

TRIPLE TALAQ: WAS IT JUSTIFIED OR A CONVENIENCE FOR MALES

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Introduction

Triple Talaq, also known as *talaq-e-biddat*, instant divorce.¹ and *talaq-e-mughallazah* (irrevocable divorce),² is a form of Islamic divorce which has been used by Muslims in India, especially adherents of Hanafi Sunni Islamic schools of jurisprudence.³ It allows any Muslim man to legally divorce his wife by stating the word *talaq* (the Arabic word for "divorce") three times in oral, written, or more recently, electronic form.

The use and status of triple talaq in India has been a subject of controversy and debate. Those questioning the practice have raised issues of justice, gender equality, human rights and secularism. The debate has involved the Government of India and the Supreme Court of India, and is connected to the debate about a uniform civil code in India.⁴ On 22 August 2017, the Indian Supreme Court deemed instant triple talaq (*talaq-e-biddah*) unconstitutional.⁵ Three of the five judges in the panel concurred that the practice of triple talaq is unconstitutional.⁶ The remaining two declared the practice to be constitutional while simultaneously asking the government to ban the practice by enacting a law.⁷

Practice

Triple Talaq is a form of divorce practiced in India, whereby a Muslim man can legally divorce his wife by pronouncing *talaq* (the Arabic word for divorce) three times. The pronouncement can be oral or written, or, in recent times, delivered by electronic means such as telephone, SMS, email or social media. The man need not cite any cause for the divorce and the wife need not be present at the time of pronouncement. After a period of *iddat*, during which it is ascertained

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1 "Triple Talaq verdict: What exactly is instant divorce practice banned by court?". *Hindustan Times*. 2017-08-22. Retrieved 2017-09-18.

2. Mohammed Siddique Patel. "The different methods of Islamic separation – Part 2: The different types of Talaq". *www.familylaw.co.uk*. Retrieved 2017-05-29.

3. "Hanafi jurisprudence sanctions triple talaq"

4 "Triple Talaq". *The Times of India*. 13 May 2017. Retrieved 2017-05-13.

5 "Supreme Court scraps instant triple talaq: Here's what you should know about the practice". *Hindustan Times*. 2017-08-22. Retrieved 2017-09-18.

6 Pratap Bhanu Mehta (2017-08-23). "Small step, no giant leap". *The Indian Express*. Retrieved 2017-09-18.

7 "Triple Talaq: Ban this un-Islamic practice and bring in a uniform civil code".

whether the wife is pregnant with a child, the divorce becomes irrevocable.⁸ In the recommended practice, a waiting period is required before each pronouncement of *talaq*, during which reconciliation is attempted. However, it has become common to make all three pronouncements in one sitting. While the practice is frowned upon, it is not prohibited.⁹ A divorced woman may not remarry her divorced husband unless she first marries another man, a practice called *Nikah Halala*. Until she remarries, she retains the custody of male toddlers and pre-pubertal female children. Beyond those restrictions, the children come under the guardianship of the father.¹⁰

The All India Muslim Personal Law Board (AIMPLB), has told the Supreme Court that women can also pronounce triple talaq, and can execute *nikahnamas* that stipulate conditions so that the husbands cannot pronounce triple talaq.¹¹

Background

The Muslim family affairs in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937 (Muslim Personal Law), one of the first acts to be passed after the Government of India Act, 1935 became operational, introducing provincial autonomy and a form of dyarchy at the federal level. It replaced the so-called "Anglo-Mohammaden Law" previously operating for Muslims, and became binding on all of India's Muslims.¹² The *Shariat* is open to interpretation by the *ulama* (class of Muslim legal scholars). The *ulama* of Hanafi Sunnis consider this form of divorce binding, provided the pronouncement was made in front of Muslim witnesses and later confirmed by a Sharia court. However, the *ulama* of *Ahl-i Hadith*, *Ithna Ashariyya* and *Musta'lian Isma'ili Shia* persuasions do not regard it as proper. Scholar Aparna Rao states that, in 2003, there was an active debate among the *ulama*.

In traditional Islamic jurisprudence, triple talaq is considered to be a particularly disapproved, but legally valid form of divorce.¹³ Changing social conditions around the world have led to increasing dissatisfaction with traditional Islamic law of divorce since the early 20th century and various reforms have been undertaken in different countries.¹⁴ Contrary to practices adopted in most Muslim-majority countries, Muslim couples in India are not required to register their marriage with civil authorities. Muslim marriages in India are considered to be a private matter, unless the couple decided to register their marriage under the *Special Marriage Act of 1954*. Owing to these historical factors, the checks that have been placed on the husband's unilateral right of divorce by governments of other countries, such as prohibition of triple talaq, have not been implemented in India.¹⁵

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

9 Choudhury, (Mis)Appropriated Liberty (2008), p. 95.

10 "SC strikes down 1400-year-old Islamic practice of Triple talaq". *Outlook*. 22 August 2017.

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

12 Mukhopadhyay, *Construction of Gender Identity* (1994), p. 61.

13 Esposito & Delong-Bas, *Women in Muslim Family Law* (2001), pp. 30–31.

14 Schacht, J., and Layish, A. (2000). "*Ṭalāq*". In P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel, W. P. Heinrichs. *Encyclopaedia of Islam*. 10 (2nd ed.). Brill. p. 155.

15 Esposito & Delong-Bas, *Women in Muslim Family Law* (2001), pp. 111–112.

Opposition

The practice has faced opposition from various Muslim women. 16 Some of them have filed PIL in Supreme Court of India against the practice terming it as "regressive" 17 The petitioner has asked for scrapping of section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, terming it against the Article 14 of the Constitution. 18

During the hearings before its final judgement, the Supreme Court of India, on 13 May 2017, has described Triple Talaq as the "worst form of marriage dissolution". It also noted that the custom is banned in Muslim-majority countries Saudi Arabia, Morocco, Afghanistan and Pakistan. 19

Previously on 8 December 2016, the Allahabad High court in its ruling, has observed that the practice of Triple Talaq is unconstitutional and violates the rights of Muslim women. 20

In March 2017, over 1 million Muslims in India with women in majority, have signed a petition to end Triple talaq. The petition was started by the Muslim Rashtriya Manch (MRM), an Islamic organization affiliated to the right wing Hindu nationalist Rashtriya Swayamsevak Sangh (RSS). 21

Prime Minister Narendra Modi has raised the issue of Triple Talaq several times. On 29 April 2017, he commented that reformers from Muslim community would come forward to protect women from bad effects of Triple Talaq. He said, the Muslim community should not allow the issue to be politicised. On 9 May 2017, he told a delegation of 25 Muslim leaders from Jamiat Ulama-i-Hind to take the responsibility for initiating reform in this regard. 22

On 16 April 2017, the Bharatiya Janata Party led Government of Uttar Pradesh has said that it will constitute a high level committee of ministers, representatives of Muslim women's organisations and women who have been given talaq to address the issue. 23

Support

The All India Muslim Personal Law Board (AIMPLB) defends the practice. In April 2017, citing a report prepared by Muslim Mahila Research Kendra in coordination 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 highest number of divorce in the country due to the practice of Triple Talaq. It also claimed that it had received forms from 3.5 crore Muslim women across the country, supporting *Shariat* and Triple talaq. 24

16 "What India's liberals get wrong about women and sharia law".

- 17 "Muslim Personal Law Board to discuss Ayodhya dispute, triple talaq on Saturday", Hindustan Times, 14 April 2017
- 18 "Section 2 in The Muslim Personal Law (Shariat) Application Act, 1937". *Indian Kanoon*. Retrieved 2017-08-23. This article incorporates text from this source, which is in the public domain.
- 19 "Triple Talaq: Law panel studies practices of Muslim nations", The Times of India, 24 January 2017
- 20 "Triple talaq undesirable, worst form of dissolution of marriage among Muslims: Supreme Court". *India Today*. Retrieved 2017-05-13.
- 21 *CNN*, Manveena Suri. "Triple talaq: 1 million Indian Muslims sign petition against divorce practice". *CNN*. Retrieved 2017-05-22.
- 22 "India bans a Muslim practice of instant divorce". 26 August 2017 – via *The Economist*.
- 23 "Kapil Sibal epitomises oppositions dilemma on Triple talaq verdict". *News18*.
- 24 "Muslims have lower divorce rate than other groups". *The Times of India*. Retrieved 2017-04-21.

India's Supreme Court on Tuesday banned "triple talaq", or instant divorce, practised by some in the Muslim community, saying it is "unconstitutional".

Triple talaq is the practice under which a Muslim man can divorce his wife by simply uttering "talaq" three times. It is prevalent among India's Muslim community majority of whom follow the Hanafi Islamic school of law.

This mode of divorce is not universal among Muslims across the world, as many other Islamic schools of thought prefer the divorce process to be deferred, in many cases over a period of three months.

The government has cited the example of many predominantly Muslim countries, including Pakistan, that have banned triple talaq.

Why is it in the news?

The issue has attracted media attention in the past two years since a Muslim organisation, Bharatiya Muslim Mahila Andolan (BMMA), launched a campaign to ban triple talaq and "nikah halala" - a practice where divorced women, in case they want to go back to their first husbands, have to consummate a second marriage.

"In the course of our work, we have regularly been approached by our sisters, complaining about mistreatment and misuse of the oral talaq system. In most cases, men go scot-free and believe their action is approved by the Quran," Zakia Soman, one of the cofounders of the BMMA, told Al Jazeera in an earlier interview.

India's Prime Minister Narendra Modi has spoken on the issue a number of times, calling for "justice for Muslim women".

Is India ready to abolish triple talaq?

It has generated debate around the rights of Muslim women as the issue of divorce, marriage, and inheritance come under the purview of the Muslim Personal Laws. India has a provision for personal laws for all religious communities.

But the All India Muslim Personal Law Board (AIMPLB), a non-governmental organisation that aims to educate Muslims on the protection and application of Islamic laws, has opposed the move to ban triple talaq and polygamy. The latter is illegal in India.²⁵

Critics say divorce and polygamy are not the main issues facing the Muslim community, the majority of whom are close to the bottom of economic and educational indicators in the country.

The AIMPLB has opposed what it calls government interference in the personal laws of the Muslim community, who form nearly 14 percent of India's 1.3 billion population.

Should India review Muslim divorce?

25. "Muslim community has a low rate of divorce". *The Hindu*. Retrieved 2017-04-21.

"It is only when these two situations are not there, triple divorce will look bad. And, therefore, I would also say in that situation the better solution would be that the three pronouncements should be considered as one. So that there is a scope for reconciliation."

Can triple divorce be banned?

A five-judge bench will examine whether the Islamic divorce practice "is fundamental to religion" and whether it is a fundamental right. Article 25 of India's constitution grants the right of religion as a fundamental right.²⁶

Triple talaq has already been ruled unconstitutional by the Supreme Court in a number of cases, including in February 2015.

"I think that would be a very poor understanding of the law because banning is a legislative action," Mustafa said.

He suggested instead polygamy should be made a crime for Muslims as well.

"But the bigamy law for Hindus has not really helped Hindus in becoming less bigamous. So one must understand that normative changes in law do not really bring about any major social reforms. You have to create those conditions; the attitudinal changes have to come," said Mustafa.

Judgement

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, Justices Kurian Joseph a Christian, RF Nariman a Parsi, UU Lalit a Hindu and Abdul Nazeer a Muslim. ²⁷

The Supreme Court has to examine 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

wants to establish whether or not Triple talaq is an essential feature of Islamic belief and practice.²⁸

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 3–2 majority.²⁹ One judge argued that instant triple talaq violated Islamic law. The bench asked the central government to promulgate legislation within six months to govern marriage and divorce in the Muslim community.³⁰ 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.³¹

26 "Divorce rate among Muslims low compared to other communities". *India Today*. Retrieved 2017-04-21.

27 "Triple talaq validity case: All you need to know". *The Times of India*.

28 "Triple talaq verdict has not gone the entire distance". *Livemint*.

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

30 "Supreme Court declares triple talaq unconstitutional, strikes it down by 3:2 majority". *The Times of India*.

31 "Injunction on husbands pronouncing triple talaq until law is made: SC advocate". *Business Standard*.

According to *The Economist*, "Constitutional experts said [the judges] legal reasoning fell short of upholding personal rights over religious laws", whilst noting "The judgment did not ban other form of Muslim divorce that favour men, only the instant kind."

The Muslim Women (Protection of Rights on Marriage) Bill, 2017

The BJP Government formulated the bill after 100 cases of instant triple talaq in the country since the Supreme Court judgement in August 2017.³² On 28 December 2017, Lok Sabha passed The Muslim Women (Protection of Rights on Marriage) Bill, 2017.³³ The bill make instant triple talaq (*talaq-e-biddah*) in any form — spoken, in writing or by electronic means such as email, SMS and WhatsApp illegal and void, with up to three years in jail for the husband. MPs from RJD, AIMIM, BJD, AIADMK and AIML opposed the bill, calling it arbitrary in nature and a faulty proposal, while Congress supported the Bill tabled in Lok Sabha by law minister Ravi Shankar Prasad.³⁴ 19 amendments were moved in Lok Sabha but all were rejected.

Measures

AIMPLB issued a code of conduct in April 2017 regarding talaq in response to the controversy over the practice of Triple Talaq. It also warned that those who divorce for reasons not prescribed under Shariat will be socially boycotted in addition to calling for boycott of those who use Triple Talaq recklessly and without justification.³⁵ In addition, it also stated that it should be delivered in three sittings with a gap of at least one month each.³⁶

32 "'100 cases of instant triple talaq in the country since the SC judgement'".

33 "Lok Sabha passes triple talaq bill".

34 "Congress' backing of triple talaq bill indicates it's gradually withdrawing from Muslim appeasement politics"

35 "Muslim Personal Law Board to discuss Ayodhya dispute, triple talaq on Saturday", Hindustan Times, 14 April 2017

36 "Section 2 in The Muslim Personal Law (Shariat) Application Act, 1937". *Indian Kanoon*. Retrieved 2017-08-23.

