SC declares instant triple talaq unconstitutional

The Supreme Court by a majority verdict set aside the practice of divorce through triple talaq, saying the practice was void, illegal and unconstitutional.

The apex court held that the triple talaq was against the basic tenets of Quran.

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

Different view of marriage for Muslims

Unlike in Christianity or Hinduism, the view of marriage is different for Muslims. Under Muslim law, marriage is not seen as a sacrament but as a civil contract. The contract is accepted between the two parties on the basis of mutual consent, after the utterance of ‘kabool’.

What is instant triple talaq?

Instant triple talaq or talaq-e-bidat is a practice that was challenged in the court. It is different from the practice of “talaq-ul-sunnat”, which is considered to be the ideal form of dissolution of marriage contract among Muslims.

Under the latter form, once the husband pronounces talaq, the wife has to observe a three-month *iddat* period covering three menstrual cycles during which the husband can arbitrate and re-conciliate with the wife. In case of cohabitation between the couple, during these three months, the talaq is revoked. However, when the period of iddat expires and the husband does not revoke the talaq either expressly or by consummation, the talaq is irrevocable and final.

In the practice of talaq-e-biddat, when a man pronounces talaq thrice in a sitting, or through phone, or writes in a talaqnama or a text message, the divorce is considered immediate and irrevocable, even if the man later wishes to re-conciliate. The only way for the couple to go back to living together is through a nikah halala, which requires the woman to get remarried, consummate the second marriage, get divorced, observe the three-month iddat period and return to her husband. The practice of talaq-e-biddat has been viewed as abhorrent in theology but upheld as valid by law.’ Declaring the practice of talaq-e-biddat as “unconstitutional” may not balance out the gender parity among Muslims, because men still reserve the right to talaq without resorting to legal course of action.

What is the most significant thing about the SC's verdict?

Instant triple talaq is now illegal. The court, with a majority of three judges, has held that the freedom of religion under the Constitution of India is absolute. Justice Kurian Joseph has struck down this form of talaq because, he holds, it is not an integral part of Islam, and because sources other than the Holy Quran are only supplementary in nature. Thus, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Quran. The most important outcome of the majority view of CJI J S Khehar, Justice Joseph and Justice S Abdul Nazeer is that personal laws, which are not statutory in nature, cannot be tested on the anvil of the right to equality under Article 14. The judgment will have substantial bearing on legislation on the religious practices of Muslims or other religious groups. The majority of three judges could set aside instant triple talaq because one of these judges took the view that this method of talaq was sinful and inappropriate as per the religion itself.

Both the minority and majority opinions nip in the bud any future attempt by the state to take away the right to divorce from Muslim men, as was indicated by former Attorney General Mukul Rohatgi. The CJI has rejected the argument that when Hindu laws have undergone major reform qua the devdasi system, sati and polygamy, why Muslim law should remain unchanged — he has differentiated between these practices, and stated that these inhuman practices were abolished through legislation, not by the Supreme Court.

Will all personal laws be now decided in the courts?

: Only talaq pronounced thrice in one sitting has been declared invalid. The other two forms of talaq — talaq hasan and ahsan — can continue to take place without a court decree. On other personal law-related issues, too, this judgment has nothing. The concepts of nikah, talaq, inheritance, custody, waqf etc., remain unaffected as far as requirement of a court decree is concerned.

By restricting itself to the constitutional validity of instant triple talaq, the SC has deflected any future challenge to other personal laws. However, the CJI recommended legislative intervention under Articles 25(2) and 44, read with Entry 5 of the Concurrent List, contained in the Seventh Schedule of the Constitution.

Where do Dar-ul-Qaza — family courts — stand after this verdict?

Dar-ul-Qaza is a forum for mediation. If the parties agree, it can act as a forum for arbitration, which has been spoken about in the Shamim Ara judgment and this judgment. After this judgment, irrespective of which school Islamic jurisprudence is followed by the parties, Dar-ul-Qaza shall not be able to give the opinion that talaq given in one sitting comes into effect instantaneously. If parties, with consent, approach Dar-ul-Qaza to act as a forum to facilitate amicable settlement or khula, it will have a role to play.

The court relied heavily on the submission that at least 20 Muslim nations have abolished instant triple talaq, and discussed how the power for declaration of divorce in these countries has been granted to Sharia courts, or Dar-ul-Qaza, as they are known in India. It, however, stopped short of devising a similar mechanism for Indian Muslims. It could have given Dar-ul-Qazas the power to allow divorce in cases of irretrievable breakdown of marriage. The principle of conciliation in matrimonial cases is both legal and Quranic. The family courts established under secular law will now not recognise talaq-ul-bidda'h as proper talaq.

Is this RULING in line with earlier rulings on instant talaq?

In **Shamim Ara (2002)**, the Supreme Court held that talaq as ordained by the Holy Quran must be for a reasonable cause and be preceded by attempts at reconciliation by an arbiter each from the wife's and husband's families. Since, in general, instant triple talaq does not provide this opportunity, it shall not be correct. Three judges have held this to be a ground to declare instant triple talaq illegal.

The Supreme Court has had the opportunity to examine the constitutional validity of talaq-ul-bidda'h earlier. In Ahmedabad Women Action Group vs Union of India (1997), it declined to interfere as the matter pertained to state policy. In **Maharshi Avadhesh v Union of India** (1993), it declined to interfere stating the matter pertained to the legislative domain. The present case originated from an intervention in the judgment in Prakash and Ors versus Phulavati and Ors (2015) where the right of Hindu women in the **Mitakshara school** was in question.

Do most scholars see instant triple talaq as Islamic?

Islamic scholars of the Hanafi school, on the basis of religious texts and interpretations of Quranic injunctions, have understood it to be Islamic. Their stand has been that talaq pronounced thrice becomes binding, in one or separate sittings. Hanafi scholars have also supported the other two forms of talaq.

Most Islamic scholars have held that even though talaq-ul-bidda'h is un-Islamic, it is valid. Imam Hanifah and Imam Malik considered talaq-ul-bidda'h as bidah, even though instant triple talaq was valid and irrevocable. Imam Hanbal initially held the same view, but subsequently stated that instant triple talaq was revocable. Imam Taymiyyah regarded instant triple talaq invalid and revocable, a view that his disciple Ibn Qayyim, too, followed. There is no mention in the history of Islam about the practice of triple talaq in one sitting during the time of the Prophet. Tanwir practises in the Supreme Court of India. He is interested in Muslim Personal Law.

About Judgement:

The chief justice said the practice of triple talaq has to be considered integral to the religious denomination in question; it is part of their personal law and cannot be tinkered with by the court. Any change in personal law can be done only through parliamentary legislation, the minority opinion said.

What the majority said

Justice Nariman said triple talaq does not fall within the sanction of the Quran. Even assuming that it forms part of the Quran, Hadis or Ijmaa, it is not something that is "commanded". Talaq itself is not a recommended action and therefore, he argued, triple talaq will not fall within the category of sanction ordained by the Quran. While the practice is permissible in the Hanafi jurisprudence, that very jurisprudence castigates triple talaq as being sinful, he wrote.

Justice Nariman said a practice that is manifestly arbitrary is obviously unreasonable and, being contrary to the rule of law, would violate Article 14 of the constitution. If an action is found to be arbitrary and unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground. Pointing out that triple talaq is sanctioned under the Muslim Personal Law (Shariat) Application Act, 1937, Justice Nariman said it is constitutionally invalid. He said,

"Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage.

…After the advent of Islam, divorce was permitted to a man if his wife by her indocility or bad character renders marital life impossible. In the absence of good reason, no man can justify a divorce for he then draws upon himself the curse of God. Indeed, Prophet Mohammad had declared divorce to be the most

disliked of lawful things in the sight of God. The reason for this is not far to seek. It is clear, therefore, that Triple Talaq forms no part of Article 25(1) of the Constitution.

…This being the case, the submission on behalf of the Muslim Personal Board that the ball must be bounced back to the legislature does not at all arise in that Article 25(2)(b) would only apply if a particular religious practice is first covered under Article 25(1) of the Constitution.

…If a constitutional infirmity is found, Article 14 will interdict such infirmity. Positively speaking, it should conform to norms, which are rational, informed with reason and guided by public interest, etc. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. It is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it.

…In our opinion, therefore, the 1937 Shariat Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) of the Constitution and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq."

Justice Joseph, supporting Justice Nariman's judgment, said, "What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well."

"Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible. The whole purpose of the 1937 Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2, which include talaq. Therefore, in any case, after the introduction of the 1937 Act, no practice against the tenets of Quran is permissible. Hence, there cannot be any Constitutional protection to such a practice."

He said the simple question that needs to be answered in this case is only whether triple talaq has any legal sanctity.

"The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt for reconciliation and if it succeeds, then

revocation are the Quranic essential steps before talaq attains finality. In triple talaq, this door is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat. Therefore, in any case, after the introduction of the 1937 Shariat Act, no practice against the tenets of Quran is permissible. Hence, there cannot be any Constitutional protection to such a practice. When issues of such nature come to the forefront, the discourse often takes the form of pitting religion against other constitutional rights."

The minority view

The chief justice said the practice of talaq-e-biddat is a constituent of personal law and hence has a stature equal to other fundamental rights conferred in part three of the constitution.

"The practice which is in existence and accepted by all for over 1,400 years cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention. Reforms to 'personal law' in India, with reference to socially unacceptable practices in different religions, have come about only by way of legislative intervention."

Chief Justice Khehar, however, wanted the practice to be stayed for six months. He said till such time as legislation on the matter is considered,

"We are satisfied in injuncting Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-e-biddat' (three pronouncements of 'talaq', at one and the same time) – as one, or alternatively, if it is decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate.

…The practice of 'talaq-e-biddat' being a constituent of 'personal law' has a stature equal to other fundamental rights conferred in Part III of the Constitution. The practice cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention. Reforms to 'personal law' in India, with reference to socially unacceptable practices in different religions, have come about only by way of legislative intervention. Such legislative intervention is permissible under Articles 25(2) of the Constitution. The said procedure alone needs to be followed with reference to the practice of 'talaq-e-biddat', if the same is to be set aside.

…International conventions and declarations are of no avail in the present controversy; because the practice of 'talaq-e-biddat', is a component of 'personal law' the whole nation seems to be up in arms. There is seemingly an overwhelming majority of Muslim-women, demanding that the practice of talaq-e-biddat' which is sinful in theology, be declared as impermissible in law. The Union of India, has also participated in the debate. It has adopted an aggressive posture, seeking the invalidation of the practice by canvassing, that it violates the fundamental rights enshrined in Part III of the Constitution, and by further asserting, that it even violates constitutional morality.

…During the course of hearing, the issue was hotly canvassed in the media. Most of the views expressed in erudite articles on the subject, hugely affirmed that the practice was demeaning. Interestingly even during the course of hearing, learned counsel appearing for the rival parties, were in agreement, and described the practice of 'talaq-e-biddat' differently as, unpleasant, distasteful and unsavory. The position adopted by others was harsher; they considered it as disgusting, loathsome and obnoxious. So religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice, which constitutes personal law."