



TRIPLE TALAQ. THE BAN AND THE BILL. DEBATES AND UPDATES.



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Newsletter Mar – Aug 2018

On 22 August 2017, it was high drama at Court No.1 of the Supreme Court. A five judge Constitutional Bench headed by the then Chief Justice J.S. Khehar declared the practice of Triple Talaq invalid by a 3:2 majority. Interestingly, his own (and Justice Abdul Nazeer's) judgment was in a minority while Justices Kurian Joseph, U. U. Lalit and R. F. Nariman delivered the majority judgment striking down Talaq-e-biddat, or the instantaneous, unilateral Triple Talaq as both, un-Constitutional and un-Quranic.

It was a great moment in the history of the women's movement, more particularly, the struggles of Muslim women in the country who have relentlessly fought for gender justice, despite facing overwhelming Islamophobia and Hindu majoritarian aggression, as well as patriarchal backlash and fundamentalism from within their communities. Hence, we joined other women's rights groups* from across the country in issuing the following statement:

We wholeheartedly welcome the judgment of the Hon'ble Supreme Court in the matter of Triple Talaq brought before it by a number of Muslim women and Muslim women's rights groups. In arguing that the practice of Triple Talaq is both, un-Quranic and un-Constitutional, it is an important departure from earlier judgments on all women's rights, because it is based on the tenets of equality, dignity and secularism as enshrined in the Constitution.

As women's groups and individuals we recognise that the current political climate of communalisation and violence, when the entire Muslim community is under attack in India and much of the Islamophobic world today, makes the fight for minority and gender rights an even more uphill task. Hence, we extend our solidarity and salute the courage of the Muslim women who have fought everyday patriarchy within, religious institutions and the family, as well as communal forces to seek justice and equality from the courts.

Even as we celebrate this victory as one that strengthens the fight for secular rights, we are aware that this is but one step in our continued battle against all kinds of patriarchal power and the prevailing political order that seeks to convert this into a majority-minority issue.

In our joint struggle for gender justice in all laws relating to marriage and family, beyond the religious framework, we believe that the Supreme Court judgment on Triple Talaq is an important affirmation of Constitutional values of equality, secularism, pluralism and dignity for all citizens. We hope that this will be the framework in all matters of justice for gender and minority rights.

While issuing this statement, we were recalling and paying tribute to the struggles of Shehnaaz Sheikh – the first woman in India to challenge the Muslim Personal Law in the Supreme Court in 1983. A few years later, Shah Bano, fought a maintenance lawsuit against her ex-husband that she won in the Supreme Court, only to end up with the

ruling that the Congress party passing the Muslim Women (Protection of Rights on Divorce) Act which effectively took Muslim women out of the secular Section 125 that entitled them to maintenance. With the increased communalisation of politics and society in 1980s and 1990s, the issue of women's rights in family and marriage within personal laws got embroiled in minority-majority politics. The long term impact of this was that for a considerable period of time it became difficult to raise the issue of discrimination against women in personal laws. However, women from the minority communities continued to fight within their communities and with the State for their rights. Then, in 2015, in a case triggered by the struggle of yet another courageous woman, Shayara Bano from Uttarakhand challenged the Constitutional validity of Talaq-e-biddat. The cases of a number of other petitioners namely Ishrat Jahan, Gulshan Parveen, Afreen Rehman, Atiya Sabri were added to the case, and women's groups like the Bebaak Collective and Bhartiya Muslim Mahila Andolan and others intervened to strengthen the case. The core argument of Bebaak Collective (Voice of the Fearless) along with Centre for Secular Studies was that such patriarchal practices are un-Constitutional while Bharatiya Muslim Mahila Andolan (BMMA) primarily contended that it was un-Islamic and un-Constitutional. It was clear that 1980s were behind us, and a newer voice of Muslim women had emerged – ready to challenge both, religious orthodoxy and the communal forces around us.


BEFORE THE BAN. A DISCUSSION AT SAHELI.

Almost exactly a month before this judgment was pronounced, Saheli had invited Indira Jaising (Senior Advocate, Supreme Court) to give a talk titled, **Decoding Arguments in the Supreme Court Hearings on Triple Talaq**. The idea was to understand the myriad issues related to Muslim women's rights in the context of personal laws and Constitutional rights. We felt it was important to meet and deliberate; and hoped that the discussion would help us strategise further before the final judgment is pronounced.

On July 21, 2017, the office was packed from floor to tabletop. Indira articulated and addressed some of our deepest concerns, both basic and complex. Questions such as these were deliberated upon: What is religion? What is religious practice? Can a religious practice be elevated to law? How do 'personal laws' violate any provision of the Constitution, including the right to equality and non-discrimination based on sex? Can they be declared unconstitutional?

Indira spoke of the historic reluctance of Indian courts to intervene in the terrain of personal laws of many religions, across many cases since the 1950s involving the Syrian Christian law, the Hindu Guardianship Act 1956, the Special Marriages Act 1955, Muslim Women's Protection of Rights upon Divorce Act 1986.

She cited cases in which the courts had gone on record saying that 'introducing Constitutional Law into personal laws was like introducing a bull in a chinashop'; and 'Introduction of Constitutional law in the home is most inappropriate!' Interestingly, while arguing on behalf of the All India Muslim Personal Law Board in the Triple Talaq case, their advocate and former Law Minister, Mr. Kapil Sibal, had asserted in the Supreme Court that personal laws are protected by saying, 'the problem is not religion, it is patriarchy.' As if the two could be magically separated from each other!

Indira also clarified that **there is no definition of personal laws in the Constitution**, except for the reference to it in the Seventh Schedule which reads as: '...M  age and divorce; infants and minors; adoption; wills, intestacy and succession: joint family and partition: all matters in respect of which parties in judicial proceedings were immediately

before the commencement of this Constitution subject to their personal law.'




'No court has so far defined what religion is, but they have devised tests for what is/not an essential part of religion,' she said. Courts look at whether the practice in question is an 'essential feature' of the religion or not, the test of which is whether you would cease to belong to a certain religion if you do not practice that feature. If it is, it cannot be disturbed, but if not, then it may be altered.

She also argued that the expression **'religious laws'** is an oxymoron. If something is part of religion, it cannot be law; it can only be protected as a freedom. On the other hand if something is 'law' notwithstanding that it is or may be based on a religious source, once it is recognised and enforced by the State, it is a law and not a religion. Hence, the more appropriate expression in its place would be 'laws governing people who belong to a particular religion'. Hence, any law codified or un-codified, custom or practice which is recognised by the State as having legal consequences is law and not religion. In fact, it is important to remember that freedom of religion is a freedom vested in an individual and not in a community. It is explicitly subject to the other provisions of the Constitution, as well as to 'public order' or 'morality'. And there are some practices 'associated' with religion, which are secular or economic or financial or political in nature which may be changed.

Other challenges that were posed before the Courts **revolved around religion and marriage.** Indira said, 'we will have to consider the question whether marriage is a social institution with economic consequences or a religious institution?' This argument that marriage is not a religious institution could be met with a possible objection that since marriage is performed in a religious form, it is, in fact a religious institution. Every religion may prescribe the form of marriage to make it a valid marriage recognised by law, but that does not make marriage itself a religious institution, or part of religion. If this was done, we would be confusing the issue of validity of marriage with its consequences, which are, in any case, determined by law. The institution of marriage has been loosely defined as 'a union between two persons', and the law defines the rights and obligations attached to that union. The question here would be, if the legal consequences of a marriage as defined by the law are discriminatory, could they be challenged or would they be protected as being part of the right to profess and practice religion? Hence, she concluded by arguing that 'at the heart of the Triple Talaq case is the battle for a secular framework for dispute resolution.'

A RUSH TO LEGISLATE WITHOUT PUBLIC DEBATE

In the weeks following the celebrations around the Supreme Court judgment on Talaq-e-biddat, the government introduced a hurriedly drafted Bill through the Lok Sabha titled, **The Muslim Women (Protection of Rights on Marriage) Bill, 2017 (henceforth the Triple Talaq Bill).** At its core was a blatant attempt to assert itself as the saviour of Muslim women, by making the declaration of the now invalid Talaq-e-biddat a cognizable and non-bailable criminal offence attracting up to 3 years imprisonment and a fine, while claiming to secure 'subsistence maintenance' for the wife and dependent children! Such a legislation would end up not just making all Muslim men vulnerable to police complaints from any vested third party, it would also mean that Muslim women who are being deserted by their husbands would be entitled to a 'subsistence  ntenance', which is much less than what all women in the country are entitled to under The Protection Of Women From Domestic Violence Act, 2005 or even what Muslim women are

entitled to under the old, controversial Muslim Women Protection of Rights on Divorce Act 1986.




A MANY-SIDED CHALLENGE.

On 28 December 2017, this outrageous Bill sailed through the Lok Sabha where the ruling dispensation has an absolute majority while the opposition was reduced to mere uncertain murmurings and objections. The Bill is now in Rajya Sabha where the ruling party has increased its numbers after the elections to the vacant seats in March 2018. The bill could not be taken up for discussion in the Budget session and thus is pending for passage.

This sudden development of a Bill that had been created without any public debate and discussion led to an eruption of responses in the public domain. Women's rights activists, feminists and legal luminaries have been arguing loud and clear that the Bill has been hurriedly formulated, without taking into account the lived realities of women and the substantial experience of women's groups in handling this, and other family related issues – both, on the ground, and in the courts. The Bill, even with its limited aim of putting an end to the arbitrary right of men to instantaneously declare 'talaq', is problematic and insufficient.

On the other hand, conservative forces within the community like the All India Muslim Personal Law Board became very vocal, posing the criminalisation of 'Talaq-e-biddat' as a matter that threatens Islam itself. Even as we go to print, they are mobilising thousands of women in places like Malegaon, Mumbai, Thane, Lucknow, etc., in protests that interestingly, take on the language of the times such as My Sharia, My Pride!



Meanwhile, members of the Hindu Right from Prime Minister onwards, were thumping their chests for having ‘ Muslim women! The irony is that some of the worst attackers of Muslim (and Hindu) women have been members of the Hindu Right – be it in Gujarat in 2002 or love-jihad and more recently in the case of the 8 year old girl from Kathua who was kidnapped, raped and brutalised in a temple to hound a Muslim nomadic community out of the area!

FURTHERING THE FEMINIST DEBATES AND UNDERSTANDING.


In recognition of the fact that there are varying positions on the issue even among feminists and women’s groups, in mid February 2018, Saheli initiated a dialogue among women’s rights groups and activists to deliberate on various dimensions of the Triple Talaq Bill at Saheli. As our invite letter said, ‘With the de-legitimisation of the instantaneous Triple Talaq by the Supreme Court, the need to move such a Bill is itself debateable, and added to that are its many provisions that clearly intend to further criminalise Muslim men, now under a new pretext. As saathis in the struggle for gender justice, we/our groups have often worked with differing perspectives, concerns, priorities and approaches. Yet, we in Saheli believe that our common goal of gender justice gives us a common ground to work from. The meeting is envisioned as a collective sharing and deliberation, so we have a free and open discussion on our multiple positions; at the very least understand them better.

The meeting was attended by a range of women’s groups and feminists from Delhi, Mumbai, Chennai, Uttar Pradesh and Jharkhand. An intense day, through which we all stopped neither for tea nor for a meal – ‘let’s keep the meeting going’, as we discussed our various positions on issues relating to personal laws as well as to the current Triple Talaq Bill. Matters discussed at length included the criminalisation clause of the Bill, as well as the fact that it did not address other issues that were raised in the petitions like the gender-discriminatory practice of polygamy and halala, nor did it look at holistically the social security issues of Muslim women.

A rich and rigorous exchange, the day left us all more aware of each other’s perspectives and concerns. We hope that this will open the doors to more debates and discussion among us on issues of religion and faith, religious and customary practices, marriage, family, constitutionality and the law. Since gender discriminatory practices are still prevalent in both law and custom, affecting women of all religions (as well as atheists), there is no doubt in our mind that this dialogue is a fresh step towards finding our way into the future, together.

WHERE SAHELI STANDS ON THE ISSUE.

We believe that The Muslim Women (Protection Of Rights On Marriage) Bill, 2017 in its present form is unacceptable. It should not make the declaration of the now-invalid unilateral, instantaneous Triple Talaq (TT) a criminal offence. But there is a need to develop a procedure for divorce among Muslim couples that:-

- Is gender just, and gives women and men equal rights to exit the marriage
- Protects the interests of wife and children.
- Is based on deliberations with women's  ups and women's rights' activists to work out a procedure based on ground realities. and our collective experience over decades.

- Provides for or improves upon the provisions laid down under The Muslim Women (Protection of Rights on Divorce) Act, 1986, and S.125 of the Code of Criminal Procedure, 1973.
- In cases where the marriage/divorce involves mental, physical and economic cruelty, provisions as ensured under the Protection of Women from Domestic Violence Act, 2005 and S.498A IPC must be invoked. These secular laws are already available to all women across castes and communities.

This may be a step towards codifying and reforming the Muslim Personal Law with the objective of achieving gender justice, and for this, consultations with women's groups should be held.

We believe that there is an urgent need to revisit all the personal laws and customary practices which continue to have gender discriminatory provisions, and work towards reforms in them so as to achieve constitutional values of gender justice and equality.

Finally, we also have to understand that there is another lived reality that has so far been left completely out of our conversation: that of single women, queer and gender non-conforming people. Therefore, we have to simultaneously push the envelope and move beyond heteronormative definitions of the 'family' and 'marriage' within which personal (and several other) laws have been framed.

Hence, the Bill must be sent to a Select Committee for further deliberations, and be amended suitably after wider consultations with women's organizations, and women rights activists to ensure that this Bill, in letter and in spirit, truly serves the purpose for which it has been created – the protection of rights of Muslim women.









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