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**CASE COMMENTARY: IS TRIPLE TALAQ AN
ESSENTIAL RELIGIOUS PRACTICE UNDER ARTICLE
25 OF THE INDIAN CONSTITUTION?
SHAYARA BANO v. UNION OF INDIA AND ORS.
[AIR 2017 9 SCC 1 (SC)]**

AUTHORED BY - NISHTHA GAUTAM* & PRACHI VASUDEV**

I. Introduction

Triple Talaq, also known as *talaq-e-biddat* or *talaq-e-mughallazah*, is a practice of Islamic divorce that has been observed by Muslims in India for a significant period, particularly adherents of the Hanafi Sunni Islamic schools of jurisprudence. It allows any Muslim man to legally end his marriage by uttering the word “talaq” three times, in any form—written, oral, or more recently, electronic—which immediately and irrevocably dissolves the marital bond. Although this practice is sanctioned by Section 2 of the Shariat Law and predominantly followed by Sunni Muslims, who constitute the majority of India’s Muslim population, it does not find explicit mention in the Holy Quran. This issue sparked widespread controversy, especially with the escalating number of cases involving such divorces, elevating it to a matter of national significance. However, there was no resolution for the victims until Shayara Bano, one of the affected individuals, filed a Public Interest Litigation (PIL) in the Supreme Court in 2016. In the case of *Shayara Bano v. Union of India*¹, the Supreme Court delivered a landmark verdict, invalidating the practice of instant triple talaq or *talaq-e-biddat*. This practice had often been misused by Muslim husbands to abruptly and irrevocably terminate their marital relationships with their wives. The verdict was widely applauded, particularly by women’s rights groups, as it was seen as a significant step toward achieving gender equality in society. Another noteworthy aspect, albeit symbolic, is that the bench which pronounced the judgment comprised judges from diverse religious backgrounds.²

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¹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

² The Bench comprised of J.S. Khehar (at that time Chief Justice of India), Kurian Joseph, Rohinton Nariman, U.U. Lalit, and S. Abdul Nazeer, JJ. belonging to Sikh, Christian, Parsi, Hindu and Muslim faiths respectively. Despite this plurality representing Bench, the absence of a female justice is clearly evident.

Personal laws govern an individual's rights and responsibilities in various areas such as succession and marriage, based on their affiliation with a particular religion. While these laws apply to followers of their respective religions, they do not apply uniformly. Historically, men have been favored over women within the framework of personal laws, perpetuating gender inequality in family and marital matters. Article 13 of the Indian Constitution stipulates that any law inconsistent with fundamental rights shall be void to the extent of the inconsistency. However, the Supreme Court has consistently ruled that personal laws do not fall under the purview of Article 13. This judicial distinction upholds the "public-private dichotomy", allowing for gender-based discrimination within the private realm of family affairs. Although the Supreme Court's recent focus was on the constitutionality of triple talaq under personal laws, its ruling has broader implications for the reform of personal laws. While hailed as a progressive step for Muslim women's rights within marriage, the decision has also drawn criticism for failing to apply fundamental rights protections to personal laws.

II. Summary of the facts

The battle against triple talaq was largely championed by women's rights activists and media, but it was ultimately sparked by the victims themselves. Shayara Bano, a 36-year-old woman from Kashipur, Uttarakhand, played a pivotal role in challenging this patriarchal tradition that had adversely affected countless Muslim women. In 2016, Bano became the lead petitioner in the case, seeking to invalidate the *talaq-e-biddat* pronounced by her husband, which abruptly ended their 15-year marriage in October 2015. She argued that this unilateral and irrevocable form of divorce violated the fundamental rights of Muslim women and should be deemed unconstitutional. Bano's husband, Rizwan Ahmad, had pronounced *triple talaq* in the presence of witnesses and sent a *talaqnama* to her via speed post on October 10, 2015. The primary writ petitions leading to the landmark judgment were filed by Bano and Ishrat Jahan. They, along with other petitioners, challenged the constitutional legitimacy and continuation of practices like *talaq-e-biddat*, *nikkah halala*, and *polygamy* permitted under the Muslim Personal Law (Shariat) Application Act, 1937, citing Articles 14, 15, 21, and 25 of the Indian Constitution. While the Supreme Court decided to address only the issue of triple talaq in this case, Chief Justice Khehar noted that other issues would be addressed separately. Consequently, the constitutional validity of *talaq-e-biddat* came under scrutiny before a constitution bench comprising five judges of the Supreme Court.

III. Brief Legal History of Triple Talaq in India

The Muslim Personal Law (Shariat) Application Act, 1937, commonly known as Muslim Personal Law, governs the religious aspects of Muslims in India, including marriage. However, if a marriage falls under the Special Marriage Act of 1954, it is not governed by Muslim Personal Law. Victims of triple talaq have approached the higher judiciary numerous times, with the first notable case being *Mohd. Ahmed Khan v. Shah Bano Begum*³ in 1985. In this case, Shah Bano, a 62-year-old Muslim woman with five children, was divorced via triple talaq by her husband in 1978 when she was 40 years old. She filed a suit for maintenance under the Code of Criminal Procedure in a trial court in 1980 and won the case. Khan, who was a lawyer himself, challenged the trial court's decision in the Supreme Court of India, where Shah Bano once again emerged victorious. The Supreme Court ruled that the Criminal Procedure Code was a secular law applicable to all religions and emphasized the need for a Uniform Civil Code. However, due to political considerations and pressure from Muslim clerics who viewed the ruling as interference in religious practices, the then Prime Minister Rajiv Gandhi succumbed to pressure and supported a bill introduced by an independent parliamentarian. This led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, which mandated that husbands pay alimony to their wives only during the iddat period, nullifying the provisions of the Code of Criminal Procedure for Muslim women.

In 2002, the case of *Shamim Ara v. State of U.P.*⁴ presented a scenario similar to Shah Bano's, involving triple talaq, maintenance, and the applicability of Section 125 of the Criminal Procedure Code (CrPC) to Muslim women. Despite arguments citing historical legal precedents, including Privy Council decisions, that maintenance provisions under Indian and Islamic jurisprudence do not apply to divorced wives due to the validity of triple talaq, the two-judge bench expressed a progressive stance. Justice Lahoti emphasized the need for a forward-looking interpretation of laws, acknowledging societal progress. Citing the case of *Bai Tahira v. Ali Hussain Fidaalli Chothia*⁵, the bench allowed maintenance and nullified the divorce, also outlining an elaborate procedure similar to *talaq-e-hassan* for pronouncing a valid talaq.

In 2002, the Bombay High Court set a precedent in *Dagdu Chotu Pathan v. Rahimbi Dagdu*

³ (1985) 2 SCC 556.

⁴ (2002) 7 SCC 518.

⁵ (1979) 2 SCC 316.

*Pathan*⁶ by invalidating triple talaq, referencing the Quran. The court ruled that a Muslim husband cannot unilaterally dissolve a marriage through triple talaq. It outlined the necessary procedure for divorce, stating that mere statements or documents like *talaqnama* are insufficient proof. Instead, divorce must be proven under the Civil Procedure Code, 1908, and the Evidence Act, 1820. This stance was reaffirmed by the Allahabad High Court in 2016 and the Supreme Court of India in the landmark case of *Shayara Bano v. Union of India* in 2017.

IV. Issues Involved

Issue 1: Is *triple talaq* considered an essential religious practice in Islam?

Issue 2: Is the Muslim Personal Law (Shariat) Application Act, 1937 (referred to as the ‘1937 Act’), considered to endorse and enforce triple talaq as a legal principle to be adhered to by Indian courts? If not, is the legal precedent that personal laws are exempt from the provisions of Article 13(1) of the Indian Constitution, correct?

V. Arguments

On behalf of the Petitioners:

Mr. Amit Chadha, representing Shayara Bano, commenced his argument by asserting that triple talaq is not a recognized form of divorce under the Muslim Personal Law (Shariat) Application Act, 1937. He highlighted previous court decisions that limited the unilateral power of Muslim men to divorce women and criticized triple talaq for lacking Quranic sanction. The case of *Sarabai v. Rabaibai*⁷ was referred, where the court deemed triple talaq as “good law but bad ideology.” Justice Krishna Iyer in the Kerala High Court initially raised concerns about this practice, which led to various judgments against triple talaq over the next two decades. Notably, in *Nazeer v. Shemeema*⁸, the Kerala High Court ruled that triple talaq in one utterance is not valid according to Quranic injunction. Mr. Chadha urged the court to invalidate triple talaq, arguing that granting uncodified power to Muslim men violates Articles 14, 15, and 21 of the constitution. Referring to Supreme Court precedents like *Masilamani Mudaliar*⁹ and others¹⁰, he contended

⁶ 2002 SCC OnLine Bom 440; (2003) 1 Bom CR 740.

⁷ (1906) 8 BOMLR 35.

⁸ 2017 (1) KLT 300.

⁹ (1996) 8 SCC 525.

¹⁰ For instance, *Danial Latifi v. Union of India* (2001) 7 SCC 740; *Shah Bano and John Vallamatom v. Union of India* (2003) 6 SCC.

that Muslim personal law should be considered “law in force” under Article 13(1). The court’s duty, as established in *Kesavananda Bharati*¹¹ and *Minerva Mills*¹², is to intervene in cases of fundamental rights violations, particularly when legislation is lacking due to political considerations. Mr. Chadha argued that religious freedom, as stated in Article 25, is subject to other provisions in Part III of the Constitution, while Articles 14 and 15 are not subject to such restrictions. The argument posited that triple talaq is not safeguarded by Article 25 of the Indian Constitution because it does not constitute an “essential practice” of religion. Furthermore, he cited international treaties such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, emphasizing gender equality and human dignity. Mr. Chadha highlighted that Muslim women were actively protesting against triple talaq, suggesting that it does not align with prevailing social conditions. He compared the abolition of triple talaq to the elimination of practices like sati, devdasi, and polygamy in the Hindu community. Lastly, Mr. Chadha proposed that if triple talaq is invalidated, the Dissolution of Muslim Marriage Act, 1939 would apply uniformly to the entire Muslim community, regardless of gender.

On behalf of the Respondents:

Mr. Kapil Sibal began by clarifying that the Shariat Act, 1937, does not codify substantive Muslim personal law but reiterates that Sharia shall be applied as a rule of decision to Muslims, superseding any contrary customs or usages. He argued that the act aims to overcome discriminatory customs against women, particularly in matters of inheritance. Regarding marriage, he emphasized its status as a private contract and sacred covenant in Islamic law, suggesting that state legislation cannot alter it.

Referring to constituent assembly debates, Mr. Sibal contended that personal laws were intentionally excluded from the definition of law under Article 13 of the Constitution. He drew upon *Narasu Appa Mali*¹³ and *Ahmedabad Women Action Group*¹⁴ cases to argue that the constitutionality of personal laws cannot be questioned by the court. He distinguished between “laws” and “laws in force” in Article 13 and underscored that interference with triple talaq would

¹¹ (1973) 4 SCC.

¹² (1980) 3 SCC.

¹³ *The State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

¹⁴ *Ahmedabad Women Action Group v. Union of India*, (1997) 3 SCC 573.

require legislative action, as evidenced by similar bans in other countries. Mr. Sibal asserted that triple talaq, practiced for centuries, is an integral part of Sunni Muslim personal law and thus protected under Article 25. He suggested that Article 25(2) empowers Parliament to enact social reform laws related to religious practices. Consequently, the validity of such laws should be assessed by the court only after Parliament passes relevant legislation.

He concluded by proposing options for Muslim women to safeguard themselves against discriminatory use of triple talaq, such as registering marriage under the Special Marriage Act, including conditions in the nikah-nama, or delegating the right to talaq to herself. Mr. Sibal argued that social reforms concerning personal laws should originate from the community itself, and Indian state had followed a policy of non-interference in personal law matters.

VI. Judgment

On August 22, 2017, the Supreme Court delivered a judgment on Triple Talaq, with a 3:2 majority ruling the practice unconstitutional. Justice Nariman, on behalf of himself and Justice Lalit, authored the majority opinion, which was also supported by Justice Joseph. Chief Justice Khehar, along with Justice Nazeer, penned the minority opinion. The majority concluded, after extensive deliberation, that Triple Talaq is not an essential religious practice, while the minority viewed it as essential to religion.

Hence, according to the majority opinion, the practice of Instantaneous Triple Talaq, or Talaq-e-biddat, is not protected under the exception provided in Article 25, as it was deemed not to be an essential aspect of the Islamic religion. The court reasoned that while it is practiced by the Hanafi School of Sunnis, it is considered sinful within that school and completely prohibited in the Shia sect of Islam. Moreover, Triple Talaq contradicts the fundamental teachings of the Quran, and anything contrary to the Quran is deemed contrary to Shariat. Therefore, the majority bench, drawing on its previous ruling in *Shamim Ara v. State of U.P and Anr.*, concluded that Triple Talaq is not only against Islamic theology but also against the law. Just because it is followed by a significant number of people does not validate its practice. As a result, the court declared this practice unconstitutional and set it aside.

According to Article 25(1), only essential religious practices are protected, and state intervention in such practices would violate the rights guaranteed in Article 25(1). However, non-essential

practices are not protected. The fact that the majority of Islamic countries have abolished the practice of Triple Talaq suggests that it is not considered an essential religious practice. Article 25 guarantees the right to freely practice and propagate any religion, with exceptions including public order, health, morality, and other provisions of Part III of the Constitution. While Triple Talaq may not relate to the first three exceptions, it does violate Article 14, the fundamental right to equality, as it deprives women of the right to participate in the divorce process, unlike in other religions. Justices Nariman and Lalit held that this practice allows husbands to dissolve marriages arbitrarily, without attempting reconciliation, thus violating Article 14 and warranting judicial intervention. However, Justice Khehar, in the minority opinion, argued that Triple Talaq is an essential religious practice of Islam because it is followed by a significant portion of the Muslim population and has the sanction of religious denomination. Therefore, he deemed it constitutional.

VII. Critical Analysis

Justice Nariman's opinion, supported by Justice Lalit, is pivotal in the judgment and sets the tone for the decision. However, it reflects a reluctance to address the issue of gender justice. Justice Nariman refrained from delving into the question of discrimination, stating that since the court had already declared Section 2 of the 1937 Act void on the grounds of arbitrariness, there was no need to consider discrimination. This approach aligns with the court's historical tendency to maintain a public-private dichotomy in implementing fundamental rights. Justice Nariman's view is criticized for its lack of progressiveness. He primarily focused on the arbitrariness of *talaq-e-biddat*, emphasizing its immediate severance of marital status without room for reconciliation. This paternalistic approach prioritizes the protection of the marital institution over gender justice concerns. His failure to address gender-based discrimination in the context of personal laws reflects a broader judicial attitude towards gender issues.

Justice Joseph's approach to the issue of *talaq-e-biddat* is criticized for framing the question solely in terms of the interpretation of Shariat, ignoring the fundamental rights challenge. He posed the question of whether *talaq-e-biddat* can be considered valid in law despite being deemed incorrect in the Quran. Justice Joseph quickly answered this by referring to the *Shamim Ara*¹⁵ case, which had already held that *talaq-e-biddat* lacked legal sanctity, considering it a settled position of law in India under Article 141 of the Constitution. However, this determination is

¹⁵ (2002) 7 S.C.C. 518.

questioned for two reasons. Firstly, if *Shamim Ara* had already settled the issue, there would be no need for the Supreme Court to re-examine it. Secondly, the observations in *Shamim Ara* regarding *talaq-e-biddat* were not binding as they were made in passing and were not central to the dispute. Justice Joseph's approach is criticized for being paternalistic and unclear. While he acknowledged the Quranic stance on *talaq-e-biddat*, he focused on protecting the institution of marriage rather than recognizing women's rights within marriage. The petitioners had sought equal rights within the family and marital institution, not a declaration of Quranic dissolution methods for Muslim marriage.

The opinion of Chief Justice Khehar can be characterized as confusing and flawed. Initially, he acknowledged *talaq-e-biddat* as a valid practice in Muslim law, but then stated that the Supreme Court is not the appropriate forum to determine its conformity with accepted hadiths in Islamic jurisprudence. Subsequently, he deemed *talaq-e-biddat* integral to the religious practices of Sunni followers of the Hanafi school in India, as it is sanctioned and approved by their religious denomination. Chief Justice Khehar's argument followed a similar line as in *Narasu*¹⁶, asserting that personal laws are protected under Article 25(1) of the Constitution. However, he overlooked the restriction of Article 25 with respect to "other provisions of Part III." His focus on religious practices overshadowed the question of equality within the private sphere of marriage. The error in his judgment lies in its operational part. Despite declaring *talaq-e-biddat* integral to the religious practices protected under Article 25, he granted injunction from using *triple talaq* as a mode of divorce for six months from the date of judgment and urged the Union of India to consider legislation on the matter. This suspension effectively contradicted his earlier declaration of its constitutionality.

VIII. Implications of the Decision

Following the court's directives, the Muslim Women (Protection of Rights on Marriage) Bill, 2017 was passed in the Lok Sabha on December 28, 2017. This bill criminalized triple talaq in any form, imposing a maximum penalty of three years imprisonment for the husband and incorporating various other remedial provisions. Subsequently, ordinances in 2018 and 2019, as well as a bill in 2018, were passed, but none remained in effect for long, as they lapsed with the dissolution of the 16th Lok Sabha. Upon the re-introduction of the bill by the newly elected NDA

¹⁶ AIR 1952 Bom 84.

government, it was passed by the Lok Sabha on July 25, 2019, and by the Rajya Sabha on July 30, 2019, receiving the President's assent. Despite significant opposition nationwide regarding its legality and rationale, the bill ultimately became law.

IX. Conclusion

The triple talaq judgment stands as a significant milestone in our legal landscape, particularly in private law. Justice Joseph's culturally grounded perspective showcased a nuanced understanding, indicating a learning curve from past errors in personal law cases. While the ruling didn't offer explicit clarity on gender justice and inequality in personal laws, it represents a step toward equality and sets a precedent for future amendments. The subsequent enactment of the Muslim Women (Protection of Rights on Marriage) Bill, 2017 criminalized the practice, albeit raising concerns about its impact on marriage as a private institution.

An alternative approach could involve declaring triple talaq as void and illegal, without imposing criminal penalties. Instead, the magistrate could order compensation to the wife for any mental anguish caused. Failure to comply with such orders could result in penalties akin to those in the Domestic Violence Act. Additionally, addressing polygamy is crucial, as it undermines the protection of women's rights. The legislature should consider incorporating civil safeguards against polygamy to uphold the objectives of protecting Muslim women's rights effectively.

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