The formula of divorce is one such eraser, to get rid of those mistakes that one makes.

Triple Talaq or *Talaq-ul-Biddat* is one of the many forms of *talaq* as carried out by the Muslims, it is considered as the cruellest of the cruel practice that is divorce, the reason behind these believes are elaborated below, but before that, it is important for us to discuss the concept of marriage and *mahr* as under Muslim personal laws.

There is a very thin line between culture and law, both are intertwined as well as separate from each other at the same time. Hence the connection between the two is both sensitive and delicate. India is a secular country, which recognises the right of its citizens to be governed by their own personal laws. The Muslims in India hence follow Mohammedan Law, or the Sharia Law, which is said to be a codified form of their holy text the Qur'an. Muslims believe in only one God, that is Allah, and in the words of Mohammed, who is said to be His messenger.

¹ Editorial, "Triple talaq verdict: Judgment will be in my favour, says petitioner"
<http://news.rediff.com/commentary/2017/aug/22/triple-talaq-verdict-judgment-will-be-in-my-favour-says-petitioner/8dbff5d3415c5e0d948bccfa3b5c72be> (As accessed on 5th February, 2018 at 2037 hours)

² *Shayara Bano v. Union of India*, AIR 2017 SC 4609

CONCEPT OF MARRIAGE

Just like all other religions of the world, the Qur'an also believes in the importance of marriage, which is viewed as a solemn and sacred social contract (*mithaqun ghalithun*) as expressed in Qur'an 4:21. Muslims too believe in the institution of marriage as the meeting of two individuals to complete each other. They believe that man is the provider of financial security, while the wife looks after the household.

A Dollars and Sex commenter wrote that the "origin of marriage was to create a legal contract by which a man could acquire a female slave."³

Muslim marriage is also known as *Nikah* the literal meaning of which is 'being tied up together'. Where the man and woman accept each other as their partners and agree to take up responsibility and duties of each other. In the words of The Qur'an (An Nisa) Verse (4:3) 'And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice].'⁴

Therefore, we can see that Qur'an neither promotes nor makes polygamy mandatory, it merely permits it. The Shia School of Muslim Law also recognises a special kind of marriage, called *Muta* marriage, or *Nikah Mut'a* which literally means 'marriage for enjoyment, pleasure, delight'. A 'marriage of *mut'a*' is a contractual marriage which will last for a fixed period of time (1 year to 99 years) as decide by the contract. A Shia male may contract a *muta* marriage with *kitabiah* woman (professing Muslim, Christian or Jewish religion) or even with a woman who is fire-worshipper but not with a woman following any other religion. But a Shia woman may not contract a *muta* marriage with a non-Muslim.⁵ which is identified by *hadith* and not the Qur'an. 'So those of them

³ <http://bigthink.com/dollars-and-sex/the-origin-of-marriage-and-the-evolution-of-divorce> (As accessed on 5th February, 2018, 2105 hours).

⁴ The Holy Qur'an, [4:3], <https://quran.com/4/3> (As accessed on 5th February, 2018 (As accessed on 5th February, 2018, 2143 hours).

⁵ https://legalpoint-india.blogspot.in/2013/03/muta-marriage-introduction_22.html (As accessed on 7th March, 2018 at 0026 hrs).

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[women] whom you enjoy, give to them their appointed wages⁶ (4:24). There are certain essentials of a mut'a marriage, the most important being fixed duration of cohabitation and fixed amount of dower, which would be payable in half if the marriage is not consummated.

Such marriages are valid marriages, which come to end *ipso facto*, that is, on the expiry of the stipulated period, without the formality of divorce or at the option of the husband. And any child born out of such marriages are legitimate and are entitled to inherit property from both the parents.

CONCEPT OF MAHR

There is a unique concept called *mahr* (dower) in Islam where the Muslim man is responsible for paying his wife some amount of money or gifts as '*mahr*'. It is treated as a right given to women by Allah upon marriage. According to Wilson - 'Dower' is a consideration for the surrender of person by the wife.⁷ There are also types of *Mahr* which are specified dower and proper dower. Specified dower is further subdivided into prompt dower and deferred dower.

The Qur'an has many references of *mahr*, some of which are:

- i. 'Give the woman on marriage their dower as a free gift, and if they are good enough to remit any of it themselves, then devour it with good digestion and appetite.'⁸ Qur'an: Verse (4:4)
- ii. 'Even if ye had a whole treasure in dower, take not the least but back....'⁹
- iii. 'If ye divorce a woman before consummation or the fixation of *mahr*, bestow them a suitable gift; a gift of reasonable amount is from those who wish to do the right thing; And if ye divorce them before consummation but after fixation of dower for them, then half of the dower is due to them....'¹⁰ Qur'an: Verse (2:236 and 2: 237)

⁶ Harvey J. Sindima, *Major Issues in Islam: The Challenges Within and Without* 163 (Rowman & Littlefield, United Kingdom, 2017).

⁷ Rega Surya Rao, *Lectures on Family Law-II* 28 (Asia Law House, Hyderabad, 2nd ed., 2017).

⁸ The Qur'an 77 (Atlantic Publishers & Distributors)

⁹ The Qur'an [4:20] <http://thequranrecitation.com/an-nisa.html?language=english> (As accessed on 8th march, 2018 at 1725 hours)

¹⁰ Safia Iqbal, *Woman and Islamic Law* 210 (Oswal Printers & Publishers, New Delhi, 2014).

MUSLIM LAW AND DIVORCE

According to most of the religions in the world, marriage is a sacramental concept, where the man and woman are tied in a holy union and hence cannot be separated, however, the concept of marriage has gradually evolved as a mixture of a sacrament as well as a civil contract, which can be dissolved and a divorce is this form of dissolution of marriage.

The Mohammedan Law marriage was always considered as a purely civil contract, which could be dissolved by taking a divorce or *talaq*, however, the Prophet himself treated the concept of divorce as an evil practice, but believed that sometimes it is the only option left. But in Islam the right to take a *talaq* solely belonged to the husband unless he gifts it to the wife. There are broadly three modes of *talaq* in Muslim Law:

1. By Act of Parties:

i. By Husband:

(a) *Talaq-ul-sunnat*: It was the only accepted and recognised form of divorce by Prophet Mohammad. It is the *talaq* in conformity with Sunnat or the tradition of the prophet. The *talaq* gives the husband an opportunity to reconsider his decision of separation and has the option to revoke it. And is of two types:

Talaq-e-Ahsan: ‘Ahsan’ means ‘very good’ and is considered as the best form of *talaq* as the evil formula of *talaq* is pronounced only once, in the *tuhr* period (time between two menstruations cycles).

Talaq-e-Hasan: ‘Hasan’ means ‘good’ it is another accepted form, but not as much as *Talaq-e-Ahsan*, here the husband pronounces the evil formula of *talaq* thrice in three successive *tuhr* periods, failure of which revokes the *talaq*, however, with the last pronouncement, the divorce becomes binding.

(b) ***Talaq-ul-biddat***: It is the most common form of *talaq* and in popular parlance, known as, *triple talaq* or instantaneous *talaq*. The husband makes the three pronouncements in a single sentence and it is irrevocable in nature.

(c) ***Ila***: The husband abstains from the activity of sexual intercourse with her wife for a period of four months and the marriage is dissolved after completion of such period.

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(a) **Zihar**: If the husband makes a comparison of his wife to his mother, sister or to any prohibited degrees of relationship then the marriage is considered to be dissolved.

ii. **Talaq-e-Tafweez (By Wife)**: The dissolution of marriage takes place when the power to dissolve the marriage has been delegated to any third party by the husband which includes the wife also.

iii. **Talaq by Mutual Consent**

(a) **Khula**: The marriage is dissolved on the basis of an agreement where the wife makes an offer of consideration to her husband and it is dissolved on the acceptance of it by the husband. Such divorce is considered as single irrevocable divorce.

(b) **Mubaraat**: It is also a form of divorce where the marriage is dissolved by agreement. In this case, either the wife or husband may make such offer for dissolution. It is exclusive of consideration.

3. **By Judicial Process:**

4. **Lian**: If the husband makes a false charge of adultery on his wife, the wife may sue his husband on that ground and is entitled to obtain divorce.

5. **Faskh**: *Faskh* means annulment whereby the authority is given to the Qazi for such annulment of marriage

6. **By Act of God:**

The marriage is dissolved on the death of either the husband or the wife. The husband is allowed to remarry any time after the death of the wife but the wife has to undergo the *Iddat* period before her remarriage.

TALAQ-UL-BIDDAT

However, the main focus of our paper is *Talaq-ul-Biddat*, which is most widely known as *triple talaq* or instant *talaq*. Muslim law rests on the four-fold pillars of the fiqh, namely¹¹: the Qur'an

¹¹Mulla, *Principles of Mahomedan Law* 22 (Lexis Nexis-Butterworths, New Delhi, 19th edn, 15th reprint).

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(*kitab*), the Sunnah (*Hadiths*), the *Ijma* and *Qiyas*. These are like ladders to the solution of a problem in the lives of a Muslim, first we look in the Qur'an, if the solution is not found there, we move to the life of the Prophet, or the *Hadiths*, and if the problem has no solution in either of the two then only is resort taken to *Ijma*.¹² There is no Qur'anic basis to establish that three divorces on a single occasion will amount to an irrevocable divorce; in fact the Prophet despised divorce¹³ and described marriage¹⁴ as his Sunnat. The Qur'an approves only two kinds of divorces *Talaq-e-Ahsan* and *Talaq-e-Hasan* as it was the only form of *talaq* accepted by the Prophet. In fact *Talaq-ul-Biddat*, is agreed to be the most sinful and draconian form of divorces as it is against the spirit and words of Qur'an¹⁵, because the Prophet believed that Divorce itself was not right, but a divorce which does not give a chance to reconsider or reconciliation is absolutely unacceptable.

The view of the Shias and Sunnis however, differ in regard to the validity and concept of *triple talaq*, like the rules of *tuhr* (purity), status of her virginity, periods of *Iddat* and other formalities that must be strictly adhered to, to validate any divorce, without which the divorce has no validity. It is provided in the Holy Qur'an, that before the validation of the divorce the parties shall make efforts towards reconciliation. As in [Surah An-nisa 4:34, 35]. In the words of the Apex Court, *Shamim Ara v. State of U.P.*¹⁶

“None of the ancient holy books or scriptures mention such form of divorce. No such text has been brought to our notice which provides that a recital in any document, incorporating a statement by the husband that he has divorced his wife could be an effective divorce on the date on which the wife learns of such a statement contained in an affidavit or pleading served on her.”¹⁷

¹² Furqan Ahmed, *Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspect* 41 (Regency Publication, New Delhi, 1994).

¹³ [Abu Dawud 9: 2173] - Narrated by Abdullah ibn Umar, “Allah’s Messenger (PBUH) said: Divorce is most detestable in the sight of God; abstain from it”;

¹⁴ Tahir Mahmood, *Muslim Law of India* 48 (LexisNexis-Butterworths, New Delhi, 3rd ed., 2002).

¹⁵ Alamgir Muhammad Serajuddin, *Shari’a Law and Society: Tradition and Change in the Indian Sub-continent* 201 (Dhaka: Asiatic Society, Bangladesh, 1999).

¹⁶ AIR 2002 SC 3551

¹⁷ *Ibid.*

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The Apex Court invalidated the practice of *triple talaq*. In the instant case, the court said that the order for a *talaq* is considered to be valid if it is in correspondence with the Qur'anic injunction. And this view has been supported by many High Courts, like in *Dagdu Pathan v Rahimbi Pathan*¹⁸, the Bombay High Court held in ever more unequivocal terms that a husband may not annul a marriage according to his whims and fancies. The Full Bench of the Court invoked the Qur'an to say that instantaneous *talaq* was invalid, carefully stepping away from demonising Islam:

“To divorce the wife without reason, only to harm her or to avenge her for resisting the husband's unlawful demands and to divorce her in violation of the procedure prescribed by the Shariat is haram.”¹⁹

Not only is *triple talaq* against the spirit of Qur'an, but also against Natural Justice as *Talaq-ul-Biddat* is the exclusive right of the husband, and is binding immediately after three successive pronouncement of the word '*talaq*' which leaves the lady vulnerable with no right to be heard or justified, in fact there are a lot of cases, where the husband is under the influence of alcohol and cannot even walk straight, leave alone thinking, pronounces the formula of *Talaq-ul-Biddat* and it becomes binding on the couple. Also as per the Islamic practice of *Halala*, the wife on being irrevocably divorced by the husband can remarry the same man again, but only after she marries another man, and consummates such marriage with the new husband and then divorce the new husband to marry the previous one, all the while observing *Iddat* in each case. [Sahih-Bukhari 63:186]; [Abu Dawud 12: 2302]

Observing the fact that *Talaq-ul-Biddat* is against the spirit of the Qur'an and is considered unholy by renowned Islamic scholars, and that the practice has been declared unacceptable in many so-called Muslim-majority nations along with the fact that it blatantly violates the provisions of Natural Justice and Constitution of India, the practice of *triple talaq* and the treatment of a woman as a commodity has been under severe scrutiny. Beginning with the case of *Mohd. Ahmed Khan v. Shah Bano Begum*²⁰ where The Constitution Bench in its judgment unanimously upheld the

¹⁸ 2002 (3) Mh LJ 602

¹⁹ *Ibid.*

²⁰ AIR 1985 SC 945

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judgement of the High Court wherein the divorced wife was allowed to claim maintenance from her husband under Section 125 of Code of Criminal Procedure, 1973. The Court held that Section 125 of the Code provides for secularity and it does not discriminate on the basis of religion or caste. The Court observed that:

“Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of *Iddat*, does not contemplate or countenance the situation envisaged by Section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of *Iddat*, to his divorced wife who is unable to maintain herself.”²¹

The Apex Court cleared the position whereby any Muslim wife can claim maintenance from her husband under Section 125 of Code of Criminal Procedure, 1973, in the scenario when she is unable to maintain herself and such liability if the husband extends beyond the *Iddat* period.

Explanation to clause (b) of Section 125(1) of Code of Criminal Procedure, 1973, now encompasses divorced woman also until she has remarried and is considered to be a 'wife' under the said section. Personal laws applicable to her will be overridden by the rights provided to her under the said section of the Code.

The Apex Court observed that in accordance with the Explanation to the second proviso to Section 125(3) of the said Code, the Magistrate is given the authority to make an order of maintenance, if satisfied, even if the wife refuses to accept the condition set out by the husband to maintain and stay with her.

It was the *Shah Bano Begum* verdict that inspired the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 by the legislators. This enactment provided women the right to claim maintenance from her divorced husband, relatives or from Wakf Board. The Act provides for reasonable and fair provision that the divorced husband should pay the maintenance within the period of *Iddat*.

²¹ *Ibid.*

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The constitutionality of the aforesaid Act was challenged before the Supreme Court in *Danial Latifi v. Union of India*²², it held:

“the word ‘provision’ indicates that something is provided in advance for meeting some needs. ... The expression “within” should be read as “during” or “for” ... but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the *Iddat* period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.”²³

The Act was held to be valid because the Legislature never intends to draft a law which would be unconstitutional. It cannot be implied that the Parliament has provided for the provision of maintenance for the finite period of *Iddat* only rather it extends till the time, the wife hasn't remarried.

The conflict was finally put to rest by the landmark judgement of the 5-judge Constitution Bench in *Shayara Bano v. Union of India*²⁴ where the Apex Court set aside the practice of *triple talaq*. It held:

“In view of the different opinions recorded, by a majority of 3:2 the practice of ‘*talaq-e-biddat*’ – *triple talaq* is set aside.”

JS Khehar, CJ and SA Nazeer, J have given their dissenting opinion in which the Union of India has been asked to enact a legislation particularly for ‘*talaq-e-biddat*’. The then CJI held that until such legislation is enforced, the practice of *triple talaq* by Muslim husbands is to be injuncted for dissolution of marriage. The order of injunction has been passed for an operative period of six months. If the said legislation is not enforced within such timeframe, the order of injunction will continue to be effective till the time the Act is passed.

CJI and Nazeer, J. also observed the fact that the All India Muslim Personal Law Board has advised through their website that the ‘*nikah-nama*’ should contain a provision that the marriage would not be dissolved by ‘*talaq-e-biddat*’.

²² AIR 2001 SC 3958

²³ *Ibid.*

²⁴ AIR 2017 SC 4609

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The majority judgement by Nariman and Lalit, JJ. observed that *triple talaq* is instantaneous and irrevocable. It doesn't even provide an opportunity for reconciliation by two arbiters from each of their families. *Triple Talaq* is considered to be arbitrary because it is at the desire and will of the husband to dissolve the marriage without providing for reconciliation. Thus, it was held that *triple talaq* was violative on the ground of being not in tune with the fundamental rights as provided under Article 14 of the Constitution of India.

It is to be noted that the Muslim Personal Law (Shariat) Application Act, 1937, which comes under the ambit of the expression "laws in force" as provided under Article 13(1). Hence it was held that the said Act recognizes and enforces *triple talaq* and it must be struck down on the ground of being void.

The Court also pointed out the fact that even the Hanafi jurisprudence criticizes *triple talaq* for being sinful. The Apex Court said that *triple talaq* is also not in the Sunna and is an unorthodox form of *talaq*, it was held that:

"the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice."²⁵

It was held that the practice of *triple talaq* was not covered under the ambit of Article 25(1) of the Constitution and hence it cannot be provided any Constitutional protection.

Joseph, J, writing down a separate judgment but agreeing with the majority opinion, said, "Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible."²⁶

According to Joseph, J, the enactment of the Muslim Personal Law (Shariat) Application Act was to get rid of the anti-Shariat practice in place and declare the Shariat as the rule to be followed by the Islamic community. The anti-Shariat practices were provided under Section 2 of the said Act which included *talaq*. Thus, it was held by the court that any practice against the tenets of Qur'an is not permissible after the enforcement of the above-mentioned act.

²⁵ *Ibid.* at 7

²⁶ *Ibid.*

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Following the order of the Court, the legislature drafted a bill namely, The Muslim Women (Protection of Rights on Marriage) Bill, 2017, which was passed by the Lok Sabha and is pending to be passed by the Rajya Sabha. The bill calls for imprisonment of three years for the husband and this concept of criminalizing the act is flawed because under the Muslim law, the nature of marriage is a civil contract and therefore, a civil procedure must be adhered to. Even, the Muslim women across the country and the Muslim Personal Law Board are not supporting the Bill.

The *nikah-nama* which is the contract of marriage under the Muslim law should contain a provision of adhering to the mechanism of Alternative Dispute Resolution (ADR) i.e., referring parties to arbitration or mediation. As a matter of fact, arbitration is one of the procedures which are prescribed by the Qur'an.

CONCLUSION

Widespread efforts are needed to make the Muslim community aware of the social evils like *triple talaq*. The awareness campaign must be undertaken by the government and the All India Muslim Personal Law Board and other similar bodies.

From the above discussion it is clear that *triple talaq* indeed degrades Muslim women as well as disempowers this section of Indian society which already suffers from the problem of low literacy and socio-economic markers. Triple *talaq* provides for an easy escape to the husband because he exempts himself from the legal process which is not only long but also requires him to pay appropriate compensation and alimony to his wife. This adversely affects the women because she is left financially hampered and without any support. Due to these reasons, there was a hue and cry for bringing about the change. The judgement of Shamim Ara was the first case where the Court held it to be invalid and the position was made clear in the Shayara Bano verdict. Therefore, the standpoint of the Apex Court made it clear that the practice of *triple talaq* was regressive in nature and it is the duty of the court to decide the validity of such practice and hence, it was invalidated.