

CASE COMMENT : SHAYARA BANO & Ors. V. Union of India
& Ors.¹

- Jitika²

It has been said –

*“of all the permitted, divorce is the worst in the sight of God”.*³

Talaq was considered abominable by the Prophet as it not only interfered in the happiness of conjugal life but it also had negative consequences in the tending and upbringing of children.

If it is not absolutely necessary, it is strongly disapproved and discouraged against. Talaq can be opted by the men in the case where he is fully convinced that the marriage has been broken irretrievably. Abu Hurayrah re-counts what the Prophet has said in regards to Divorce

*“Marry, do not divorce, for God does not like men and women who relish variety in sex matters.”*⁴

The process of Talaq is quite simple. The Muslim law provides for two types of talaq to men-

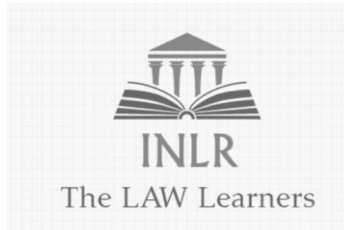
1. TalaqulSunnat
2. Talaq e Bidat

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³<http://www.spiritofislam.co.in/spiritnew/index.php/divorce-in-islam>

⁴Muslim Law of Divorce by KN Ahmed, 1978



The former is considered the more virtuous form of Talaq whereas the latter is considered to be the less virtuous form.

1. **Talaq-ul-Sunnat** –

It is the approved form of Talaq. It has two sub categories-

i. **Talaqahsaan** –

Considered to be *the most proper or the best form* of Talaq. Because it is needed to be pronounced only once, there is no reason that the bad should be spoken again and again. Conditions that are needed to be fulfilled –

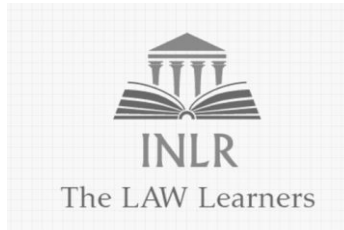
- a) Husband must pronounce in one single sentence
- b) Can be pronounced only in Tuhr (state of purity)
- c) Husband must abstain from exercising conjugal rights after his pronouncement of Talaq. Otherwise the pronouncement of Talaq stands revoked.

Why is it considered to be the best? ⁵Talaqahsaan is revocable during period of Iddat and also provides the man option of re-marrying (twice, after which there is no option of reconciliation) his wife after the expiration of Iddat.

Note – Here the woman doesn't marry another man, to marry her husband again.

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Personal laws in crisis, Syed Tahir Mahmood, 1986.



ii. Talaqhasan

Considered to be a *proper or good form* of Talaq. Here the Husband pronounces the Talaq thrice in three successive Tuhr of woman.⁶ With last pronouncement i.e. the third pronouncement the Talaq becomes final and irrevocable. The moment the Husband utters the last pronouncement; the marriage is dissolved irrespective of iddat.

It is important that no intercourse takes place in the *tuhr* in which the Talaq is pronounced by the Husband.

The importance of hasan is understood by knowing the background of pre-islamic Arabian Practice, under which the cycle of revocation and remarriage was quite prevalent.⁷

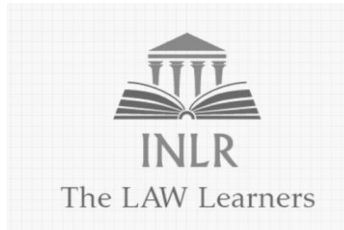
In Talaqhasan, after Talaq is finalized the husband do have the option of marrying again. But here is the main difference between Ahsaan and Hasan. Here, for to marry her husband again the woman will have to get married to another man, consummate that marriage with him. Then that man will give her Talaq, and only after that she can marry her first Husband.

The intent of marrying the woman to another man was to chastise and penalize the husband, who thoughtlessly repudiated his wife.

Both these forms provide an opportunity to compensate for hasty action. To undo the harm caused by cancelling the Divorce given to his wife and to have the chance to

⁶Muslim Law of Divorce by KN Ahmed, 1978

⁷ Ibid.



continue his marriage as before. Revocation of Talaq can be done only two times, the third time, it will become irrevocable.

2. Talaq-e-Biddat

It is the most disapproved form of Talaq. Having no recognition in either Hadis or Quran, it is just the matter of innovation. This form of Talaq is also known as Talaq-ul-Bain. It was introduced by Omeyyads in second century of Islam and has gained prevalence in India since. Amir Ali says – This type of Talaq was introduced by Omayyid Monarchs to escape from the strictness of law and they wanted to find a “loophole” to complete their purposes.

It is considered to be based on some distorted ideas. Some of the Muslim Schools that recognize the ‘Talaq-e-Biddat’ describe it as “**a sinful form of divorce**”.

Talaq-e-Biddat, also known as Talaq-ul-Bidda has two ways to be pronounced –

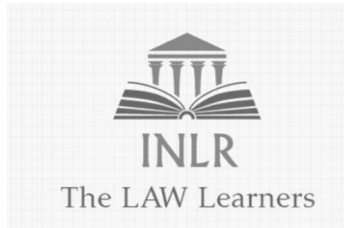
- a. When the Talaq Declaration is made thrice in one go–

“I divorce thee, I divorce thee, I divorce thee”

With utterance of last word, the Talaq becomes final and irrevocable. There is no time of reconciliation between husband and wife. It is called Triple Irrevocable Talaq.

- b. When the Talaq Declaration is made by uttering the words once –

I divorce thee by Talaq-ul-biddat.



The pronouncement can be made even when the woman is in her Mensuration Period. This Talaq is also final and irrevocable and is called Single Irrevocable Talaq.

These kind of Talaq are referred to be theologically and morally wrong.

The Practise of Halala –

Same as in Talaqhasan, if the man wants to re-marry his wife the following steps are followed –

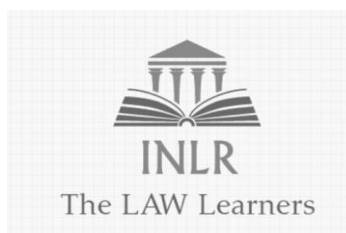
1. The Divorced Wife is made to marry another man.
2. That marriage must be consummated.
3. The other man divorces the wife.
4. Now she can marry her first husband again.

The Case of Triple Talaq

Background of the Case -

ShayaraBano(wife) was married to Rizwan Ahmed(husband) for 15 years. In 2016, Rizwan divorces her through instantaneous triple *talaq(talaq -e biddat)*. A Writ Petition is filed by ShayaraBano in the Supreme Court to hold three practices – *talaq-e-biddat*, polygamy, *nikah-halala*– unconstitutional as they are violating to Articles 14, 15, 21, 25 of the Constitution.

After the acceptance of ShayaraBano's petition, the Apex Court formed a 5 judge constitutional Bench. On 22nd August 2017, Bench pronounced its decision in regards to the Triple Talaq Case, declaring that the practice was unconstitutional by a 3:2 majority.



The 5 Judge Bench of SC held that -

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

Issues

- i. Whether the practice of talaq-e-bidat an essential practice of Islam?
- ii. Whether the practice of Triple Talaq violates any fundamental right.

In regards to the first issue the Court held that:

“the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim’s eyes, will not change without this practice.”

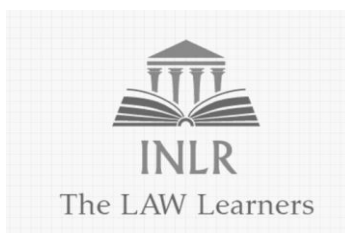
Joseph, J. said -

“Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible.”⁸

Analysis –

Triple Talaq, right now, is one of the heated issue in the country. Today lots of cases have arisen and forced us to ponder upon and take action on this issue.

⁸SCC Blog. (2018). In the historic judgment, SC says that Triple Talaq is not fundamental to Islam; Practice set aside by a 3:2 majority | SCC Blog. [online] Available at: <https://blog.sconline.com/post/2017/08/22/in-the-historic-judgment-sc-says-that-triple-talaq-is-not-fundamental-to-islam-practice-set-aside-by-a-32-majority/> [Accessed 9 Oct. 2018].



A family in India is destroyed in just few moments, just a word repeated thrice can wreck the life of a woman. The practice of Triple Talaq promotes cruelty towards women. It promotes exploitation. It shows how a man recklessly ends the marriage on his whims.

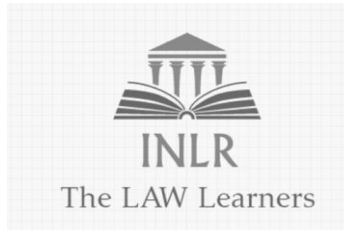
It is not the first time that a judgement has been made on Triple Talaq – **in the case DagduLatur vs. RahimbDagduPathan, 2002 Bombay High Court** - It was held by the full bench that ⁹*“a Muslim husband cannot dissolve a marriage at will and for triple talaq to be valid the facts of the due talaq procedure should be proved in court.”*

Case of ShamimAra vs. State of U.P. &Anr -: Invalidate the arbitrary triple talaq, It was held by SC that the facts which lead to talaq must be proven and just a document stating the date or events of talaq will not be considered as the valid talaq.

Masroor Ahmed vs. State (NCT of Delhi) &Anr. - Holding the instant talaq as invalid, it was held by the Delhi High Court that *“..where a talaq is revocable, the attempts at reconciliation can take place even after the pronouncement. This is so, because, in a revocable talaq, the dissolution of marriage does not take place at the time of pronouncement but is automatically deferred till the end of the iddat period.”*

Recently, in news articles we come across clippings of Muslim Husbands giving their wives Talaq on matter as small as waking up late and as petty as making a burnt roti or using extra salt in food. This is the apparent exploitation and disregard to women. It raises the question whether can we, in under the cover of personal law, attack the rights of women? Another point to mention is that, nowhere in Hadis or Quran the practice of Triple Talaq is mentioned.

⁹ The Indian Express. (2018). This is not the first time Indian courts have invalidated instant triple talaq. [online] Available at: <https://indianexpress.com/article/india/this-is-not-the-first-time-indian-courts-have-invalidated-instant-triple-talaq/> [Accessed 17 Oct. 2018].



It has been the matter of innovation by which people made a distorted law for selfish and thoughtless purposes without caring what consequences a woman will have to face.

The Supreme Court's decision, has no doubt, positively affected the women victims of the instantaneous and unilateral triple talaq. It has given voice to the sufferers of this practice. However, we can't ignore the refusal of the Court to comment and reason on the issue of discrimination.

Present Scenario –

This decision of the Apex Court has made triple talaq no longer legal throughout India. Following the judgment, the government has introduced a bill to criminalize triple talaq. The Lok Sabha passed the bill in December 2017 and is currently tabled before the Rajya Sabha to be taken up in the coming Winter Session.