
CASE COMMENT: SHAYARA BANO VS UNION OF INDIA (THE TRIPLE TALAQ CASE)

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ABSTRACT

From the ancient period to the mediaeval period to the modern period, mankind's living situations and laws have changed dramatically, and what has stayed constant with changing laws cannot always offer equality of status among human beings. As we implement new laws, we must eliminate irrational practises in society, much as the preamble of the Indian constitution states that social justice can be offered and practised in the country regardless of religion, caste, creed, gender, or ethnicity. When such cases arise in society, there may be a question of religious practises because secularism is another ideal set in the Indian constitution on one side, and on the other side, a judiciary and government may have greater conflicts of abolishing unreasonable practises to establish gender equality in the society, but in such cases, the judiciary and government can take a collective step by discussing all possible conflicts and keeping the harmony among religions and cultures.

This case is a true example of a fair judgement provided to give equal status to women regardless of religion that satisfies Articles 14, 15, 21 and 25 of the Indian constitution, and set a precedent to abolish all such laws practising in any religion in the future as we see India's potential to change status from developing country to developed country.

Keywords: *Gender equality, Religious practises, Secularism. Triple Talaq, Commentary.*

1. INTRODUCTION

In these modern times, when the entire world is rejecting immoral or unjust practises in a civilised society and providing safeguards against inequality, discrimination, liberty of life, and freedom of religion, there are still such practises in Indian society that is detrimental to the progress of Muslim wives, such as the practise of Triple Talaq (Talaq-e-biddat) in the Muslim community, where Muslim wives are instantly divorced by uttering the word "Talaq" three times. With the advancement of technology, a bunch of situations encountered that Muslim husbands sent talaq to their wives via voice notes, what's app messages and other modes too. The Supreme Court bench consisted of 5 members, and the majority (3:2) of the bench, in this case, provided astute and justified reasoning after scrutinising the case from various dimensions and declared this practise unconstitutional, leading to the abolition of the practise of "Triple Talaq" in India¹. This was a landmark case, also popularly called as Triple Talaq Case.

2. THE FACTS OF THE CASE²

- The petitioner, Shayara Bano married for 15 years, was given divorce by her husband Rizwan Ahmed through talaq-e-biddat (triple talaq) in 2016; talaq-e-biddat is an Islamic practice in which a Muslim husband utters talaq three times in one goes to divorce his Muslim wife without her consent.
- Aggrieved by this, a writ petition was filed in the Supreme Court by her to consider the practices such as talaq-e-biddat, polygamy(having more than one wife) and nikah-halalaa³ as unconstitutional as these practices violates the fundamental rights (Article 14,15,21,25) of the women provided in the constitution of India⁴.

¹ 12 PARAS DIWAN, FAMILY LAW (Allahabad Law Agency 2023)

² Shayara Bano vs Union of India, AIR 2017 SC 4609

³ In order to remarry first husband, a divorced Muslim wife should marry and get divorced from second husband.

⁴ INDIA CONST. arts. 14, 15, 21 & 25

- Further, Supreme Court requested written submissions from the petitioner, UOI, other women's rights organizations and AIMPLB on the issues raised on talaq-e-biddat, polygamy and nikah-halala.
- The UOI also came up with the same opinion that these practices are unconstitutional, and the same is supported by women's rights organizations such as Beebak Collective and BMMA.
- But AIMPLB argued that Muslim law is uncodified, it is not subject to judicial review, and these practices are protected under Article 25 of the constitution which is freedom of religion⁵.

3. ISSUES DEALT IN THIS CASE

- Is Islam's practice of immediate Triple Talaq necessary and essential?
- Is there any constitutional validity against this triple talaq practice and does it violate any fundamental right?
- Is there any way that triple talaq attracts Article 25 of the Constitution?
- What is the role of Shariat law in this regard and its applicability?

4. CONTENTIONS

4.1 Arguments made on behalf of the petitioner:

Mr. Amit Chanda and Mr. Salman Khurshid, who represented the case on behalf of Shayara Bano brought the arguments in front of the court with respect to Muslim personal law saying that Muslim personal law does not recognize the practice of triple talaq, and it does not attract any sanction in Quran, and they pointed on three major things and requested the bench to take the important notice of them⁶:

1. What is the reason for divorce?
2. Are there any attempts made for reconciliation prior to divorce?

⁵ INDIA CONST. art. 25

⁶ 12 PARAS DIWAN, FAMILY LAW (Allahabad Law Agency 2023)

3. What is the constitutional validity of the triple talaq practice as it violates Articles 14 and 15 of the Constitution⁷?

Before entering into any form of relationship, there is a certain, valid, and social reason associated with it, and it is legally accepted in various forms by different laws, and to break such a legally binding relationship, there must be a valid reason otherwise it leads to exploitation, which is a violation of Article 14, 15 of the Indian constitution as it gives protection to each individual to be treated equally regardless of gender.

Moreover, the practise of immediate triple talaq does not afford the time or possibility for a Muslim marriage to reconcile; before calling for divorce, there must be possible and honest efforts to reunite the couple, which does not occur in this practise.

As per the Quran text, it is mentioned that one should put efforts to reconcile the couple, but if it gets failed then only one should take the help of uttering talaq 3 times for the divorce, and it should accompany an iddat period of 3 months for pronouncement of each talaq. The majority of Muslim communities in India follow Sunni law and triple talaq is not valid practice under Sunni law.

Besides the above contentions, Mr. Amit Chanda and Mr. Salman Khurshid have provided an alternative solution for this case saying that the Muslim community can get a divorce under the Dissolution of Muslim Marriage Act, 1939⁸ without violating Articles 14 and 15 of the constitution.

4.2 Arguments made on behalf of the respondent:

Mr. Mukul Rohatgi, Mr. Kapil Sibal, and Mr. Manoj Goel, who represented the case on behalf of Rizwan Ahmad and others, brought out the following major points in front of the court:

1. What is the validity of judicial review with respect to personal laws?
2. The court can access validity only when parliament made changes to secular practices which is mentioned under Article 25(2) i.e., freedom of religious practice⁹.

⁷ INDIA CONST. arts. 14 & 15

⁸ Dissolution of Muslim Marriage Act, 1939, No. 8, Acts of Parliament, 1939 (India).

⁹ INDIA CONST. art. 25(2)

3. It was also mentioned that triple talaq does not attract Article 15 since they can seek protection under the Special Marriage Act of 1954, where the wife can request delegation of talaq rights and a larger Mehar sum.

In response to a question about the judicial review under Article 13, Justice Nariman stated that Shariat Act, 1937 includes the state, which means that when the constitutional validity clashes with personal laws, the court can intervene to keep the balance from encroaching on each other.

Also went on to say that personal laws are subject to fundamental rights, the constitution of India protects one's rights under Articles 13,14,15,21 and triple talaq violates one's fundamental rights and section 2 of Shariat Act, 1937 should be nullified¹⁰.

The counsel of the respondent further argued that any marriage and a Muslim marriage is a private contract, and it is not subjected to judicial review. The sensitive part of the personal law which is so private to the Muslim community cannot be declared unconstitutional, and marriage is a personal relationship between two individuals, and involvement of the state is not necessary.

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5. JUDGEMENT

The judge bench, with a 3:2 majority on this case, delivered judgement to dispose of the case accordingly saying that the practice of triple talaq should be abolished and giving directions to nullify section 2 of Shariat Act,1937¹¹.

1. Talaq-e-biddat or triple talaq is not an essential Islamic practise, which means it is not a custom that has existed since time immemorial and is still practised in the community. Because triple talaq is not such a custom, it does not qualify under Article 25(1) of the Indian constitution.
2. Giving the importance to the Quran, it was stated that individual discretion is contrary to Quranic principles and Shariat Act, and it cannot be justified because it is followed by the majority of people. Article 25 says the same that until and unless there is an essential religious practice, it cannot be struck down but when it is not an essential religious practice it can be struck down.

¹⁰ 58 J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA (Central Law Agency 2022)

¹¹ The Muslim Personal Law (Shariat) Act, 1937, §2, No. 26, Acts of Parliament, 1937 (India).

3. Any marriage tie that is dissolved without the wife's consent is an expression of gender inequality, and if reconciliation efforts are not undertaken, it is almost definitely a violation of Article 14 of the Constitution¹².
4. Because the Shariat Act of 1937 was enacted before the establishment of the Indian constitution, it is regarded as a pre-constitutional law (Article 13(1)). According to pre-constitutional law¹³, if any other law violates fundamental rights, it should be declared void due to the inconsistency involved by the doctrine of eclipse and severability. Shariat Act, 1937 is not applicable here because it violates Article 14, which is a fundamental right of a person, and it gives more unfair privileges to males rather than females.

6. CRITICAL ANALYSIS

This case certainly gave a new direction and debate on how to look at personal law in a secular country like India, it challenged the general principle to a certain extent that only state-made laws are subject to judicial review when they violate the fundamental rights of the people.

However, in this case, whether an uncodified personal law is subject to judicial review or not has become a substantial constitutional validity question, for that, the bench has given varied opinions supported by the majority, another important point was raised that the test of reasonable classification versus test of arbitrariness between religion(Article 25) and constitution(Article 14)¹⁴ but the court held that triple talaq practice in religious angle looks more of arbitrariness rather than inequality of the two genders.

Since Article 25 protects religious freedom, the bench thoroughly reviewed whether one can seek protection under it in the case of certain personal law practises, such as triple talaq, which has been practised by Muslims since time immemorial, but it concluded that it is not an essential Islamic practise or custom that one can seek protection under Article 25 of the Indian constitution.¹⁵

¹² INDIA CONST. art. 14

¹³ INDIA CONST. art. 13(1)

¹⁴ INDIA CONST. art. 14

¹⁵ INDIA CONST. art. 25

With this case, the supreme court of India established a principle for future cases where gender harmony is more important than religious harmony as fundamental rights are more important to every individual living in India.

7. CONCLUSION

After scrutinizing the case from various angles with respect to personal and constitutional law, the majority of the bench 3:2 delivered a judgement for the abolition of the triple talaq practice un-Islamic and unconstitutional in India, it is a historical and landmark judgement delivered to uphold the Muslim women fundamental rights, however, there could be a difference of opinions still exist among public and law fraternity, it is an accepted fact now, and the practice of instantaneous triple talaq will attract legal consequences¹⁶.

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¹⁶ 58 J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA (Central Law Agency 2022)