

ISAS Brief

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Triple *Talaq* in India: Religious versus Gender Issues

In August 2017, the Indian Supreme Court delivered its verdict on the triple talaq (divorce), stating that it violates the state's Constitution. The judgement can be seen as a victory for a Muslim woman's individual rights versus the Muslim community's collective customs and traditions. However, despite the decision, it remains unclear if the ruling will allow the Supreme Court to differentiate in the same manner in the future. It is also to be seen how the ruling will affect the practice of triple talaq in India because of the gap between the legal aspects of the Supreme Court's decision and the customary practice.

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On 22 August 2017, delivering the verdict in the triple *talaq* (divorce) case, the Indian Supreme Court bench, comprising five judges from different religions and headed by the then-Chief Justice of India (CJI) J S Khehar, invalidated the practice of *talaq-i-biddat* (triple *talaq*), the practice of divorce by uttering *talaq* thrice consecutively.² The bench said that the practice violated Articles 14 and 21 of the Indian Constitution. Three judges – Justices

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² "Centre to Issue advisory to all states to ensure compliance of SC order on Triple Talaq", *The Hindu*, 22 August 2017. Retrieved from <http://www.thehindu.com/news/national/live-sc-to-pronounce-verdict-on-triple-talaq/article19538487.ece?homepage=true>.

Kurian Joseph, R F Nariman and U U Lalit – decided against the triple *talaq* while the other two – CJI Khehar and Justice Abdul Nazeer – ruled in its favour.³ The Supreme Court reserved its verdict on 18 May 2017 after the hearings.⁴

The case against the triple *talaq* was filed by six petitioners – Shayara Bano, Ishrat Jahan, Gulshan Parween, Aafreen Rehman and Atiya Sabri, along with the Bharatiya Muslim Mahila Andolan (BMMA). Bano, a 36-year old Muslim woman, battling multiple ailments following several abortions, received a *talaqnama* (divorce) by post while she was staying with her parents in Kashipur, Uttarakhand.⁵ In her petition, Bano argued that “the Muslim husband’s right to ask for divorce by uttering *talaq* three times in a row is completely unilateral, unguided, absolute and has no rationale. It cannot be identified with the Muslim culture and is not part of Muslim law. So it is not part of religion and hence not part of the right to practice or propagate religion and deserves no protection.”⁶

The Practice of Triple *Talaq* in India

The family affairs of the Muslim minority in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937, which is also known as the Muslim Personal Law. Under this law, there is a provision whereby Muslim men or women can legally divorce their spouse by pronouncing *talaq* three times.⁷ This pronouncement can be in the written or oral form.

In 1928, the Motilal Nehru-chaired Nehru Commission, among other things relating to the Indian Constitution, recognised the importance of the rights of the minority communities. Later, the Indian Constituent Assembly (1946-1949), following debates, recognised the rights of the minorities to practise their religion, culture and beliefs. Although a group’s rights are

³ “Triple talaq verdict updates: Jaitley says SC judgment a great victory and welcome step”, *Indian Express*, 22 August 2017. Retrieved from <http://indianexpress.com/article/india/triple-talaq-verdict-judgment-live-updates-supreme-court-all-india-muslim-board-instant-divorce-centre-polygamy-4807803/>.

⁴ Ibid.

⁵ “Triple Talaq invalid: Who are the petitioners, what are their arguments?”, *Indian Express*, 22 August 2017. Retrieved from <http://indianexpress.com/article/india/triple-talaq-verdict-today-who-are-the-petitioners-what-are-their-arguments4807842/>.

⁶ Ibid.

⁷ “Women can say triple talaq, Muslim law board tells Supreme Court”, *Times of India*, Dhananjay Mahapatra, 17 May 2017. Retrieved from <http://timesofindia.indiatimes.com/india/women-too-can-say-triple-talaq-muslim-law-board-tells-supreme-court/articleshow/58707428.cms>.

considered to be a pre-condition for the exercise of personal rights by an individual within the group, issues have cropped up when a group's rights clash with the rights of its individual members to freedom or equality.⁸ One such case was that of Shah Bano in 1985 – the Supreme Court gave the right to alimony to a divorced Muslim woman. The judgement elicited protest from many Muslim groups who saw the judgement as an attack on their religion and the Muslim personal law. Under pressure from the anti-judgement movements and in an effort to appease them, the Rajiv Gandhi-led Indian government overturned the Supreme Court's decision through a legislation called the Muslim Women (Protection of Rights on Divorce) Act, 1986.

In 2017, the question before the Supreme Court was that of triple *talaq* and not the practice of *talaq*. In March 2017, one million Muslim women signed a petition to express support for the abolition of triple *talaq*. The petition was initiated by the Rashtriya Swayamsevak Sangh (RSS) affiliate, the Muslim Rashtriya Manch. The RSS is ideologically associated with the ruling Bharatiya Janata Party (BJP) at the Centre. The BJP leader, Narendra Modi, after becoming Prime Minister in 2014, raised the issue at various platforms, the latest occasion being during his address to the nation on Independence Day on 15 August 2017.⁹

India is home to around 172 million Muslims, with around 82.3 million being women.¹⁰ Before the Supreme Court, the All India Muslim Personal Law Board (AIMPLB) defended the practice of triple *talaq* by arguing that, “for the Hanafi School of Islam, to which a majority of Indian Muslims adhere, *talaq-e-biddat* is an essential practice that has been followed for 1,400 years.”¹¹

While hearing the arguments from 11 to 18 May 2017, the constitutional bench explored the possibility of including a clause in the *nikahnama* (Muslim marriage contract) which would

⁸ Chandhoke, Neera (2002) ‘Individual and Group Rights: A View from India’, in *India's Living Constitution: Ideas, Practices, Controversies*, ed Zoya Hasan, E Sridharan and R Sudarshan, New Delhi, Permanent Black, pp 207-241.

⁹ “Key highlights of Prime Minister Narendra Modi’s speech on 71st Independence Day”, *Economic Times*, 15 August 2017. Retrieved from <http://economictimes.indiatimes.com/news/politics-and-nation/prime-minister-narendra-modis-71st-independence-day-speech-key-highlights/articleshow/60067698.cms>.

¹⁰ “On triple *talaq*, Supreme Court must uphold Constitutional values, not religious ones”, *Scroll.in*, Meneka Guruswamy, 1 June 2017, Retrieved from <https://scroll.in/article/839259/on-triple-talaq-supreme-court-must-uphold-constitutional-values-not-religious-ones>.

¹¹ “Untangling the debate on Triple Talaq”, *The Wire*, Matthew Idiculla and Satya Prasoorn, 16 June 2017. Retrieved from <https://thewire.in/147729/untangling-debate-triple-talaq/>.

prevent the husband from pronouncing triple *talaq*.¹² Although model *nikahnamas* have been prepared in the past, these were not accepted. In 2012, the BMMA released a “model *nikahnama*”. Another was prepared by the Muslim Women’s Personal Law Board, a breakaway faction of the AIMPLB.¹³ In all patriarchal societies, including in India, “the *nikahnama* is usually drawn up by *qazis* (Shariat court magistrate or judge) affiliated to the Muslim law board and they hardly ever inform the bride of her right to negotiate the terms of her marriage.”¹⁴

Unlike in India, the practice of triple *talaq* has been abolished in 22 Muslim countries, including Pakistan and Bangladesh. “The list also includes Turkey and Cyprus, which have adopted secular family laws; Tunisia, Algeria and the Malaysian state of Sarawak, which do not recognise a divorce pronounced outside a court of law; and Iran, where triple *talaq* doesn’t have validity under its Shia law.”¹⁵ In India, it is being argued “that religious minorities of any country are relatively impervious to change. They fear that any alteration in their practices could lead to the loss of their religious identity. However, this apprehension does not seem to afflict the Muslims of Sri Lanka, where they constitute a little less than 10 per cent of the population. Sri Lanka’s Marriage and Divorce (Muslim) Act, 1951, which was amended up to 2006, does not recognise instantaneous divorce. The Sri Lankan law requires a husband wishing to divorce his wife to give notice of his intention to a *qazi* who should attempt reconciliation between the couple over the following 30 days. Only when the reconciliation effort fails the husband can express *talaq* to his wife – that too, in the presence of the *qazi* and two witnesses.”¹⁶

Conclusion

¹² “Half-Measure: Triple Talaq-forbidding marriage contract may not do Muslim women much good”, *Scroll.in*, Agnes Falvia, 28 May 2017. Retrieved from <https://scroll.in/article/838518/half-measure-triple-talaq-forbidding-marriage-contract-may-not-do-muslim-women-much-good>.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ “If Pakistan and 21 other countries have abolished triple talaq, why can’t India?”, *Scroll.in*, Aijaz Ashraf, 18 April 2016. Retrieved from <https://scroll.in/article/806299/if-pakistan-and-21-other-counties-have-abolished-triple-talaq-why-shouldnt-india>.

¹⁶ Ibid.

Despite giving a verdict in favour of an individual's right in the Shayara Bano case, it will not necessarily be easy or straightforward in the future for the Supreme Court to make the differentiation between an individual's and a group's rights. The Muslim community in particular and the Indian society in general remain divided on the validity and relevance of the triple *talaq*. The supremacy or otherwise of a group's customs and traditions over the rights of an individual or *vice-versa* still remains open to interpretations by the Supreme Court and/or the Indian state.

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