THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES, KOCHI

DISSERTATION

Submitted in partial fulfilment of the requirement for the award of the degree of

MASTER OF LAW (LL.M)

(2019-2020)

ON THE TOPIC

MUSLIM WOMEN |PROTECTION OF RIGHTS ON MARRIAGE| ACT, 2019 : A CRITICAL ANALYSIS

UNDER THE GUIDANCE AND SUPERVISION OF

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CERTIFICATE

This is to certify that **Ms NASLA K, REG NO: LM0119015** has submitted her Dissertation titled "**MUSLIM WOMEN [PROTECTION OF RIGHTS ON MARRIAGE] ACT, 2019: A CRITICAL ANALYSIS**" in partial fulfilment of the requirement for the award of Degree of Masters of Laws in Constitutional Law and Administrative Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that the dissertation submitted by her is original, bona fide and genuine.

Ms. Ambily. P

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Date: 12-10-2020

Place: Ernakulam

DECLARATION

I declare that this Dissertation titled "Muslim Women [Protection of Rights on Marriage] Act, 2019 : A critical Analysis" is researched and submitted by me to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional Law and Administrative Law, under the guidance and supervision of Dr Ambily P, Assistant Professor and is an original, bona fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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ACKNOWLEDGEMENT

I take this opportunity to express my profound respect and deep sense of gratitude to Mrs Ambili P, my guide and supervisor, for her support, guidance and encouragement throughout the course of my research work. She was always approachable, respected my ideas and gave me clear, cogent and meaningful suggestions, which has aided meprofusely in completing this dissertation.

I would like to extend my gratitude to the Vice-Chancellor **Prof. (Dr.) K C Sunny** for his constant encouragement and support. I express my sincere thanks to **Prof (Dr) Mini S** who is the Director of Centre for Post Graduate Legal Studies for her support and encouragement extended during the course. I would further extend my deep felt gratitude to all the Professors, NUALS for their guidance and support.

I would also like to convey my thanks to all the Library Staff and the Technical Staff for their timely assistance to carry out the work.

Words fall short of expressing love, appreciation and gratitude to my dear family and friends for their constant encouragement. With genuine humility, I am thankful to The Almighty for all his uncountable bounties and blessings.

NASLA K

PREFACE

The role of women in the world's various societies is different. Women take a special place whether it is under developed, developing or developed countries. In almost all the contemporary and present societies it is racist and detrimental. In chains, women are found denied all their basic rights because they are weighed down by unjust system of administration, on the basis of unfair or biased traditions, cultures and beliefs discriminatory variations between males and females. It becomes essential to examination the factors that deny women their constitutional rights and how they are in the sense of our culture and community, a right may be exercised. However, the largest area of discrimination against women remains in the field of personal law. Women continue to suffer from extreme family and social handicaps expressed in procedures, despite legislation and liberal interpretation of this legislation. Gender-bias, in its many ways, is stopping millions of women from acquisition of knowledge and enjoyment of legal rights. Illiteracy refuses women to love the rights and possibilities even though there are legislations that entitles them numerous privileges and rights. The truth remains that women have not yet achieved equal status as of males in society. All the legislations formed grants this equality status. But reality is that this equality have not been achieved yet. So to make this dream come true legislations must be fruitful to complete their aim. All the loop holes and confusions in interpreting law makes further complications. Rights and privileges must nnot remain merely in paper. There must be stringent plans to eradicate all the sins which retain women from empowering their own life.

ABBREVIATIONS

- AIMLB- All India Muslim Law Board.
- AIR- All India Reporter
- All- Allahabad Law Review
- Bom – Bombay
- Cal- Calcutta
- Cri LJ- Criminal Law Journal
- Del- Delhi
- Gau LR- Gauhati Law Review.
- GLR- Gujarat Law Review.
- Govt – Government.
- i.e., - That is
- ICJRT- International Journal of Creative Research Thoughts.
- IJPAM- International Journal of Pure and Applied Mathematics
- ILR – Indian Law Review
- JETIR- , International Journal of Emerging Technologies and Innovative Research
- Ker- Kerala.
- KLT- Kerala Law Times.
- Mad – Madras
- MhLJ- Maharashtra Law Journal.
- MP- Madhya Pradesh
- SCC- Supreme Court Cases.
- UP- Uttar Pradesh.

LIST OF CASES

- Saleha v sheikh AIR 1973 MP 207
- Sarabai v Rabiabai, (1906) 8 BOMLR 35.
- Sarla Mudgal v Union of India, AIR 1995 SC 1531
- Sayid Rashid Ahmed v Anisa Khatun, AIR 1932 PC 25.
- Sebastian Alias Kunju v State of Kerala, 1992 Cri LJ 899.
- Shamim Ara V State of UP, (1932) 59 IA 21 (Alld): 1932 PC 25
- Shayara Bano v. Union of India and others, (2017) 9 SCC 1.
- Smt. Suman v. Surendra Kumar, AIR 2003 Raj 155 (India)
- Soumya Ann Thomas v Union off India, (1981) 3 SCC 689.
- State of Bombay v Narasu Appa Mali, AIR 1952 Bom 84.
- Sureshta Devi v. Om Prakash, AIR 1992 SC 1904
- Swaminathaswami swaminathaswami Thirukoil and others, 1996(8) SCC 525.
- Syed Ali Nawaz Gardezi v Lt.-Col Muhammad Yousuf, PLD 1963 SC 51
- Vijayee Singh v. State of Uttar Pradesh, (1990) 3 SCC 190
- Yousuf Rawther vs Sowramma , AIR 1971 Ker 261.

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CHAPTER I

INTRODUCTION

Marriage is a gift, and it is intended and sustainable when this partnership is formed. It is through this link that God gives children. Divorce terminates marital partnerships and contributes to a variety of family issues.Divorce is itself is, therefore, an undesirable act Prophet showed his dislike towards divorce. He pronounced 'talaq to be the most detestable before the Almighty Good of all permitted things'.[1]

Islam considers marriage to be important and necessary for procreation or, in the words of Engineer, "sexual intercourse within marriage is legitimate and necessary"[2]. Talaq, on the other hand, ruins the relationship, and, although talaq is permissible in Islam, as far as possible it is something to be avoided. There are hundreds of Muslim women have suffering because of this pre-Islamic practice which came back into Hanafi and Shafi Islamic law for reasons not to be gone into here.

Today, there is a great need for Muslim Personal Law codification.During the British era,it was known either as AngloMohammedan law or simply as Mohammedan law a nd was enacted by the British. But the language shifted after independence and the An glo Mohammedan Law came to be renamed as the Muslim Personal Law in order to wash out its colonial stamp. Nevertheless, its content has not changed.[3]

The word talaq is means repudiation. In literal meaning it means 'the taking off of any tie or restraint'. In law it signifies the absolute power which the husband possesses of divorcing his wife at all time. Thus talaq means the repudiation of the wife by the husband in exercise of his absolute power confined in him by law. Triple Talaq means the practice of pronouncement of talaq three times consecutively. As per the past Muslim Personal Law this practice brings in the dissolution of marriage between the

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[1] B L Chua, *Muslim Law of Marriage,* 364, (University of Malaya Law Review), 1959
[2] Asghar Ali Engineer, The Rights of Women in Islam,99 (London: C. Hurst & Co., 1992).
[3] Anahita Pathak, *To Codify or Not to Codify Muslim Law, The Question,* The Leaflet, 23 March 2020, https://www.theleaflet.in/to-codify-or-not-to-codify-muslim-personal-law-that-is-the-question/#

husband and wife. This type of divorce is not explained in Quran. It is just a part of the uncodified muslim law.[4]

There is no dispute between the jurists on the case of Triple Talaq when it is pronounced in three times in three different times during the purity of a woman. However they disagree in the case of triple talaq where it is pronounced in thrice in one session (talaq-e-biddat). The majority of Muslim jurists agree that triple talaq is not permissible. They argue that it is an innovation, the performance of which is prohibited.[5]

SCOPE OF THE STUDY

Triple talaq or tala-e-biddat is not fundamentally based in Quran. According to practice Muslim marriage is a civil contract. The study here evaluates various provisions of Muslim Women Act, 2019 and brings the conclusion whether it supports women or violates the fundamental rights of men. Researcher explores whether the punishment prescribed under Muslim Women [Protection of Rights on Marriage] Act,2019 is effective to the wrong committed or if any changes is to be brought to the mode or degree of punishment.

RESEARCH OBJECTIVES

1. To analyse the Muslim Women [Protection of Rights on Marriage Act], 2019 as an Act benefitting Muslim women against victims of triple talaq?
2. To evaluate the constitutional validity of Muslim Women [Protection of Rights on Marriage Act], 2019
3. To find if any further changes have to be made in the Act so as make its provisions much more impressive.

RESEARCH PROBLEM

The problem highlighted here is to check whether Muslim Women [Protection of Rights on Marriage] Act, 2019 is efficient in eradicating the evils of Triple Talaq and to ensure that it has efficient provisions for protecting the miserable life of divorced Muslim women. Researcher also intends to findout whether the Act actually benefits

[4] Harumrashid A Khadri, *Rights Of Muslim Woman With Special Reference To Matrimonial Causes -A Human Rights Perspective,* 35, 3 Fiat Justicia- Deccan Education Society, 2015
[5] Id

women from the dark side of instant triple talaq and the impacts of how men are treated within the wordings of this legislation.

HYPOTHESIS

Whether Muslim Women [Protection of Rights on Marriage Act] 2019 is fruitful and sufficient in protecting Muslim women?

REVIEW OF LITERATURE

1. Ashgar ali, "Abolishing Triple Talaq :What Next?", : Economic and Political Weekly, Vol. 39, No. 28 (Jul. 10-16, 2004), pp. 3093-3094
2. Muhammad Munir, "Triple Talãq In One Session: An Analysis Of The Opinions Of Classical, Medieval, And Modern Muslim Jurists Under Islamic Law"
3. David Pearl , "Recognition of the Talaq; Some Recent Cases", The Cambridge Law Journal, Vol. 43, No. 1 (Apr., 1984), pp. 49-54
4. Khalid al-Azri Source, "One or Three? Exploring the Scholarly Conflict over the Question of Triple Ṭalāq (Divorce) in Islamic Law with Particular Emphasis on Oman", Arab Law Quarterly, Vol. 25, No. 3 (2011), pp. 277-296
5. Sir Dinshaw Fardunji Mulla, "*Principles of* MAHOMEDAN LAW",pp 139-164, 20th Edition, 2013, LexisNexis.
6. Dr S R Myneni, " Muslim Law & Other Personal Laws (Family Law II),pp 320 First Edition, 2009.

RESEARCH METHODOLOGY

Researcher employs Doctrinal method of research in order to establish the hypothesis in the best suitable way.

CHAPTERISATION

1. Introduction.
2. Matrimonial Law and Divorce in Indian Legal System
3. Triple Talaq : Past and Present
4. International Scenario followed in Triple Talaq.

5. Shayara Bano To Muslim Women [Protection Of Rights On Marriage] Act 2019
6. Muslim Women (Protection Of Rights On Marriage) Act, 2019: Critique
7. Conclusion and Suggestions.

CHAPTER II

MATRIMONIAL LAW AND DIVORCE IN INDIAN LEGAL SYSTEM

INTRODUCTION

Ancient human culture was a culture of nomads. Before the dawn of humanity, maybe only a herdinstinct form of marital relationship existed. The nomadic human beings d eveloped into an agricultural society over time and it was deemed important to establi sh children's paternity. It was maternity alone that could be recognised as long as the s exual relationship remained unregulated. It could not determine paternity. It is reasona ble to assume that, as a natural consequence of human behaviour, the need emerged at some stage of human development to demarcate possession and ownership of materia l possessions and the human male was seized with the concept of knowing his childre n.When sex promiscuity appeared to be the norm, this was not possible. If it was possi ble to make a marital partnership an exclusive marriage between one man and one wo man, only then could the paternity between children be decided. Thus, it appears, the s eeds of the institution of marriage lie in man's desire to understand the paternity of chi ldren[6].

Thus, the idea of marriage, a kind of partnership between man and woman as a respon sible onetoone unit of society, established a distinctive human family system. The mai n components were intercourse, infant procreation and working together with shared o bligations and responsibilities for the treatment of offspring. The traditional Hindu fa mily was an organisation characterised by the homogeneous unity of parents, grandpa rents, sons and daughters, their wives, even uncles and aunts, and a shared family stru cture. With each member understanding his or her origins, there was a distinct family identity. The institution of marriage provides women with respectability, increases the ir personal happiness & welfare, provides support for families & companionship.

Presently, family, not even conscious of its origins, is becoming only an individualistic conjugal family. Hindus have attempted to idealise and sanctify the

[6] P. Diwan and Peeyushi Diwan, *Modern Hindu Law Codified and Uncodified*, 62 (Allahabad Law Agency, Faridabad, 16th Ed. 2005).

institution of marriage since time immemorial, as no other civil society has done so far. The ultimate virtue of a woman is considered to be conjugal fidelity, and it is this character that has preserved the Hindu race and Hindu faith through the centuries. The purity of the soil and the seed, the sperm and the ovum, alone leads to a race 's purity, and it is for this reason that so much emphasis has been put on the chastity and fidelity of women in our scriptures. This bedrock of human society completely and Hindu society in particular, is challenged in modern India by civilizational assaults from different sources.[7]

Marriage benefits society uniquely because it is the cornerstone of the family and the essential building block of society. It brings to human relationships tremendous stability and meaning. For the raising of children, this remains the ideal. In transmitting culture and civilisation to future generations, it plays an significant role. Marriage is a social institution of great public importance and interest, not simply a private arrangement. The decline in marriage since the 1960s has been followed by a rise in a number of serious social problems, as social science studies and government surveys increasingly demonstrate.[8]

We have another aspect of family law in India, which can come into force if parties wish to be governed by it. As per the the Special Marriage Act , 1954, any two persons belonging to any group or nationality may choose to marry and thus bring into force not only the matrimonial law as provided for in the Act, but also certain other laws, for example the Succession Act, 1925 and the succession to the property of such persons will be regulated by this Act, and there will be no option between the parties in this matter. It means automatic ceasing of his status from the joint family in the case of a Hindu man. And if parties be the members of different communities (except in the case of Muslims where a non-Muslim male may validly marry a non-Muslim) and neither want to convert to the religion of another, or if parties desires to have a civil marriage, under the Special Marriage Act of 1954 they have no choice but to marry. There is a uniform family law granted to all individuals, although they have different views once they are married under the Act..[9]

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[7] EVOLUTION OF MARRIAGE AS A SOCIAL INSTITUTION, , 10 May 2020 https://shodhganga.inflibnet.ac.in/bitstream/10603/26528/8/08_chapter%201.pdf

[8] Id 3

[9] Paras Diwan, FAMILY LAW, Indian Legal System , 674 , 13 May 2020 http://14.139.60.114:8080/jspui/bitstream/123456789/738/23/Family%20Law.pdf

All aspects of personal law are included in the concurrent list (entry 5) under the Constitution of India. With regard to them, both Parliament and state governments have the right to legislate. State legislatures have not utilised this power to any significant degree apart from legislation relating to Muslim wakfs and Hindu endowments. The Union Parliament has enacted the whole codified Hindu law, although some amendments have been made by some state legislature; for example, the Uttar Pradesh enactment, the Hindu Marriage (the Uttar Pradesh Sanshodhan) Adhinyam, 1962 has made a ground of divorce, among other things, cruelty. This can be assumed to be superseded by the 1976 Marriage Laws (Amendment) Act , which made divorce a ground for cruelty. The Shariat Act of 1937 and the Muslim Marriage Dissolution Act of 1939 were passed by the Central Legislature. Same was the case with the the Christian Marriage Act, 1872; Parsi Marriage and Divorce Act, 1936; and the Indian Divorce Act, 1869; and before independence, several Hindu personal law reform enactments.[10]

There was a chance of problems of conflict of laws occurring with each group having its own personal law, but because interpersonal relations in family matters are not allowed, conflict of personal laws has not arisen. Inter-communal marriages are either not allowed, unless one of the parties recognises the faith of the other party (in which case the issue of conflict can not arise) or they marry under the Special Marriage Act , 1954 (in which case the personal law of both parties ends to apply), the issue of conflict of personal laws is removed. In a few situations where a person becomes a convert to another faith (mostly Hindus, Parsis and Christians adopting Islam) and takes another spouse, such problems have arisen..[11]

FAMILY UNDER CONSTITUTION OF INDIA

For families belonging to various faiths, India has separate personal laws and, thus, has not agreed on priorities regarding this essential feature of civic life. Each religion has its own personal law, which covers issues of personal relations and family practises such as marriage and divorce, adoption, maintenance, guardianship and custody of children, and inheritance and succession. Hindus, Muslims , Christians, Sikhs, Jews, and Parsis. As these laws build on the respective religious traditions,

[10] Id 675
[11] Ved Prakash Verma, *Conflict of Personal Laws in Divorce Cases in India,* 85 XXII-2 The Law Review [1969]

traditional patriarchal traditions are always perpetuated and the reform process is slowed down..[12]

While Article 44 of the Constitution states that 'the State shall seek to ensure a uniform civil code for people in the territory of India,' the attempts to enact secular family laws applicable to the family practises of all Indians are subject to protracted and bitter discussion. The few successful attempts have led to secular family legislation, such as the 1929 Child Marriage Restriction Act; the 1972 Medical Termination of Pregnancy Act; the 1974 Special Marriage Act; the Criminal Procedure Code; the 1961 Dowry Prohibition Act and and Indian Penal Code provisions. The interpretation and application of these rules, however, leave much to be desired. Thus, for the family and its members, there are countless policies. There are independent targets, however, for separate policies for family size, family rules, housing, infants, youth, and so on. These policies influence the family in different ways, with often conflicting and negative effects, in the absence of an overarching family policy with clear family objectives..[13]

LAW OF MARRIAGE

Prior to 1955, India was the largest nation in the world which allowed the large majority of its people i.e., Hindus and Muslims[14] to practice polygamy.[15] Then it was also the nation on whose Polyandry frontier area prevailed. Polygamy, however, was performed only nominally, and polyandry was limited to a very small number of individuals. Polygamy is a criminal offence punishable by imprisonment that may extend to seven years after 18 May 1955, when the Hindu Marriage Act came into force, and, if the truth of the first marriage was withheld from the partner, punishable by a period of imprisonment that may extend to ten years.[16]

From very early times, under Hindu law, marriage was considered a sacrament. As a sacramental union, marriage meant that it was sacrosanct, inviolable and unchanging. There was no problem for Hindu males with the immutability of marriage combined

[12] Reeta Sonawat, Understanding Families in India: A Reflection of Societal Changes**, 177, 178,**17 **Instituto de Psicologia, Universidade de Brasília, (2001)**
[13] Supra 4
[14] Modern India still permits its Muslims population to practice limited polygamy, though very few Muslims have a plurality of wives
[15] Unlimited in the case of Hindus and limited to four wives in the case of Muslims.
[16] The Indian Penal Code, 1860, Sections 494 and 495

with polygamy, but it meant that a woman should not remarry even when she became a widow in the case of females. The new Hindu law, the Hindu Marriage Act of 1955, excludes nearly any element of sacramental union. A divorce is permitted. Marriage maintains its sacramental character only in the sense that a sacred ceremony is still required in most Hindu marriages. It is difficult simultaneously to conclude that Hindu marriage has become a contract. The marriage does not become null, not even voidable, by non-consent or non-age. The same is true of the guardian 's refusal to agree. In the case of the innocent, if consent is gained by deception or coercion, the marriage is voidable.[17]

Marriage is conducted solely for dharma and not for amusement. Lot of reasons may be given for considering the sacred Hindu marriage (i) dharma was the highest aim of marriage; (ii) the success of the religious ceremony included certain rites such as havan, kanyadan, panigrahana, etc., which were considered sacred, based on the sacred formula, (iii) the rites were carried out before Agni (the most sacred God) by reciting Vedas mantras (the most sacred script) by a brahmin who is said to be the most sacred men on earth , (iv) the marriage was considered indissoluble and irrevocable, and not only before death, but after death, husband and wife were bound to each other., (v)thought that during the course of their lives a man performed many sacraments, a woman performed only one sacrament of marriage in her life, hence its greatest importance to her, (vi)emphasis was placed on a woman's chastity and a man's faithfulness, and (vii) marriage was considered a 'social obligation' to the family and the society, and there was little consideration of individual desires and ambitions..[18]

Muslim law has always tagged marriages as a civil contract. 'Marriage is a civil contract that has the procreation of children as its object.' Marriage, which is simply a civil contract, must be offered on the one hand and agreed on the other. It is, in other words, ijab wa kabul, or declaration and acceptance. What is important is that at one and the same meeting, proposal and acceptance must be made. No clear manner in which proposal and approval are to be rendered is defined by Mpslim law. For its validity, neither writing nor the presence of witnesses is required, although Sunni law requires witnesses to be present and their absence makes the marriage irregular. By

[17] Supra 4 at 680
[18] Bablu Barman, *Concept Of Hindu Marriage Of India*, 5 JETIR, 426, 427(September 2018).

consummation, the irregularity is healed. There are no religious rituals required, although typically some verses from the Quran are recited. Their recitation is not necessary and does not affect the marriage 's validity.[19]

Marriage as per Parsi Lw is a civil contract, but the validity of the marriage involves a religious ceremony called ashirvad. It also required the involvement of two Parsi witnesses. To the exclusion of all others, Christian marriage is a voluntary union of a man and a woman for life. The Indian Christian Marriage Act, 1872, is based on the English marriage law that was then in effect. One of the strange characteristics of the Act is that, even though one of the parties to the marriage is a non-Christian being a Christian, marriage must be done under the Act. Before a minister or a marriage officer or any person approved under the Act, a marriage may be solemnised.Marriage among Indian Jews is a contract. A written contract called *Katuba* between the parties is essential for the validity of marriage. A religious ceremony is also required.[20]

SPECIAL MARRIAGE ACT

A traditional marriage of two Indians is included in the Special Marriage Act , 1954, without the need to reject their individual religion. The Act accommodates common marriage that would empower people to get married outside of their individual group commands. Marriages outside of one's own rank or religion bring about social exclusion. Such relational unions are granted authenticity by the Act. It removed station or religious marriage boundaries and gave a stately marriage that was completely normal and non-formal. The Act also includes an opportunity to enlist relational unions executed in compliance with one's own rules. Despite the solemnization of marriage through the execution of religious services, this arrangement of consequent enrollment empowers meetings to benefit from common and standardised cures. This directs them to overcome the demands found in their own laws.[21]

The one of a kind feature of the Special Marriage Act , 1954, is that under any other statute, Indian or nonnative, any marriage solemnised in any other manner between any two persons may be enlisted under the Act. Under this Act, marriage is generally a polite marriage and is expected to complete the common conventions. Gatherings

[19] Supra 13
[20] Id
[21] K.SURESH, *A Study On Special Marriage Act*,1954, 120 IJPAM, 2955 (2018)

planning to be hitched under the Special Marriage Act may give a written notice to the Marriage Officer in the predetermined form of the region in which no less than one of the marriage gatherings has lived for a period of at least thirty days immediately before the date on which such notice is given.[22]

HINDU MARRIAGE ACT

The orthodox system of Hindu Law, as contained in the ancient and venerable Hindu religious Scriptures, does not permit divorce at all as it treats marriage as a sacrament, a religious ceremony, and hence regards it as permanent and indissoluble.[23] This traditional view has found a classic exposition at the hands of Manu[24] who has said : "Neither by sale nor by desertion is the wife released ". This rigid view was in full force in India regarding Hindus before 1955.[25] The traditional and conservative Hindu attitude to marriage has now been displaced by the Hindu Marriage Act, 1955, which makes pro visions, inter alia , for dissolution of a Hindu marriage in certain circumstances.[26] Another very important reform introduced by the Act is monogamy amongst the Hindus. Prior to the Act, a Hindu male could marry any number of wives but he cannot do so now. On the whole, the Act minimises the religious content of a Hindu Marriage and makes it somewhat secular in character.

A petition for divorce under the Hindu Marriage Act[27] may be presented either by husband or wife if the respondent - (i) is living in adultery; or (ii) by converting to another faith, has ceased to be a Hindu; or (iii) has been incurably unhealthy for at least three years on an ongoing basis ; or (iv) has, for at least three years, been a victim of a virulent and incurable form of leprosy ; or (v) has, for at least three years, been suffering from a venereal disease in a communicable form ; or (vi) has renounced the world by entering a religious order or (vii) those individuals who would naturally have heard of it had that party been alive have not been heard of as alive f or at least seven years, or (viii) have not resumed cohabitation for at least two

[22] Id
[23] Marriage, according to the Hindu law, is a holy union for the performance of religious duties. It is not a contract". Sir Dinshaw Fardunji Mulla, MULLA HINDU LAW, Lexis Nexis, 518 [32 ed, 2018]
[24] Manu is the most celebrated ancient Hindu law giver who flourished near about Second Century
[25] The rigours of this view were however mitigated, to a small extent though, by customs permitting divorce among some small sections of people, which, if reasonable, were enforced judicially
[26] The Act does not abrogate the pre-existing customs relating to divorce with a view to enable people, more in the rural, rather than in the urban area, to seek and obtain divorce without much formality and expense under their own customs without being driven to take recourse to costly and dilatory judicial proceedings for that purpose.
[27] Section 13 Hindu Marriage Act, 1955

years after determing a decree of judicial separation against that party; or (ix) have refused to comply with a decree of restitution of conjugal rights for at least two years;.

In addition, the wife may also present a petition for divorce on the ground that - (i) her husband has more than one wife ;[28] or (ii) the husband has been guilty of rape, sodomy or bestiality after solemnization of marriage. No petition for divorce is to be entertained by a court before three years of marriage, unless the court permits such a petition on the ground that the case is of exceptional destitution to the petitioner or of exceptional deviance on respondent's side.[29]

Hindu law applies to any person (i) who by faith is a Hindu, Jain, Buddhist or Sikh, (ii) who is born to Hindu parents, i.e. parents who are Hindus, Jains, Buddhists or Sikhs (and if one of the parents is a non-Hindu, then if the child is raised as Hindu), and (iii) who is not a Muslim, Christian, Parsi or Jew. Those people who have converted to Hinduism , Jainism, Budhism, or Sikhism are also included in the first group. It is a astonishing feature of Hindu law that no religious ritual is required for conversion: the intention of the convert and his acceptance by the community is sufficient.[30] Even if he does not profess, practise or believe in either of these religions, a person may be a Hindu, as mere deviation or dissent from the doctrines of Hinduism or lapse from traditional Hindu religious practises or being an atheist will not make him less of a Hindu.

Hindu law regulates Sikhs, Jains and Budhists, but it can not be assumed that by religion they are Hindus. Likewise, a person who is not a Muslim, Christian, Parsi, or Jew is governed by Hindu law, but religion does not rule such a person. In this sense, Hindu law refers to all individuals within the territories of India who are not Muslims, Christians, Parsis or Jews (except the State of Jammu and Kashmir). This suggests that the word "Hindu" has lost its religious connotation in modern Hindu law; if Hindu religion has any meaning in modern Hindu law, then it is in relation to religious endowments.[31]

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[28] This provision is intended to benefit a female whose husband had married another wife before the Act.
[29] See, *Maganatha Nayagar v. Smt . Susheela*, A.I.R. 1957 Mad 423
[30] *Perumal v. Ponnuswami* AIR 1971 SC 2352.
[31] Supra 4 at 677

INDIAN DIVORCE ACT

The Law of divorce for the Christians is contained in the Indian Divorce Act, 1869.[32] The object of the Act was to place the Indian Law on the same footing as the English Law of Divorce. It is based primarily on the principles of the Matrimonial Causes Act of 1857 and its amendments till 1866.[33]

Under the Divorce Act, a husband may present a petition for divorce on the basis that his wife has from the solemnization of marriage, been guilty of adultery.[34] A wife may similarly present a petition on the ground that since the solemnization of her marriage her husband has - (a) exchanged his profession of Christianity for some other religion, and went through a form of marriage with another woman ; or (b) been guilty of incestuous adultery ; or (c) been guilty of a bigamy with adultery ; or (d) been guilty of marrying another woman with adultery ; or (e) been guilty of rape, sodomy or bestiality ; or (f) been guilty of adultery along with such cruelty as without adultery would have entitled her to a divorce a *mensa eithoro* ;[35] or (g) been guilty of adultery coupled with desertion without reasonable excuse for two years or upwards.

The divorce decree under the Divorce Act is made in two stages. First is the decree *nisi* and it becomes absolute after six months.[36] During this period any person is at liberty to show cause why the said decree should not be made absolute, such, as that it may have been obtained by collusion or by suppressing material facts from the court. On cause being so shown, the court may either make the decree *nisi* absolute or reverse it or order further inquiry.

The court may dismiss the suit for divorce if, after the making of the decree nisi, the petitioner couldnot within a reasonable time move to the court to have such decree made absolute. A decree made by a district judge (lower than the High Court) for dissolution of a marriage becomes absolute only after its confirmation by the High

[32] The Act applies only when either the petitioner or respondent professes the Christian religion
[33] ġ In England, the entire law has been consolidated and amended by the Matrimonial Causes Act of 1950. The Indian Act has not been amended to keep pace with the developments in England. S. 7 of the Act lays down that when the Act is silent on any point the courts would give relief on principles and rules prevalent in England for the time being. Therefore, in the absence of specific prohibitions to the contrary, the Indian courts follow the English law as it may happen to be at the relevant time. There is some conflict among the High Courts whether S. 7 refers only to procedural law or includes even the substantive law. *Baily v. Baily* , I.L.R. 30 Cal. 490 ; *Agnes Ammal v. Paul*, I.L.R. 1936 Mad. 324; *George Swami Das v. Joseph*, I.L.R. 1955 Mad. 688
[34] Section 10 of Indian Divorce Act 1869
[35] Judicial Seperation
[36] Indian Divorce Act, 1869, section 16

Court which takes place only after six months of the date when the decree was made by the lower court.[37]

NATIVE CONVERTS' MARRIAGE DISSOLUTION ACT

In addition to the above grounds for divorce provided by the various legal systems, the Native Converts' Marriage Dissolution Act, 1866, furnishes one more ground for dissolution of marriage available to a person belonging to a community other than Christian, Mohammedan or Jew who has become a convert to Christianity. The Act in question was enacted to legalise, under certain circumstances, the dissolution of marriages of converts to Christianity who were deserted or repudiated on religious grounds by their wives or husbands.[38]

The Act provides that if a husband (who has completed the age of 16 years) or wife (who has completed the age of 13 years), not being a Mohammedan, Jew or Christian, changes his or her religion to pursue Christianity, and if in consequence of such change the other party for a period of six months deserts or repudiates him or her, he or she may sue for restitution of conjugal rights against the other party. If at the hearing of the petition the respondent refuses to cohabit with the petitioner, and the judge is satisfied that the ground for such refusal is the petitioner's change of religion, he shall adjourn the case for a year. If at the expiry of such adjournment, the respondent still refuses to cohabit with the petitioner, the judge then passes a decree declaring that the marriage between the parties has been dissolved.[39]

MOHAMMEDAN LAW

Muslim Marriage is known as Nikkah which is the union of sexes. It is a civil contract. Upon completion of proposal and acceptance, a valid contract of marriage comes into existence.[40] The consent of both the parties must be free will, not under undue influence, misinterpretation or coercion.[41] Since it is a contractual marriage parties are to make certain agreements before entering into marriage, for regulating their marital relationship. These terms are to be followed by the parties. But all the

[37] Indian Divorce Act, 1869, section 17
[38] M P Jain, MATRIMONIAL LAW IN INDIA, Journal of Indian Law Institute, 71, 83 [Jan 1962]
[39] Id
[40] Proposal is known as Ijab made by the bridegroom. Acceptance is made either by the bride or legal guardian of bride which is known as Qubool. Ijab and Qabool must be done at one meeting.
[41] Abdul Latif v Nyaz Ahmed (1909) 31 All. 343, 1 I.C. 538 [illness of wife concealed]; Kulswnbi v Abdul Kadir (1921) 45 Bom. 151, 59 I.C. 433, (’21) A.B 205 [Pregnancy of wife concealed]

terms and conditions should be legal they should not violate the provisions of public policy, also should not be detrimental to the provisions of Muslim marriage.[42] Such agreements are said to be illegal and cannot be enforced.

In *Mydeen v Mydeen*[43], on second marriage the husband entered an agreement with his wife to transfer certain products in favour of her. Later he divorced her and demanded the property, which was denied. But the court held that agreement is void and enforceable.

Another important character of Muslim marriage is dower or mehr. It means a sum of money which the husband is duty bound to give to his wife as a part of marriage contract.[44]

Mehr is given by the husband and is an essential component of a Muslim marriage contract. Even if no sum is mentioned in the contract or, even if it is explicitly stated that no mahr will be given, the wife is nonetheless entitled to a 'proper' mahr,[45] assessed on the basis of her personal qualities and the status of the families involved.

Qura'n refers the Mehr as 'sadaqah', meaning the gift that is given in good faith and as a good deed, out of generosity.[46] Mehr or Dower is paid by husband to his new guest as a gift of honour, an expression of love and responsibility, which in effect creates confidence in her mind and raises her love towards husband. It is a welcome gift given by groom to newly wedded bride, which she can use exclusively without interference by anybody including husband. Such a gift by husband can never be equated with consideration. Such provision of Mehr is absent in other personal laws. [47]

Dower is agreed by the parties which includes specified dower and another by operation of law which is proper dower. Specified Dower is again divided into prompt

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[42] Nanda Chiranjeevi Rao , *Marriage Agreements Under Muslim Law*, 55 A WEAPON IN THE HANDS OF MUSLIM WOMEN,JOURNAL OF THE INDIAN LAW INSTITUTE, 94, 95 (2013)
[43] AIR 1951 Mad 992
[44] Mohammad Afzal, Lee L. Bean and Imtiazuddin Husain, *Muslim Marriages: Age, Mehr and Social Status*, 12 THE PAKISTAN DEVELOPMENT REVIEW,48, (1073)

[45] Tahir Mahmood, The Muslim Law of India, 71 [LexisNexis], 2002
[46] Neilofar Ahmed, "The imporance of Mehrt", 29 March 2020 available at lry//www.dawn.com/news/726611/the-impottance-of-mehr
[47] 3, Dr. Harunrashid Kadri', RIGHTS OF MUSLIM WOMAN WITH SPECIAL REFERENCE TO MATRIMONIAL CAUSES -A HUMAN RIGHTS PERSPECTIVE, [Deccan Education Society] 20,31, 32, 2015

dower and deferred dower. Dower given immediately after marriage is known as prompt dower and the balance amount is deferred dower. An agreement promoting non-payment of dower between parties to marriage or by legal guardians in case of minors' marriage is void and wife will be entitled to it.[48] It is also considered an important aspect while fixing maintenance under section 125 of the Code of Criminal Procedure,1973.[49]

Dower is a safe-guard against the husband's arbitrary power of divorce and it is not an exchange or consideration given by the mein for marriage contract because if so then a consideration ought to have been required of the husband as well. Though an essential condition in the marriage its validity does not depend upon its express mention and thus even if the dower is not mentioned, law attaches a liability to the husband.[50]

In Abdul Khadir v Salima,[51] Syed Mahmood J. has held that Mahr is not exchange or consideration but an effect of marriage imposed by law on the husband as a token of respect.

The Muslim Law, while conceding an unbounded discretion to the husband to divorce his wife, is not so liberal to the wife in this respect. Prior to 1939, the Indian courts had denied to the Muslim women any right to dissolve their marriage. A Muslim woman could not do so even if the husband neglected to maintain her, or deserted her or persistently maltreated her. To remedy this situation, the Dissolution of Muslim Marriages Act was passed in 1939, to make a clarifications and also to consolidate the provisions of the Muslim Law relating to suits for dissolution of marriage .[52] Under the Act, a woman married under the Muslim Law is entitled to claim divorce on the following grounds :

1. The husband's whereabouts have not been known for four years.;[53]
2. The failure of the husband to provide for her maintenance for two years ;

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[48] Supra n 4 at 101

[49] Rakesh Kumar Singh, *Law of dower (Mahr) in India*, Journal of Islamic Law and Culture, 58, 63, (2010)

[50] Mohammed Farogh Naseem, 27 *Maintenance Of Divorced Wives: Indian Supreme Court Vs. Shari'at,* Islamic Research Institute, International Islamic University, Islamabad, 231, 234 (1988)

[51] (1886) 8 ALL 149.

[52] Supra 5 at 78

[53] A decree passed on this ground takes effect only after six months, and if the husband appears within this period and is prepared to perform his conjugal duties, the court will

3. Sentence of imprisonment on husband for seven or more years ;
4. Failure of the husband to carry out his marital duties for three years without fair cause;
5. Impotence of the husband since marriage ;[54]
6. Insanity of the husband for two years ;
7. The husband suffering from leprosy or a virulent venereal disease;
8. She was married by her guardian or father before the age of fifteen years, and she repudiated the marriage before attaining 18 years, provided that the marriage was not consummated ;
9. Cruelty on the part of the husband;[55]
10. On any other ground recognised as valid for dissolution of a marriage under Muslim Law[56]

The Muslim law relating to divorce raises two questions for consideration; one relates to the method of divorce, i.e., triple pronouncement of divorce, and the other to the problem of inequality of two sexes in respect of the right to divorce. These two questions are controversial and generally misunderstood. The concept of unilateral divorce is also confusing. The very idea of unilateral divorce militates against the real spirit behind Islamic law of marriage and divorce. Divorce is permissible in Islam only in cases of extreme emergency when all the efforts at reconciliation have failed.

There are different forms of divorce under Muslim Law- Khula and Mubarat which is divorce by mutual consent. In khula the wife makes an offer to compensate her husband on condition to release her from the matrimonial knot and the husband accepts the offer.[57] The incapacity of wife to pay the compensation does not

[54] Before passing a decree on this ground the court shall, if the husband applies, make an order requiring the husband to satisfy the court within one year that he has ceased to be impotent, and if the husband so satisfied the court, no decree is passed; *Kaloo v. Mst. Imaman* ,AIR 1949 All 445 [a woman can divorce her husband if he falsely alleges her of adultery].

[55] In cases where the husband habitually assaults wife, or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment; or he associates with women of evil repute or leads an infamous life ; or he attempts to force her to lead an jmmoral life ; or disposes of her property or prevents her from exercising her legal rights over it ; or obstructs her in the observance of her religious profession or practice ; or if he has more wives than one he does not treat her equitably in accordance with Koranic injunctions

[57] Moonshee Buzul-ul-Raheem v. Lut eefoorn-Nissa, 8 M.I.A. 395. Journal of the Indian Law Institute, Vol. 45, No. 3/4, Family Law Special Issue (July-December 2003), pp. 484-508

invalidate the marriage. In case of Mubarat both wife and husband mutually comes to an agreement to get rid of each other.[58]

DELEGATED DIVORCE [TALAQ-TAFWEEZ]

This form of divorce is used as a tool by a wife to get divorce from husband, when both are leading an unhappy marital life, without the intervention of the court. Generally only Muslim husband can divorce wife through pronouncement of talaq, a Muslim wife would resort to khula form of divorce.[59]

TRIPLE TALAQ

There are three types of Talaq, Talaq-al-ahsaan, talaq-al-hasan, talaq-al-biddah. Talaq-al-ahsaan is most approved, and Talaq-al-hasan is approved, by the Holy Quran and the Hadith, whereas Talaq-al-biddah is the product of interpretations not based on Holy Quran and hence disapproved.[60] Talaq-al-biddah ot Triple Talaq is pronouncement of three Talaqs in a single sitting and it is irrevocable. Such Talaq is also called as "Talaq-al-Mughallaz" i.e. irrevocable talaq.[61] It is also believed that once such pronouncement is complete, their marriage comes to an end irrevocably and re-union between them is not possible unless she marries with a flew man and he divorces her after the marriage is consummated.[62]

LEGAL EFFECT OF TRIPLE TALAQ

According to the majority of jurists among the Companions, whether divorce is pronounced three times in one sentence at once (anti t talaq thalathan ') or repeated three times in one session {i.e.' anti talaq anti taliq, anti talaq '), or whether divorce is pronounced three times during one cycle of purity or menstruation without any revocation, this has the effect of the third and final cancellation as per to the majority of the jurists of the four Sunni Schools of Thought which incudes the four founders

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[58] 2 ASAF ALI ASGHAR FYZEE, OUTLINES OF MOHAMMEDAN LAW, 139 (Oxford University Press 1974)
[59] Supra 4 at 99
[60] Dt. Shahzad Iqbal Sham, *"Some Aspects of Marriage and Divorce in Muslim Family Law*, March 2015.
[61] 3 Dr. Harunrashid A Khadri, *Rights Of Muslim Woman With Special Reference To Matrimonial Causes -A Human Rights Perspective,*32(Deccan Educational Society, April 2015)
[62] Id 33

and their adherents, of the Companions of the Prophet (sahaba), Adherents of the Companions (tabihun), and fuqaha.[63]

In *Mst Ruki a Khatun v. Abdul _Khaliq Lasker*[64] , Guwahati court has held that law of talaq as mentioned by the holy Quran , is: (i) the talaq should be for a reasonable cause; and (ii) the attempt at reconciliation between the husband and the wife must be followed by two arbitrators, one chosen by the wife from her family and one by the husband from his family. Talaq will be carried out if their attempts fail.

The judgement says that the fact that husband has effected a divorce must be duly proved. Even after its proof the court shall not recognize the same if it is not valid divorce under sharia. Under Islamic law a divorce is valid only if there is a reasonable cause for it and it had been preceded by an attempt at reconciliation by two arbitrators representing the husband and the wife as required by the Quran.

EFFECTS OF DIVORCE

(i) **The Legal Position of the Divorced Spouses** : When a marriage is dissolved by divorce, the relationship of husband and wife ceases to an end. The parties become free to remarry. However, on grounds of public policy, all marriage laws, except those of Parsis and Christians, prescribe a time limit for which the parties should wait before remarrying after divorce. Under the Special Marriage Act[65] and the Hindu Marriage Act[66] the period of waiting has been prescribed at one year. The Divorce Act[67] prescribes only six months for this purpose. No such period of waiting has been prescribed by the Parsi Marriage and Divorce Act.[68] Under the Mohammedan Law, if the marriage has not been consummated, either of them may remarry immediately. If the marriage has been consummated then - (i) the wife can remarry after the expiry of the period of iddat ;[69] (ii)

[63] Muhammed Muneer, Triple "Ṭalāq" in One Session: An Analysis of the Opinions of Classical, Medieval, and Modern Muslim Jurists under Islamic Law, Arab Law Quarterly, Vol. 27, No. 1 (2013), pp. 29-49
[64] CLQ 213 (1983)
[65] Special Marriage Act, 1954, Section 30
[66] Hindu Marriage Act, 1955, section 15
[67] The Divorce Act, 1869, section57
[68] Parsi Marriage and Divorce Act, section 48
[69] Iddat is the period of seclusion which a Muslim woman has to undergo on dissolution of her marriage. The idea is to ascertain whether she is pregnant by her former husband or not so as to avoid any confusion in future regarding parentage of the child born after remarriage.

for purposes of prohibition on grounds of number, the divorced wife observing iddat is also counted as a wife so that if the husband has three other wives, he will not be able to remarry until the divorced wife has completed her iddat ; (iii) where the divorce has been effected by the husband by pronouncing the word 'talak' thrice, remarriage between the divorcees is not possible unless after the period of iddat , the wife is lawfully married to another person and such marriage, after consummation, has been duly dissolved.

(ii) **Extinction of Affinity Relationship and Alteration of Surname:** All Indian legal systems are silent on the questions as to (i) whether the dissolution of a marriage by divorce would result in the termination of affinity relationships created by the marriage and (ii) whether the wife's maiden surname would revert to her. The only exception is that under the Mohammedan Law, it is well established that affinity relationship would continue notwithstanding the dissolution of marriage.

(iii) **The influence of divorce on the relation between Parent and Child** : The Special Marriage Act[70] authorizes the court to pass such orders and make such provisions in case of a decree of divorce as may find to it to be just and proper with respect to the maintenance, education and custody of minor children, consistently with their wishes wherever possible. Similar provisions are made by the Hindu Marriage Act[71] the Divorce Act[72] and the Parsi Marriage and Divorce Act.[73]

The mother is entitled to custody of her male child under the Mohammedan Law (Hanafi School) until she is seven years of age and of her female child until she reaches puberty. This right persists even though the child's father divorces her unless she marries a second partner, in which case the custody is the father's.Under the Shia Law, the mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years. After then, the custody belongs to her father.

[70] Section 38 of Special Marriage Act, 1954
[71] Section 26 of Hindu Marriage Act 1955
[72] Section 43 & 44 Divorce Act 1869
[73] Section 49 Parsi Marriage and Divorce Act.

A Muslim father is liable to maintain his sons until they have attained the age of puberty and to maintain his daughters until they are married. Even if the children are in the custody of their mother during their infancy, the father is not relieved from the obligation of maintaining the children. If the father is poor and incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children. Further, the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

While considering the position of a child born after divorce, it is important to note section 112 of the Indian Evidence Act[74] which applies uniformly to all judicial proceedings whether between Hindus, Mohammedans, Christians or Parsis. Lastly, it may be noted that divorce between the parents in no way alters the inheritance rights of the children qua each of the parents. The position is the same in all Indian legal systems.

CONCLUSION

The Indian Legal System relating to divorce presents a complicated, unsymmetrical and an incoherent picture. It is a curious mixture of the old and the new. On the one hand, there is the neo modern concept of divorce by mutual consent on the other there is the archaic concept of the absolute discretion of the husband to divorce his wife without any formality. It is necessary to make a uniform law applicable to all and equally to both sexes. This will simplify the law and secularise the institution of marriage. This is necessary in the context of the modern social and political philosophy of a socialistic pattern of society and national integration.

Individually, the Mohammedan Law still maintains great inequality between the two sexes in the matter of divorce. It is necessary to restrict the husband's unlimited power to effect a divorce by laying down the conditions subject to which it can be exercised and also by making it necessary for him to go to the court for the purpose. The female also should be given a reciprocal right of divorce.

Our legislature has brought a solution to this inequality in case of triple talaq through the Muslim Women [Protection of Rights on Marriage] Act, 2019. This piece of

[74] The fact that any person was born. . . within two hundred and eighty days after the dissolution of the valid marriage between his mother and any man the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

legislation has made triple talaq void and made its pronouncement punishable. This legislation arouse more debates and discussions all over the country. In order to find the fruitfulness of this Act it is necessary to look back into the concept of triple talaq more deeply.

CHAPTER III

TRIPLE TALAQ : PAST AND PRESENT

INTRODUCTION

The plurality of Indian society has had themes and institutions set out in Indian legal history. Islamic law can well be said to be rooted in the early regulations of seventeenth century wherein the law required that in the matter of "marriage, inheritance and succession ..." the personal laws of Hindus and Muslims respectively will govern the individuals. In the present context the understanding of Islamic law particularly the law relating to divorce needs to be taken in a wider perspective so as to understand the needs of Muslim men and women in the context of Constitution and movement for gender equality as also of human rights.[75]

Indeed, Islam has always had a practical outlook on all human affairs and hence recognizes divorce, but only as a necessary evil. As social policy, it has recognized divorce as an exit if things are in disarray and living together yields disharmony. Prophet denounced it as a necessary evil by pronouncing that "of all the permitted things divorce is the most abominable with God."[76] Modern jurists of comparative law also justify the need for recognizing divorce to end the bitter and miserable existence of forced partnership enabling life to be more conducive to the welfare of the parties.

In Islam, matrimonial alliance is a social contract. It can be dissolved when it ceases to serve the values and purpose of living and co-existing together. A deeper study of the institution of marriage and divorce in Islam shows that the marital tie is to be respected and to be continued till the possible extent. The mutual adjustment and tolerance are emphasized for the sake of keeping the ties intact.[77]

Justice Krishna Iyer in a felicitous manner has pointed out in *Yousuf Rawther v Sowaramma*[78]that "Islamic Law is more sinned against than sinning". Even in *Moonshee Buzloor Ruheem v Shumsoonnissa Begum*[79] the Privy Council a century

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[75] Furqan Ahmed, *Understanding Islamic Law of Divorce*, 45Journal of the Indian Law Institute, 484,508(July-December 2003)

[76] Abu Dawud Sulaiman bin al-Ashath, Al Sunan Kanpur, Muslim Law of Divorce (1978).

[77] Id 1 at 485

[78] AIR 1971 Ker 216 Justice Krishna Iyer held that a Muslim woman can sue for dissolution of marriage under section 2(ii) of Dissolution of Muslim Marriage Act, 1939 because the husband failed to maintain her even after a cause.

[79] (1867)11 MIA 551 (610)

ago ascertained that "the matrimonial law of the Muslim favors the stronger sex like that of every ancient community where the husband can dissolve the marriage arbitrary". In another century old case in *Moonshee Buzul-UlRaheem v Luteefut-Oon-Nissa*[80] Privy Council held that "dissolution of marriage by talaq is a whimsical act of husband to renounce his wife at any stage of life at his own pleasure, at any cause".

CONCEPT OF TRIPLE TALAQ

Talaq is the Islamic word for divorce and it literally means separating and breaking of marriage. In essence, 'the talaq is a unilateral repudiation or cutting off the marital tie'[81]. Muslim law makes an obligation upon the husband to give consideration of the marriage to the wife as a mark of respect. In lieu of sharia perspective, there are more ways to end a marriage and talaq is just one of them. Under the Hanafi School, founded by Abu Hanifa (699-767 A.D)[82]. It is to be said that the divorce is only at the instance of the husband is prominent rather than simple.

In Hanafi law, the talaq-ul-biddat or triple talaq may be used by husband. Although it is not accepted by classical jurisprudence, husband has the advantage of simplicity and finality. In Mohd. Umar khan v. Gulshan Begum, [83] it was held that triple talaq is usually done by ignorant Muslims to satisfy their selfish needs. The most common method of talaq-ul-biddat is for the triple pronouncement of talaq al-hasan to be brought together in a single meeting. There is no requirement of evidence to prove the talaq pronounced by husband, the presence of third person is also not necessary and the wife left with no option to challenge talaq.

Holy Quran under Chapter 25 says that;

"Divorce is only permissible twice; after that, the parties can hold up together or proceed with separation".

Sunni law gives effect to talaq-ul-biddat through its traditional interpreters, even if it violates the Quranic law procedures. According to interpreters talaq-ul-Biddat is "sinful but effective" proposition in English "Bad in theology but good in law". This

[80] (1861)8 MIA 397 (395
[81] DAVID PEARL & WERNER MEENSKI, MUSLIM FAMILY LAW, Sweet & Maxwell, 281 (3d ed. 1998)
[82] D.F MULLA, PRINCIPLES OF MAHOMEDAN LAW, P D L Publishers, xix (20th ed., 2013)
[83] 1992 cri LJ p.899 at 900 (MP)

irregular mode of talaq was introduced by Omeyyads[84] in order to evade the stringency of law.[85] As specified above triple talaq or talaq-ul-Biddat becomes irrevocable immediately pronounced by husband and children born after the dissolution of marriage by triple talaq will be illegitimate.

In *Rashid Ahmad v. Anisa khatoon*[86], talaq was pronounced thrice by the husband in presence of the witnesses but in absence of wife. After four days talaqnama was executed. But even after the valid talaq husband and wife started living together and four children's born to them. Court held that, since the talaq is valid but there is no evidence to prove that another marriage has been consummated. Thus, the women failed to perform iddat and children's born to them are illegitimate as the bar to remarriage was not removed according to the principles of Muslim personal law.

BEGINNING OF TRIPLE TALAQ

No verse in the Holy Quran can be interpreted which give authenticity to so called tripe talaq. Triple talaq is recognized but it is disapproved form of dissolution of marriage. Prophet condemned triple talaq as *"playing with the book of God while I am still alive"*[87]. After the death of Prophet, the second Caliph, Umar started giving effect to triple talaq in order to restrict the abuse and misuse of religion. When Arabs conquered Egypt, Persia, Syria and other States, they found women over there more better in appearance in comparison with Arabian woman. Women from Syria and Egypt insisted that if they want to marry them, they should divorce their existing wives by pronouncing triple talaq in one sitting. And, this condition was duly accepted by Arab men because they knew that under Islam divorce is only permissible twice in two separate periods of tuhr, and pronouncing triple talaq in one sitting is void, un-Islamic and shall not be effective. Arabs had a bad intention that in this way they cannot only marry these women but also retain their wives. When it comes to the knowledge of Caliph Umar, he decreed to give validity of dissolution of marriage by triple talaq irrevocably. It was mere an Administrative measure to meet emergency situations and not to make law. But, unfortunately Hanafi Jurist declared practice of

[84] The Banu Umayya or Umayyads, were the ruling family of the Islamic caliphate between 661 and 750 and later of Islamic Spain between 756 and 1031. In the pre-Islamic period, they were a prominent clan of the Quraysh tribe descended from Umayya ibn Abd Shams

[85] AQIL AHMAD, MOHAMMEDAN LAW, Central Law Agency, 171, 2008

[86] (1932) 59 IA 21 (Alld): 1932 PC 25

[87] TAHIR MAHMOOD, MUSLIM LAW IN INDIA AND ABROAD, Universal Law Publishing, 132 (2nd ed. 2016)

triple talaq valid and cover religious sanction to it which is now a horrifying precedent[88].

PERVERSE IMPACTS OF TRIPLE TALAQ

Triple talaq is a practice which was added later in to the Muslim culture[89]. When a deserted wife knocks the door of court to get relief either of separate maintenance or restitution of conjugal rights after waiting so long years for reconciliation, the husband pretends that he has already divorced his wife in the patries to defend himself by pretending to have divorced his wife in past, even if it is not because no burden of proof lies on husband to proof the statement of triple talaq and intention for dissolution of marriage. These instances turn the marriage scary when court refuses to decree relief in favor of wife[90].

But in *Dagdu Pathan v Rahimbi Pathan* [91]Aurangabad bench of Bombay High Court refused to accept husband plea of talaq in a case of maintenance for the very first time and held that mere making a statement that the husband has triple talaq his wife is not sufficient, the stages in which talaq has preceded and the factum of talaq is required to be proved before the court. Then only court would be able to decide the genuineness and validity of triple talaq. Here court relied upon the words of Quran, *"divorcing the wife without reason just to harm her for protesting the husband's unlawful demand and divorcing her in violation of sharia law is haram"*.

SOCIAL ASPECTS OF TRIPLE TALAQ

The exercise of this practice has a deleterious effect on Muslim women. Women are financially as well as emotionally detached with their children's, for which husbands serves no obligation. The lives of both wife and children are held on stake after the talaq pronouncement.

The trauma of triple-talaq is prevalent in reality for the women. In 2001, a lady was divorced on phone by her husband just because her husband was not ready to give her money to meet her medical expenses[92]. In another situation, a lady Amira was refused to enter into the house along with her children by her husband on returning from visit

[88] Id 11 at 174-175, 2008
[89] Saleha v sheikh AIR 1973 MP 207
[90] Ajmery v Moin 1983 ALJ 1332
[91] 2002 (3) MhLJ 602
[92] Manoj Nair, Two Women recall: Triple Talaq Trauma, Mid Day 2(2004).

to her mother house. Husband claimed that he had divorced her by instant triple-talaq, while Amira did not even know of it[93].

There are various other instances also were this unscrupulous practiced had been misused, the latest example, came when a husband divorced his wife on whatsapp, a social-networking mobile application. The misuse of this practice has become rampant and needs judicial repair. This practice violates the basic right to live with dignity of every Muslim woman and is a question of serious concern. Equality had been basic derivative of the Indian Constitution for long time. However, since long, the practice of triple talaq has denied equality to women at large. It fundamentally demarks the agenda of equality, and makes it an unconstitutional provision followed by the country, due to which the Muslim women's are still left in the grey areas, which has to be taken care in order to achieve total equality. Muslim women are often caught between loyalties to their religious or ethnic communities and a desire for greater freedom and equality as women[94].

The Holy Quran declares husband and wife as complementary to each other and states,- "O men, they (women) are as a garment for you, and you are as a garment for them".[95] Also one chapter (An-Nisa) is not only named "The Woman" but also deals in detail with the rights and the status of woman in the family and society. Though Quran unambiguously stresses on gender justice, a Muslim husband is left almost free under the personal laws to ignore the wife after talaq and push the wife into a state of destitution and vagrancy.[96]

While the practice of triple talaq is banned in more than 21 Muslim majority countries, including Pakistan, the ulema have been constantly arguing on the validity of this practice. The Ulemas have discretion that the laws speculated to humans are God-given and cannot be subject to human change. But the facts should be envisaged that Quran nowhere contemplates anti-women, inhuman and unjust practices to be followed by his disciples. In fact, the Quran makes clear speculation for three-four month period in the final call for talaq and encourages sufficient attempts of

[93] Id at 3
[94] ZOYAHASAN&RITUMENON, THE DIVERSITY OF MUSLIM WOMEN'S LIVES, Rutgers University Press 6-7 (2005)
[95] Holy chapter 2, Verse 187
[96] ASGHAR ALI, STATUS OF MUSLIM WOMEN, 29economic And Political Weekly, 297-300, 298 (1994)

reconciliation and mediation, which clearly makes this practice un-quranic and unconstitutional.[97]

BACKGROUND LAWS SUPPORTING PERSONAL LAW

In India, certain areas of law are permitted to follow religious law.[98] This concept is called personal law. Marriage and divorce fall within the scope of personal law and are thus subject to religious regulation. " Parliament also has the authority to legislate family relations. Many Muslims view personal law as a way to protect "their faith, their culture and their way of life."Muslims in India have traditionally followed Shariah law, "which is interpreted a nd tilted in their favour by male religious leaders, allowing them to marry up to four ti mes and granting them the right to unilaterally divorce their wives."[99]

Personal law is protected by several sections of the Indian Constitution, including, for example, Article 21. Personal law is also fiercely guarded by religious rights advocates.[100] Furthermore, Article 25(1) of India's Constitution states:

All persons shall be equally entitled to freedom of conscience and the right freely to p rofess , practise and promote religion, subject to public order , morality and health and the other provsions of this Part. [101]

Though India codified many laws to prevent personal laws from infringing on certain group rights, instant divorce remained unchallenged. In addition, India does not have laws that uniformly apply to marriage and divorce. Courts in India typically proceed with caution when striking down laws which implicate areas traditionally protected by personal law.'" However, in cases of severe inequality, such as gender inequality, the intersection of these rights highlights the need for the Supreme Court to address the prejudicial impact on vulnerable groups (e.g., women left destitute by the instant talaq practice).[102]

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[97] Id

[98] See Mohammad Ghouse, Personal Laws and the Constitution in India, in ISLAMIC LAW IN MODERN INDIA 50, 55 (Tahir Mahmood ed., 1972).

[99] Lamat R. Hasan, Battle to Pass Bill Banning Instant Divorce by Indian Muslim Men is On, DAWN (Feb, 2020), 10.01 am, https://www.dawn.com/news/13862

[100] Id

[101] M P Jain, INDIAL CONSTITUTIONAL LAW, LexisNexis, 2018

[102] See Michael Safi, India Court Bans Islamic Instant Divorce in Huge Win for Women's Rights, GUARDIAN (Feb, 2020) 10:17 am, https://www.theguardian.com/world/2017/aug/22/india-supreme-court-bans-islamic-instant-divorce-triple-talaq

Under the Sharia Act of 1937, wives shall not "pronounce triple talaq and are required to move a court for getting divorce." This Act codified religious law in India, leaving a gap between religious practices and governmental law, particularly pertaining to the evaluation of fundamental and equal rights issues. While this method of divorce has been employed for decades, neither the Qur'an nor Sharia Law have explicitly recognized the practice.[103]

Finally after a long journey for the protection of rights of women, in Shayara Bano[104] Judgement in 2017 instant triple talaq was declared void, also those who pronounces triple talaq will have ti face the criminal consequences as per Muslim Women [Protection of Rights on Marriage] Act, 2019.[105]

PATHYWAY LEADING TO VIOLATION OF RIGHTS OF WOMEN

In Islam marriage has been regarded as an important function which an ideal Muslim whether male or female should perform firstly in order to save the society from unchastity and to build up a healthy society.[106]

This practice of talaq has deleterious effect on women; breaking of a marriage contract has emotional and financial concerns. Often it is not interest of women, which are at stake, but those of their children as well.[107]

The trauma of triple-talaq is rife in the reality of women. For example Sameera, a resident of Doungri, married a Moulana in 2001.[108] Her husband was not ready to spend money on her medical bills after she became ill after her marriage and was to ld to go to a doctor and declined to take her up. He called from Lucknow a month late r and pronounced triple-talaq on the phone.[109]

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[103] Katelyn L. Dryde, India's Highest Court Strikes Instant Divorce Law Available to Husbands Only-Previously Protected by Personal Law, *44 N.C. J. Int'l L. 85 (2018-2019)*, 85-116
[104] Shayara Bano v. Union of India and others, (2017) 9 SCC 1
[105] Id
[106] Furqan Ahmad, *Understanding the Islamic Law of Divorce*, 43 Journal of Indian Law Institute 484, 485 (2003).
[107] Seema Durray, *Muslim Law of Divorce in India: A legal Reflection*, in Imtiaz Ahmad (ed.) Divorce and Remarriage Among Muslim 397 (Manohar, New Delhi, 2003).
[108] Manoj Nair, *Two Women recall „triple Talaq trauma*, International Journal of Advanced Legal Research in Law & Social Science, July 21, 2004
[109] Id

Another is the high profile case of Najma Bibi from Orissa, where the husband divorced his wife in inebriated condition only to regret it later, brought to the forefront the regrettable consequences of the triple-talaq practice.[110]

The scholars of Muslim law, who consider three divorces at a time as one, argue that in our present social set up religion has been relegated to such an extent that religious values have become eclipsed. It has ceased to be a way life, a guiding source and an inspiration. This is because we have neglected our prime duty to learn, explore and acquire religious knowledge.[111]

"If a man who has pronounced a triple-talaq say he did it either in ignorance of law or merely to put emphasis on his words, his marriage remain intact until the expiry of his wife‟s iddat- during this period he can unilaterally revoke the talaq, if he has not done so within that time, any time later he can marry her with her consent."[112]

LAW AND RELIGIOUS ASPECTS OF TRIPLE TALAQ

In Islam, law cannot be dealt with as a separate aspect from religion. J. Mahmood in *Govind Dayal v. Inayatullah*[113] held, "it is to be remembered the Hindu and Mohammedan Laws are closely connected with religion that they cannot readily be served from each other."

The above judgment is totally applicable in the cased of "TripleTalaq", either the three pronouncement should be treated as one revocable divorce or three divorces. For this problem both legal and religious aspect are the same and the two aspect only deal with the problem whether three divorces in single breath should be taken as one or three.[114]

SUPREME COURT RULING

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[110] In this case Nazma Bibi‟s husband divorced her in May 2004, following a quarrel in an inebriated condition. Later her husband regretted his decision and the couple continued to stay together. However, village elders objected to their living together after the Talaq. The couple went to the local Maulvi and obtained a „fatwa‟ nullifying the divorce. This was not accepted to them who physically assaulted the couple.

[111] Furqan Ahmed, *Triple Talaq: An Analytical Study with Emphasis on Socio-Legal* Aspect 13 (Regency Publication, New Delhi, 1994) 73

[112] Tahir Mahmood , *No More Talaq, Talaq, Talaq: Juristic Restoration of True Islamic Law of Divorce*, 12 Islamic and Law Quarterly Review, 1 (1992), 11

[113] (1895) 7 All. 775, 781; cf. Furqan Ahmed, *Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspect* 86 (Regency Publication, New Delhi, 1994).

[114] Samreen Hussain, *Triple Talaq: A Socio-Legal Analysis,* Indian Law Institute Law Review, [2010], 129, 139.

In majority of the triply talaq cases, the particles of domestic violence are clearly visible. Dominant partner being the husband, who arbitrary in the state of being angry divorce his wife without any justifiable reason and even without encroaching for reconciliation and arbitration. This oppressive act of husband discriminates the fundamental rights of women on the grounds of Sex and Religion.[115]

The journey of triple talaq in Indian history can be divided into pre independence and post-independence period of our nation, while post-Independence the view has been broaden compared to conservative thoughts of pre independence period.

Triple Divorce is recognized and enforced by Indian Judiciary from inception, as early as in 1905 in the case of *Sara Baiv. RabiaBai*,[116] the Bombay High Court recognized triple divorce on irrevocable footing. Further the Privy Council also in the case of *Saiyid Rashid Ahmad v. (Mst) AnisaKhatun*[117] recognized triple divorce" pronounced at one time as validly effective. In *Ahmad Giri v. Begha*[118], the court for the first time counted the role of intention as very important factor in determining the effectiveness of the divorce. However, the court refused to bring about any change in existing form of talaq-ul-biddat.[119]

The basic reason for this attitude of the judiciary could be due to the fact that judiciary in British India believed that the Muslims in India have faith that there law is of „divine" origin, therefore is infallible, immutable and unchallengeable. There was reluctance among the judiciary on the account that a decision should not hurt the feeling of the general Muslim. In spite of realizing the deficiency they could not contribute meaningfully. [120]

Logical conclusion of original sources of Islam relating to talaq reveals that neither the husband nor the wife has the unbridled and arbitrary power to divorce. In view of these facts unintentional tripletalaq pronounced at single occasions, are in total negation to Sharia.[121]

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[115] Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
[116] ILR (1905) 30 Bom 537
[117] AIR 1932 PC 25
[118] AIR 1955 J&K 1
[119] SamreenHussain, *Triple Talaq: Socio Legal Analysis*, 1 ILI law Rev. 143-145 (2010)
[120] Supra 24 at 143
[121] *(1981) 1 Gau.L.R 368.*

K. Iyer, J. in the case of *A. Yousuf Rawthher v. Sowramma*[122] held that it is a popular fallacy that Muslim male has unbridled power of divorce as it‟s against the injunction of Holy Quran. And that the Muslim law as applied in India has taken a course contrary to the spirit of Islam.

In the case of *Rukia Khatun v. Abdul Khalique Laskar*,[123] the Court decided that the exact law of talaq as contained in Quran is that the talaq must be for a reasonable cause and must be preceded by the attempts at reconciliation between the husband and wife by two arbitrators of whom one of them chosen by the wife from her family and other by the husband from his. It is only when their attempts failed talaq may be effectuated. In *Ahmadabad Women Action Group v. Union of India*,[124] A written petition was filed to declare Muslim Personal Law that allows a Muslim male to pronounce unilateral talaqto his wife without her permission and without resorting to court proceedings as violating Articles 13 , 14 and 15 of the Constitution. However, court refused to entertain the writ petition, because the issue involved state policies.

The 18 April 1996 rally towards Mantralaya in Bombay marked as the first step towards protecting Muslim women's rights was the commencement of social justice movement against triple talaq.

Before independence, the British government was of views that as Muslims in India have faith that there law is of divine origin, therefore there personal laws and religious belied are infallible, immutable and unchallengeable. There was reluctance among the judiciary that any change or interference should hurt the feeling of the general Muslim and can bring revolt against the government. So, in spite of realizing the deficiencies in the practice they could not contribute meaningfully.

This trend was changed in 1985, *Mohd. Ahmed Khan v Shah Bano Begum*,[125]where the five-member bench of the Supreme Court consisting of Chief Justice Chandrachud, Justice venkatahramaiah, Justice Chinapappa Reddy, Justice Desai & Justice Mishra held that section 125 of Crpc is open to every divorced wife irrespective of any religion who are entitled to approach the court for maintenance. Supreme Court also clarified that "wife" includes unmarried women who is not yet

[122] AIR 1971 Ker. 261.
[123] (1981) 1 Gau. L.R. 375.
[124] (1997) 3 SCC 573
[125] AIR 1985 SC 954

remarried. Court further observed that mere paying deferred dower at the time of divorce is not the conclusion. The husband is entitled to maintain not only divorced wife but also the children born to them. However, the court found that even Quran imposes an obligation to maintain the wife after divorce without rhyme and reason, wife should not be kicked out on the streets just to die without roof.

In, *Shamim Ara v State of U.P & Ors* [126]the appellant-wife filed an application under section 125 of Criminal Procedure Code complaining about cruelty to her, her children and of desertion. In reply husband mercilessly said he had divorced her earlier and therefore he is not entitled to maintenance. No evidence provided regarding the statement of circumstances, no proof for reconciliation and no witness were in support of talaq. The family court rejected the plea of wife for maintenance. Wife appealed in Allahabad High Court and again failed to seek any relief. Apex court in Special Leave Petition rejected the arbitrary triple talaq and held, the liability of husband to maintain his wife shall not come to an end based on just mere communication that she has been divorced. However in *State of Bombay v Narasu Appa Mali*,[127] the SC held that personal laws cannot be invalidated even if it violates the fundamental rights since personal laws are not laws in force as stipulated in Article 13 of the Indian Constitution (hereinafter Constitution). Thus in State of *Bombay v Narasu Appa Mali*, on the basis of a narrow interpretation of Article 13, the SC implicitly held that personal laws are exempted from any constitutional challenge. The Narasu Appa Mali judgement was upheld in *Sri Krishna Singh v Mathura Ahir*[128] but rescinded in *Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil*.[129] The Court ruled that personal laws can be subjected to judicial process if they are inconsistent with the fundamental rights however, again in *Ahmedabad Women's Action Group v Union of India*[130] the SC resorted to the reasoning of Narasu Appa Mali judgement.

Justice Lahoti further held that, the talaq must pronounce in support of Quranic Injunction. The term 'pronounce' shall not be used as meaning of dictionary it denotes "to utter formally, to declare, to proclaim, to articulate".

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[126] MANU/SC/0850/2002
[127] AIR 1952 Bom 84
[128] (1981) 3 SCC 689
[129] (1996) 8 SCC 525
[130] 3 SCC 573

In, *Riaz Fatima v Mohd Sharif*[131] husband pleaded that wife is disentitled to maintenance since he had already divorced her. He also challenged the paternity of child by alleging his wife of bad character. Husband also produced the copy of fatwa[132] to proof the validity of talaq. Magistrate Court rejected the contention of the husband and awarded maintenance to the wife and child where Sessions Court set aside the order of maintenance.

Delhi High Court in appeal laid down the guidelines regarding the procedure of pronouncing triple talaq which involves

1. Divorce shall not be against the mandate of Holy Quran and must be for reasonable cause.
2. Burden of proof lies on husband to proof the proclamation of triple talaq in presence of witnesses or in writing. Till then talaq will not be valid.
3. Prior to divorce an attempt must be made for settlement/Conciliation by the husband.
4. Husband must show proof of payment of Meher (Dower).

The court held that before Muslim husband divorce his wife he must fulfill all the pre-requisites in order to give validity to triple talaq pronounced by him.

In 2017, the Supreme Court of India comprising of five judge's constitution bench in Shayara Bano case passed landmark judgment in the history of triple talaq by banning the Muslim practice of triple talaq in India by declaring it as unconstitutional which was strickdown by 3:2 majority. Shayara Bano (wife) challenged the 'talaq nama' delivered to her by husband who pronounced talaq, talaq, talaq in presence of two witnesses. Wife challenged the same before the apex court to declare the divorce as "void ab initio" relying upon the claim which violates her fundamental rights[133].

Writing the judgment, Justice Goel expressly condemned in the issue of Gender discrimination faced by the Muslim women, arisen from this practice. "It was noted out that even though Constitution guarantees; Muslim women are subjected to discrimination.There is no defence against her husband's arbitrary divorce and second

[131] (2007) DMC 26 Del
[132] A ruling on a point of Islamic law given by a recognized authority
[133] Supra 20

marriage during the currency of the first marriage, resulting in her being denied dignit y and security."[134]

The All India Muslim Personal Law Board(AIMPLB) in opposing the petition contented that the Supreme Court does not have any jurisdiction and cannot interfere or rule into the matters of Muslim personal laws. The laws are an inference of Allah, and are untouchable. Also, JamiatUlama-i-Hind contended that the apex. The statutory validity of marriage, divorce and maintenance practises in Muslim person al law can not be questioned by a court on the ground that the rules of personal law can not be challenged on the grounds of fundamental rights. They claimed that "personal la ws should not derive their legitimacy on the basis that a legislature or other competent a uthority has enacted or created them.

"Their respective scriptural texts are the fundamental sources of personal rule.

The Mohammedan Law is fundamentally based on the Holy Quran and can therefore no t fall within the meaning of the term 'laws in force' as alluded to in Article 13 of the Indi an Constitutiton, and therefore its validity can not be challenged on the basis of a challe nge based on Part III of the Constitution."[135]

The AIMPLB argued that in *Ahmedabad Women Action Group v Union of India*,[136] th e issues being investigated by the Supreme Court in the present case had already been dealt with by the Court. In this case , the Supreme Court held that these matters applie d entirely to questions of State policy which were of no interest to the Court and, there fore, to be dealt with by the legislature.

MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ORDINANCE, 2019

Taking into consideration the triple talaq judgment by the Honourable Supreme Court in Shayara Bano v Union of India, Ravi Shankar Prasad, the Law Minister took an initiative and presented the Triple Talaq Ordinance before the Lower House of Parliament i.e., the Lok Sabha which was passed by majority in 2019. The Statement of Objects and Reasons of the Muslim Women Bill, 2019 states that the judgment did not work as a deterrent in reducing the number of cases of triple talaq.

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[134] Ashok K M, SC set to hear challenge against Triple Talaq and Polygamy, https://www.livelaw.in/sc-set-to-hear-challenge-against-triple-talaq-and-polygamy/, 15 February 2020, 11.25 am

[135] Court can't test validity of Personal Law: Muslim group to Supreme Court, LIVELAW, 15 February 2020, 11.32 am http://www.livelaw.in/court-cant-test-validity-of-personal-law-muslim-group-to-supreme-court/.

[136] (1997) 3 SCC 573

It explains, "It is felt that there is a need for State action to bring the decision of the Supreme Court into effect and to address the concerns of victims of illegal divorce. In order to avoid the continuing abuse from being delivered to the helpless Muslim women who are married due to talaq-e-biddat, suitable legislation is necessary ugently to give some relief to them. [137]

Triple Talaq Bill officially known as Muslim Women (Protection of Rights on Marriage) Bill, 2017 made instant triple talaq an punishable offence where the pronouncement of triple talaq will be void, illegal and would punish the husband for a term of three years. Opposition parties and community leaders have argued that attracting jail sentence for a man for divorcing his wife is is said to be "legally untenable". The gfovernment has asserted that it provides justice and equality to Muslim women. [138]

Certain safeguards has been provided to prevent the misuse of the proposed law. There is now provision of bail for the accused before trial. While the ordinance defines it a "non-bailable" offence, any accused can approach a magistrate even before starting of trial to seek bail. In a non-bailable offence bail cannot be given by police at the Police Station itself. A provision has been included to allow the Magistrate to grant bail "after hearing the wife".[139]

CONCLUSION

Divorce by means of triple talaq has always been a question in India. Since there existed no peculiar laws or legislations defining the procedures to be followed in granting divorce and also as Muslin law always remained as personal laws, there was difficulty in determing the clarity to be followed while practicing these laws. It took several years to get a prominent judgment in finding out the inequality followed in divorcing a wife by pronouncing triple talaq instantaneously. Although several arguements were raised against criminalising triple talaq none of them rooted in its stand.

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[137] Pushraj Deshpande, Triple Talaq, Judgment Of Hon'ble Supreme Court And The Most Anticipated Triple Talaq Bill, 5 February 2018, https://www.mondaq.com/india/Family-and-Matrimonial/670318/Triple-Talaq-Judgment-Of-Hon39ble-Supreme-Court-And-The-Most-Anticipated-Triple-Talaq-Bill 15 Ferbruary 2020, 11.57 am

[138] Shirin Abbas, *Triple Talaq Bill And Muslim Voice : Is A Law Necessary*?, March 2019

[139] Id

Since there was no particular law governing the religious regulations, personal laws ruled the religious practices. The history of triple talaq has shown how the helplessness of women have been used by men inorder to make the life of men even more smoother. Women didn't have any voice in demanding their rights towards marriage and divorce and thus remained as a discriminated section tied by the rules of religion. The protest to gain their rights have begum centuries before where by the first legislation was formed by Parliament 1939 named Dissolution of Marriage Act, 1939 where by women where allowed to obtain divorce fro courts. Later in 1986 Parliament passed the The Muslim Women (Protection of Rights on Divorce) Act, 1986 where by the claim for maintanence by Muslim women where settled.

The journey towards eradicating triple talaq began in 1905 in the case of *Sara Bai v. RabiaBai*[140] where the Bombay High Court declared Triple Talaq as irrevocable. Later the inequalities and hardships suffered by the women where no longer considered by any courts unless a lady Shayara Bano approached the Honourable Supreme Court seeking its consideration in abolishing the practice of pronouncing triple talaq. Thus the practice was banned in 2017, by 3:2 majority.

Triple talaq was banned in other countries years back, while in India it took 69 years after independence to bring in a legislation to point out the basic human rights deniel to Muslim women. According to the survey of Bharatiya Muslim Mahila Andolan (BMMA) morethan 50 percent of the Muslim women were divorced by pronouncing triple talaq where most of them were uneducated and poor. Thus triple talaq added only in increasing the hardships and cruelty faced by them.

[140] (1906) 8 BOMLR 35

CHAPTER IV

INTERNATIONAL SCENARIO FOLLOWED IN TRIPLE TALAQ

INTRODUCTION

Triple Talaq in simple words is a form of divorce in Muslim law where the word "talaq" is spoken three times in oral, written or electronic form by the husband. Triple talaq, also referred to as talaq-e biddat, immediate divorce and talaq-e-mughalaz (irrevocable divorce), is a form of Islamic divorce used in India by Muslims , especially adherents of Hanafi Sunni Islamic jurisprudence schools.

The Muslim Personal Law (Shariat) Application Act, 1937 (also known as the "Muslim Personal Law") regulates Muslim family relations in India. After coming to force of Government of India Act, 1935 became operational which introduced regional autonomy and a form of dyarchy at the central level, it was one of the first acts to be adopted. It replaced the socalled "AngloMohammedan Law," which previously served for Muslims, and became binding on all Muslims in India.

Triple talaq is considered to be an especially unapproved but legally legitimate form of divorce in traditional Islamic jurisprudence. Since the early 20th century, changing social circumstances around the world have led to growing discontent with traditional Islamic divorce law, and various changes have been undertaken in different countries. Muslim couples in India are not expected to register their marriage with the civil authorities, contrary to procedures followed in most Muslim majority countries. Unless the couple wishes to register their marriage under the Special Marriage Act of 1954, Muslim marriages in India are considered a private matter. Because of these historical reasons, the controls imposed by governments of other countries on the husband's unilateral right of divorce and the prohibition of triple talaq have not been carried out in India.

While responding to the juristic debate on the question whether three repudiations of "talaq" in one session equate to "one" repudiation, several Muslim states have carried out changes in their personal laws.Historically, various schools of thought in Islam have varied significantly on this subject, and this has been

debated as a topic of debate among a majority of Sunni jurists who favour the position of threeisthree, facing strong opposition from a small but very vocal minority of thos e Sunni jurists who favour the position of three-is-one.[141]

EGYPT

Triple Talaq was first abolished in Egypt in 1929. Before the 1920s reform, the most popular form of divorce in Egypt was triple talaq, that is to say, the utterance of talaq thrice in one sitting, and the destruction of marital life in one demeaning breath.[142]The conditional talaq in particular was frequently manipulated by Egyptian husbands to terrorize their wives and gain their obedience.[143] Husbands often used to condition divorce on their wives' leaving the house to visit relatives or having guests without permission.[144] In fact, the threat of divorce, and the use of it as a bargaining chip, became so frequent, sleazy, and cheap as to render it a common masculine figure of speech.[145] Triple talaq was abolished in Egypt where a divorce accompanied by an explicit or implied number is issued, it shall be counted only as a single divorce and such a divorce is revocable unless three talaqs ar e granted, one in each tuhr.[146]

The architects of Egyptian divorce reform recognized an exhaustive list of four fault-based divorce grounds entitling a woman to freedom: failure to provide maintenance (but payment is sufficient to revoke the divorce);[147] dangerous or contagious disease (unless the woman knew of the defect prior to marriage or explicitly or implicitly accepted it afterwards);[148] desertion for at least one year without justified cause, or

[141] See Muhammad Munir, *Triple Talaq in One Session: An Analysis of the Opinions of Classical, Medieval, and Modern Muslim Jurists under Islamic law* 27 Arab L. Q. 29–49 (2013)
[142] RUBYA MEHDI, THE ISLAMIZATION OF THE LAW IN PAKISTAN, Routledge; 1st Edition (May 22, 2015) 166-67 (1994).
[143] AHARON LAYISH, WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATE, Wiley, 156 (1st Edition1975).
[144] RON SHAHAM, FAMILY AND THE COURTS IN MODERN EGYPT, Brill, 95, 105-106 (1997).
[145] Id at 224
[146] See, Article 3 of Law No. 25 of 1929, as amended by Law No. 100 of 1985 Concerning Certain Provisions on Personal Status in Egypt
[147] Arts. 4-6 of Law No. 25 of 1920. See JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW, Syracuse University Press, 61 (2nd ed. 2001), 52-53.
[148] Arts. 9-11 of Law No. 25 of 1920.

imprisonment for three years;[149] and maltreatment, defined as, a harm which would make cohabitation impossible for a woman of equivalent social standing.[150]

While some streams of Islamic law recognize divorce pronounced in any state of mind, and even include conditional, contingent, or qualified repudiations,[151] the Egyptian legislature invalidated talaq pronouncements expressed under intoxication or coercion,[152] as well as conditional,[153] or ambiguously expressed talaq.[154] This legislative progress is not trivial and must not be underestimated. Prior to this reform, the injustice and hardship inflicted by these problematic types of talaq were literally immeasurable.[155] Sadly, it was the wives who had to pay the price for their husbands' frivolity or bad temper: the only way to undo such a divorce is for the wife to marry another man, share his bed, and be divorced by him after the consummation of their sham union.[156]

As already stated, before the 1920s reform, the most popular form of divorce in Egypt was triple talaq, that is to say, the utterance of talaq thrice in one sitting, and the destruction of marital life in one demeaning breath. To this day, men in the Islamic world resort to triple talaq, exploiting such modern technological advances as fax, phone, SMS, and even e-mail, to render marital termination all the more simple, impersonal, and instantaneous. Muslim women, in response, are reported to refuse to perform ordinary activities such as answering phones or opening letters, for fear of a triple divorce lying in ambush. Unsurprisingly, this unjust repudiation formula has been depicted as "the greatest black mark" against Islam's treatment of women, giving Islam a reputation as the most misogynist religion in the world.

Courageously, the Egyptian legislature put an end to this degradation of Egyptian women and to the frivolous treatment of divorce by men: it divorced triple divorce

[149] Arts. 12-14 of Law No. 25 of 1929.
[150] Art. 6 of the Law No. 25 of 1929.
[151] Supra 8 at 29
[152] Art. 1 of Law No. 25 of 1929.
[153] Art. 2 of Law No. 25 of 1929.
[154] Art. 4 of Law No. 25 of 1929.
[155] Supra 8 at 18
[156] See BARBARA FREYER STOWASSER & ZENAB ABUL-MAGD, *TAHLIL MARRIAGE IN SHARI'A, LEGAL CODES, AND THE CONTEMPORARY FATWA LITERATURE, IN ISLAMIC LAW AND THE CHALLENGES OF MODERNITY*, Brill, 161, 163 (JAN 2008)

from its statute book, thus eliminating a powerful patriarchal tool for perpetuating women's subordination within a domestic power hierarchy.[157]

TALAQ IN ENGLISH LAW

English Law preceding 1971 extra-judicial dissolutions of marriage was clear and concise: an extra-judicial divorce would be recognised in English law if it were valid by the law of the spouses' domicile. Assuming a divorce similar to this to be valid under the law of the spouses' domicile, it could be effected in England.[158] If the spouses were domiciled in England, an extra-judicial divorce, wherever effected, would not be recognised in English law. Recognition of extra-judicial divorces has been both considerably complicated and considerably liberalised by the Recognition of Divorces and Legal Separations Act 1971 and Domicile and Matrimonial Proceedings Act 1974.[159]

The question of recognition of extra-judicial divorces in England most commonly arises in regard to the Muslim talaq. The point which requires to be validated is whether an extra-judicial divorce such as talaq should be recognised under sections 2 to 5[160] of the Recognition of Divorces and Legal Separations Act 1971 as a divorce obtained by "judicial or other proceedings", or whether its recognition should depend solely on whether it qualifies for recognition under the common law rules of section 6 of 1971 Act. It must be emphasised that basically what recognition under sections 2 to 5, as opposed to recognition under section 6[161], accomplishes is to allow a spouse domiciled in England, or married to an English domiciliary, or habitually resident with his spouse in England, to escape the matrimonial jurisdiction of the English court

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[157] Karin Carmit Yefet, LIFTING THE EGYPTIAN VEIL: A CONSTITUTIONAL ROAD MAP TO FEMALE MARITAL EMANCIPATION IN THE ISLAMIC WORLD, 5 5 The Family in Law Journal, 88-175, 2011

[158] *Qureshi v Qureshi* [1971]1 All E.R 325. In view of the provisions of the section16(1) of the Domicile and Matrimonial Proceedings Act 1973, this decision does not apply to extra-judicial divorces after 1 January 1974.

[159] Lucy Caroll, TALAQ IN ENGLISH LAW: BARE TALAQS, PROCEDURAL TALAQS AND POLICY CONSIDERATIONS IN RECOGNITION OF EXTRA-JUDICIAL DIVORCES, 28 Journal of the Indian Law Institute, January- March 1986, 14-35

[160] A divorce may be recognised under sections 2 to 5 of the 1971 Act, which provide for recognition of a divorce obtained "by means of judicial or other proceedings" in a country with which at least one of the spouses is connected by the prescribed ties of nationality or habitual residence

[161] Divorces or legal separations obtained in the country of the spouses' domicile or obtained elsewhere and recognized as valid in that country.

and to avoid compliance with those procedures considered appropriate for the dissolution.[162]

Neither the Pakistani nor the Indian Muslim husband domiciled in England could dissolve his marriage by a talaq pronounced in England. But the Pakistani Muslim could, it seemed, return briefly to his country of nationality, pronounce the talaq formula of divorce on Pakistani soil, comply with the formalities of the Pakistan Muslim Family Laws Ordinance, 1961, and return to England as a divorced man. His foreign extra-judicial dissolution of marriage would be recognized in English law once the period of ninety days as prescribed by the Muslim Family Laws Ordinance and reckoned from the date on which he had given notice of the talaq to the chairman of the appropriate union council had expired.[163]

Also an Indian domiciled in England, might be tempted to try to divorce his wife in an equally simple and unilateral fashion. But if he journeyed to India, pronounced the talaq formula in his country of nationality, and returned to England thinking he had legally cast off his wife, he was in for a surprise: his talaq would not be recognized in English law.[164]

TRIPLE TALAQ DIVORCE IN EUROPEAN UNION

European Court of Justice has ruled that Islamic instant divorces are not valid under European Union law. This judgement was brought through a case brought by two Syrians living in Germany.

The couple who brought the case Raja Mamisch and Soha Sahyouni as married in 1999 in Syria. Both of them had dual Syrian and German Citizenship.

In 2013, Mamisch divorced his wife through a representative, who pronounced the divorce formula before the religious courts in Latakia, Syria. Soha Sahyouni made a declaration in which she acknowledged that she has received all the payments from her husband, as per the religious law, which was due to her under the contract of

[162] Id at 16

[163] Lucy Caroll, RECOGNITION IN ENGLISH LAW OF EXTRA-JUDICIAL DIVORCES EFFECTED BY ENGLISH DOMICILIARIES : THE PRIVILEGED POSITION OF A PAKISTANI'S TALAQ VIS-A-VIS AN INDIAN'S TALAQ, 22 Journal of Indian Law Institute, 1980, 266, 268

[164] Id at 269

marriage and from the unilateral divorce of her husband. This declaration helped Mamisch to escape from all the obligations towards Sahyouni.

Religious court granted divorce. But it was considered 'private' as the it was based on husband's declaration of intent only.

On October 2013 Mamisch went before the Munich Higher Regional Court to have the divorce granted by the Religious Court of Syria to be recognised in Germany.

Although it was approved instantly, Sahyouni on February 2014, applied to set aside the decision and made a declaration that the conditions for recognising divorce has not been satisfied.

The President of Munich Higher Regional Court rejected the declaration made by Sahyouni in April 2014 on ground that divorce was governed as per Rome III regulation which also recognises private divorce.

The Rome III Regulation, or Pact of the European Union on Divorce Law, is a regulation in 16 countries relating to the relevant divorce law. In crossborder divorces, it decides the legislation should be used.

The court further held that-

"The applicable law shall be decided in accordance with Article 8(c) of that legislatio n in the absence of a legitimate option of the applicable law and of the traditional habitual residence of the spouses in the year preceding the divorce. Where both partners have dual nationality, their successful nationality within the context of nation al law is the determining factor. Their successful nationality at the time of the divorce in question was Syrian"

Earlier, the couple lived in Germany until 2003, then Homs in Syria. They returned to Germany in 2011 due to civil war in Syria for a short time and then lived in Kuwait and Lebanon till 2012.

While rejecting the claim of Sahyouni, Munich Higher Regional Court presented a few questions regarding the interpretation of Rome III Regulation. Court of Justice held that European Union cannot have a say in divorces quoted as private settled under Sharia law and the case will not be taken again to Munich Court.

The Court of Justice also found that the Regulation only covered those divorces which were settled by National Court or under the supervision of a public authority. As the case involved a divorced from a unilateral declaration from one spouse before a religious court, this case will not come under the purview of Rome III Regulation.

PAKISTAN

The Muslim Family Law Ordinance, 1961 (hereafter MFLO) is the most significant but

controversial reform law in Pakistan. Bangladesh has inherited the same law. This legislation

is the most significant but controversial reform law in Pakistan. Bangladesh has inherited the same law. The milestone to the abolishment of triplt talaq began with the appointment of a Commission "the right to divorce which is exersised by one of the partners through a court, the proper registration of marriages and divorces, or by any other means which is judicial, maintenance and the establishment of Special Court to deal expeditiously with cases affecting women's rights."[165]

The Commission recommended that legislation be adopted providing three divorces in one session amount to one pronouncement and that two more pronouncements in two subsequent tuhrs would be required for a divorce to be efficient.[166] Moreover, legislat ion should provide that no person may declare a divorce without obtaining an order from the Matrimonial and Family Court to that effect.

Triple talaq in Pakistan to be valid, the husband need give the Chairman of Union Council notice in writing of his having to divorce his wife by pronouncing triple talaq, and shall supply a copy thereof to the wife.[167] Anyone who contravenes this provision shall be punishable with imprisonment for a term that may extends to one year or a fine up to rupees five thousand or both. Also if the husband did not stick on to this provision, he would be deemed to have revoked the talaq.[168] But this ruling was set

[165] "Report of the Commission on Marriages and Family Laws", The Gazette of Pakistan, Extraordinary, Karachi, 20 June 1197-98.

[166] Id 1214

[167] Section 7(1) of Muslim Family Law Ordinance, 1961

[168] *Syed Ali Nawaz Gardezi v Lt.-Col Muhammad Yousuf*, PLD 1963 SC 51

aside in the *Mst Kaneez Fathima v Wali Muhammad*[169] where it was held that "failure to send notice of Talaq to the Chairman of Union Council will not itself bring the conclusion that talaq would be revocated. It would remain ineffective but not revoked. Again in *Farah Naz v Judge Family Court*,[170] Supreme upheld the rule in *Syed Ali Nawaz Gardezi v Lt.-Col Muhammad Yousuf*. But *Farah Naz* case could not over rule Kaneez Fathima case because in *Kaneez Fathima* the number of judges where norethan that in Farah Naz because larger bench could not over rule a smaller bench.[171]

BANGLADESH

Although talaq-al-bida (a single irrevocable pronouncement) is said to be a sinful act, this practice is followed by the Hanafi school of Sunni school. Bangladeshi Muslims who being the followers of Hanafi school mstly practiced this form of divorce. The same procedure followed by Pakistan under Muslim Family Law Ordinance of 1961 is followed in Bngladesh also.

Before the coming into force of Muslim Family Laws Ordinance of 1961, there was no restriction on practice of triple talaq. This Ordinance has brought some significant alterations in the matter of talaq in section 7. At first, section 7(1) states that the husband has to serve a written notice of his so pronouncing a talaq to the chairman of the local government unit soon after the pronouncement of talaq in any form whatsoever. This sections covers all forms of divorce by including the words "talaq in any form whatsoever" which includes triple talaq or talaq-e-bidaat. As per section 7(3), if talaq is not revoked earlier, it shall not be effective until the expiry of 90 days starting from the day on which the notice is sent to the chairman and the said chairman shall set up an arbitration council for reconciliation between the parties the notice is delivered as per section 7(4).[172]

Sir Abdur Rahim commented that There are two reasons for the waiting period: to give time to decide if the wife is pregnant and to give the establishment of the Arbitration Council and to bring about

[169] PLD 1993 SC 901
[170] PLD 2006, SC 457
[171] Muhammad Muneer, *Reforms In Triple Talaq In Personal Laws Of Muslim States And The Pakistani Legal System: Continuity V Change*, International Review of Law, 8-9 (2013)
[172] Shirin Sultana, *Legal Position Of Triple Talaq In Bangladesh*,The Daily Star, 2020

a reconciliation between the parties.[173]Nadya Haider insists that mere pronouncement oftalaq without notice to the Chairman does not make the divorce successful in the ey esof law, although it is successful under the classical Hanafi school of law. If the coup le reconciles, the husband must withdraw the notice.[174]

The pronouncement and validity of triple talaq on a single occasion is certainly not the Islamic way of pronouncing divorce, but for many Muslims it is still a common means of divorce. Traditional religious experts prefer to give fatwa in favour of this practise (religious opinion or dictum).] In exchange, these fatwas also subject the wife to arbitrary and inhuman punishments. These fatwas, in return, subject the wife to arbitrary and barbaric punishments as well. In turn, these fatwas also subject the wife to punishments that are arbitrary and inhuman. In a recent landmark decision in Bangladesh Legal Aid and Services Trust [BLAST] v. Bangladesh, the Supreme Court of Bangladesh, in which the court ruled the imposition of extra-judicial punishment as unlawful and illegal in the name of fatwa. The case came before the Supreme Court's High Court Division (HCD) Bench in the form of a Public Interest Litigation (PIL) after multiple storeys on fatwa violence against women regularly appeared in the national media.[175]

In the case of *Abdul Aziz v. Razia Khatoon,* [176] which was subsequently relied on by the then Lahore High Court in *Maqbool Jan v. Arshad Hassan,* [177] the service of notification under section 7(1) was an necessary precondition for a valid divorce. In this case , the court mainly claimed that the notification service was to be regarded as an important requirement for the statutory implementation of talaq and that the absence of notification of talaq led to its revocation within the prescribed timeframe. In other words, after ninety days when the notice is well-served, talaq will be successful.

SRI LANKA

Although it is not a Muslim majority country, the Srilankan Marriage and Divorce (Muslim) Act, 1951 is regarded as the 'most ideal divorce law (Triple Talaq)' by some

[173] See more at: http://southasiajournal.net/the-ban-on-triple-talaq-the-legal-context-of-bangladesh-and-pakistan/#_edn20
[174] See more at: http://southasiajournal.net/the-ban-on-triple-talaq-the-legal-context-of-bangladesh-and-pakistan/#_edn20
[175] Taslima Yasmin, *The Ban On Triple Talaq:The Legal Context Of Bangladesh And Pakistan*, South Asia Journal, 2019
[176] (1969) 21 DLR 733
[177] [1975] PLD Lah 147

Islamic scholars. This act envisages that if the husband wants separation from his wife, he must inform Qazi (Muslim Judge) of his intention to try to rethink, reconsider and reconcile with the relatives of the partners, elders and other prominent Muslims of the region.[178]

OTHER COUNTRIES

The Sudanese law of 1935 provided that pronouncing all divorces by the husband is revocable except the third and final one, along with a divorce before consummation of marriage, and a divorce for consideration.[179]

The Syrian law of 1953 included provisions of the Egyptian and Sudanese laws by defining that if a divorce includes number, express or implied, only single divorce will take place and every divorce will be revocable except the third divorce, a divorce before consummation and a divorce with consideration, and in this law such a divorce will be considered irrevocable.[180]

Furthermore, according to Article 92 of Law No. 34 of the Law of Personal Status of Syria of 1953, where a divorce is followed by an amount, express or implied, no more than one divorce shall take place and every divorce shall be revocable, with the exception of a third divorce, a pre-completed divorce and a considered divorce. Further, such a divorce would be considered irrevocable

Morocco,[181] Iraq,[182] Jordan,[183] Afghanistan,[184] Libya,[185] Kuwait,[186] and Yemen,[187] incluided similar laws in 1957/1958, 1959, 1976, 1977, 1984, 1984, and 1992 respectively. Apart from these, many other Muslim countries have also included Ibn Taimiyah's opinion as the guideline for their personal laws on this topic. These

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[178]Shakeel Anwar, What is Triple Talaq and list of countries where it is banned? https://www.jagranjosh.com/general-knowledge/muslim-countries-where-triple-talaq-is-banned-1490788669-1, 15 February 2020, 10:57 am

[179]Article 3, Shariah Circular No. 41/1935 of Sudan.

[180] Article 92 of Law No. 34 of the Law of Personal Status of Syria of 1953.

[181] Article 51 Book Two of the Mudawwana of 1957 and 1958 of Morocco.

[182] Article 37(2) of Law No. 188 of 1959: The Law of Personal Status of Iraq.

[183] Article 90 of Law No. 61 of 1976: The Law of Personal Status of Jordan.

[184] Sections 145 and 146 of the Civil Law of 4 January 1977 of Afghanistan.

[185] Section 33(d) of Law No. 10 of 1984, Concerning the Specific Provisions on Marriage and Divorce and their Consequences.

[186] For Kuwaiti law, see section 109 of Law no. 51 of 1984 regarding "al-Ahwal al-Shakhsiyah" (Personal Law),

[187] See, Article 64 of the Republican Decree Law No. 20 of 1992: Concerning Personal Status of Yemen

include the United Arab Emirates,[188] Qatar[189] and Bahrain being the latest countries, respectively, to embrace Ibn Taimiyah's views on triple talaq.[190]

One move further has been taken by Tunisian law. In accordance with Article 30 of the Tunisian Personal Status Code, 1956, there will be no validity of any divorce pronounced outside a court of law, and under Article 32, no divorce can be decreed until the court has made an overall inquiry into the causes of the divorce and has failed to bring about a reconciliation. In Algerian law, divorce can be established only by a [court] decision followed by a judge's attempt at reconciliation for a period not exceeding three months.[191]

Also , Sri Lanka's Marriage and Divorce (Muslim) Act, 1951, amended up to 2006, states that a husbandwho intends to divorce his wife "shall give notice of his intention to the Qauzi" who will attempt reconciliation between the spouses "with the help of the relatives of the parties, elders and other influential Muslim persons of the area." Unfortunately , if after thirty days of giving notice to the Quazi, attempts at reconciling the spouses remain effortless, "the husband, if he desires to proceed with the divorce, shall pronounce the talak in the presence of the Quazi and the two witnesses."[192]

As per family law of the Malaysian state of Sarawak, a husband who wishes to divorce his wife has to file a request before the court to enquire into the causes of divorce and advise the husband not to proceed with it. However, if the differences cannot be removed, the husband can pronounce one divorce before the court.[193] The procedure stated in the laws of Algeria, Sri Lanka, and the Malaysian state of Sarawak, is in harmony with the procedure of talaq in Islamic law.

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[188] For the UAE, see, section 103(1) of Qanun al-Ahwal al-Shakhsiya (Personal Law) of UAE No. 28 of 2005

[189] See, section 108 of the Qanun al-Usrah (Family Law) of Qatar, No. 22 of 2006

[190] See, section 88(C) of Law No. 19 of 2009 regarding Qanun Ahkam al-Usrah.

[191] See Article 49 of Law No. 84-II of 9 June 1984, Comprising the Family Law of Algeria.

[192] See Marriage and Divorce (Muslim) Act, 1951 as amended till 2006 [Cap. 134] section 27 and Rules 1 & 2 Second Schedule. However, the law does not mention whether talaq pronounced by a husband without following this procedure is valid or not.

[193] See sections 43 and 45(1–4) of Ordinan 43 Tahun 2001, Ordinan Undang-Undang Keluarga Islam, 2001, Negeri, Sarawak. There is a similar procedure for talaq in the Federal Territory of Kuala Lumpur (Malaysia); See also, Zaleha Kamruddin, Divorce Laws in Malaysia (Civil & Shariah)167–168 (Kuala Lumpur: International Islamic University, 1998).

CONCLUSION

There is no codified Muslim law being practiced in India. However courts had been able to give a realistic approach to these personal laws. In order to bring in the principle of equality it is important that, those laws that discriminate a particular section have to be repealed. This can only be done by the judiciary. Therefore judicial interpretations have their power in rejecting a particular religious practice.

When the countries around are taken as an example, this wise step in making the practice of triple divorce void has been taken years ago. As this formula clearly violates the equality principle between a man and woman and make woman vulnerable, making triple talaq void is a step which our Constitution must have adopted before. As already stated Egypt was the first country to abolish triple talaq. They took this step because of the attitude of the men towards this practice which caused great hardship to women.

Women always had been a discriminatory piece since history defined them. All democratic Constitutions have equality clause within themselves defining their perspective towards the progress of women. In those theocratic countries where the practice of triple talaq has not been abolished completely, instructions has been laid down through legislations which point out the manner in which triple divorce must take place so that the hardship faced by women can be decreased.

In India this kind of divorce had been misused by husbands' to divorce their wife when they felt so. A case was reported in Kerala in 2015 where a husband divorced his wife after flying to Dubai just after 10 days of marriage. Divorce took place when the husband sent a triple talaq message on whatsapp.[194] Triple divorce has been a tool to threaten wives those who stand against the path of husand. Lack of education and poverty paved the way for this. A census taken in 2011 has proved that out of all divorced women, 65.5% has been divorce through triple talaq and they do not receive any kind of maintenance from their husband. With the improvement in technology, this kind of divorce started happening over text and email.

[194] Triple talaq: How it affects lives of India's 90 million Muslim women, INDIA TODAY, https://www.indiatoday.in/fyi/story/triple-talaq-muslim-women-supreme-court-sharia-law-islam-968630-2017-03-30#:~:text=But%20till%20today%2C%20India%27s%2090,out%2Dof%2Dcourt%20divorce.&text=A%20survey%20by%20Bharatiya%20Muslim,no%20maintenance%20from%20their%20husbands. , March 30, 2017

Several jurists came up with their opinions when triple talaq was abolished in India. Most of them favouring, while some of them where against it. Just after the delivery of the judgment invalidating the pronouncement of triple talaq, All India Muslim Personal Board (AIMPB) urged the SC "not to meddle with its personal laws" as they believed that the issue fell outside the realm of judiciary.

CHAPTER V

SHAYARA BANO TO MUSLIM WOMEN [PROTECTION OF RIGHTS ON MARRIAGE] ACT 2019

INTRODUCTION

Ironically, while the Indian Constitution and the international instruments of human ri ghts proclaim that everyone is equal, the achievement of this basic principle is, howev er, hindered by narrow interpretations of the provisions of the Constitution and the hu man rights corpus. In the name of religious freedom, women's rights are often limited or abused, thus denying them the extension and achievement of the full spectrum of h uman capabilities. While the State and its institutions are obligated to avoid religious discrimination based on gender, but because of the apprehension of massive sociopolit ical consequences, the State and itsinstitutions actively refrain from any interference with religious practises, thus enabling the continuity of gender specific discrimination. Nevertheless, the approach of the Constitutional Court of India has changed as it has g iven a new sense to social inclusion by acknowledging and understanding the rights of Muslim women, who are made invisible because of the security of religious freedom.

CASE SUMMARY OF SHAYARA BANO V UNION OF INDIA.[195]

FACTS

The petitioner-Shayara Bano, approached the Supreme Court, for bashing the divorce said by her husband Rizwan Ahmad on 10.10.2015, where he pronounced talaq in the presence of witnesses saying three times. He also added that “from this date there is no relation of husband and wife.” The aforesaid divorce was pronounced before the witnesses.

The complainant sought a declaration declaring as invalid ab initio the talaq-e-biddat pronounced by her husband on 10.10.2015. It was also her claim that such a di vorce, which suddenly, arbitrarily and irrevocably terminates marital relations, was all egedly ruled unconstitutional under Section 2 of the Muslim Personal Law (Shariat) Implementation Act, 1937.

[195] (2017) 9 SCC 1

ANALYSIS OF CASE

In its decision, the Supreme Court addressed whether or not a man's ability to divorce his wife by saying "talaq talaq talaq" was in accordance with the nation's Constitution under Article 14 equal protection considerations.

It was argued that at the time of hearing hearing that the husband's talaq-e-biddat (triple talaq), pronounced by the husband, is not legitimate since it is not part o f Shariat (Muslim personal law). The Supreme Court adopted multiple orders in the sa id petition, including the one dated 28.03.2016, asking the central government.A copy of the 2015 High Level Committee Report recommending the ban on Triple Talak an d polygamy in Muslim Personal Law should be given.

In the above case , the Government of India submitted its affidavit stating that the Mu slim Personal Law is a 'law' within the scope of Article 13 of the Constitution of India and, because it violates the right to equality between men and women guaranteed by Section III of the Constitution of India, the Muslim Personal Law is therefore null and void, to the degree that it recognises the Triple Talaq.It also cited the 1945 Charter of the United Nations and claimed that, because the Charter reaffirms its belief in the eq ual rights of men and women, the Triple Talaq must be declared unconstitutional in or der to achieve that objective.

It also demanded reconsideration of the judgement of the High Court of Bombay of 1 952, which held that Personal Law was not a 'law' within the scope of Article 13 of th e Constitution of India and could not be infringed on the basis of its disgust with fund amental rights.[196]In the meantime, the Law Commission has also stepped in and called for a response to the introduction of the Common Civil Code.

In the case, the Court pointed on the interplay between legislation and the Constitution. Specifically, the Court was forced to interpret the constitutionality and intent of the legislation, despite the previous personal law protections granted to religious groups to regulate their own marriage and divorce laws

JUDGEMENT

In a 3:2 decision, the Supreme Court of India declared triple talaq unconstitutional and gave India’s parliament six months to consider legislation for handling triple

[196] *The State Of Bombay vs Narasu Appa Mali*, AIR 1952 Bom 84

talaq. In its opinion, the court cited global advance in Islamic family law (in India, called Muslim personal law) in "even theocratic Islamic state" as evidence of the need for reform.

The court also noted that the 1937, Muslim Personal Law (Shariyat) Implementation Act protecting the religious freedom of Muslims in India does not legally protect anti-Quranic practises, arguing that triple talaq is such a practise, the court held that under the Indian Constitution it could not be covered.

RATIONALE ADOPTED BY COURT

The Court justified its view by claiming that the Triple Talaq was contrary to the fund amental principles of the Quran and that whatever was contrary to the Quran was cont rary to the Shariat School.

The majority bench relied on Shamim Ara 's case,[197] which held that this practise of Triple Talaq is contrary to both theology and law. The practise is not sustained by the mere use of practise by a vast number of individuals and the said practise is illegal and set aside.

While the said practise has no relation to the first three exceptions in Article 25 but th e said practise is explicitly violative of Article 14. This practise is in violation of the Universal Right to Equality and it is against women's rights and, unlike in other religi ons, they have no say in the declaration of divorce.

Under Article 14, read in accordance with Article 13(1), the majority judgement held that Triple Talaq was unconstitutional. The Court held in this respect that the practise had been approved by the Muslim Personal Law (Shariat) Application Act, 1937, as a matter of personal law. The Court explained that "an action which is arbitrary must ne cessarily entail the denial of equality" and that this arbitrariness violates Article 14, since triple talaq states that "the marital tie can be takenaway capriciously without any attempt at reconciliation in order to save it." The Court concluded that, to the degree that it acknowledges and enforces Triple Talaq, the 1937 Act is null and void on the ground that, pursuant to Article 13(1), all laws in effect immediately before the begin ning of the present Constitution (including the 1937 Act) are null and void to the degr ee that they are inconsistent with the fundamental rights laid down in the Constitution.

[197] *Shamim Ara v. State of U.P. (2002) 7 S.C.C. 518*

While this judgement was a landmark decision, and signified a momentous shift in the lives of Muslim women across the world, it was not enough to stop the practise entirely. Several stakeholders which included the All India Muslim Personal Law Board, have opposed it on the grounds that the court has no authority to determine the validity of judicial procedures and that this reform can only be made by the legislature.[198]

The Muslim Women (Protection of Rights on Marriage) Bill, 2017aimed to give effect to the Supreme Court's judgement and to protect Muslim women who are still vulnerable to becoming victims of the triple talaq practise. The Bill proposes that Muslim husbands' pronouncement of talaqbiddat be ruled invalid and unlawful, and also renders the act of pronouncement a criminal offence.It is an essential step in ensuring the rights of Muslim women as citizens of India, and in ensuring that gender equality and justice are secured constitutionally.

CONCLUSIONS SOUGHT FROM CASE

Ultimately, India's highest court held in Bano's favor that "[t]he practice was against Article 14 of the Constitution, which guarantees the right to equality." However, this case has highlighted the issues with having laws that do not uniformly apply to each citizen of a country and the enforcement issues associated with such disproportionate laws. Furthermore, the Court merely held the practice unconstitutional and is not responsible for enforcement mechanisms. For that, Parliament will need to enact a law outlining punishment for violations.

The Supreme Court stated "arbitrators are mandated to explore the possibility of reconciliation" but, "[i]n case reconciliation is not possible, dissolution is advised, without publicity or mud-throwing or by resorting to trickery or deception." The same Court reasoned that until the very last moment, reconciliation should be an option, and a preferred option at that.[199]

[198]The Muslim Women (Protection of Rights on Marriage) Bill, 2017 , Swaniti Initiative, file:///C:/Users/hp/Downloads/Brief-Note-on-Muslim-Women-Bill-2017_Swaniti-Initiative.pdf 22 March 2020

[199] Shayara Banu Case, (2017) 9 SCC 1

The verdict highlights the practice of instant divorce is not supported by the Qur'an. The majority opinion said it was manifestly arbitrary to allow a husband to break down "the marital tie ... capriciously and whimsically." Notably, in the exclusively male panel of Supreme Court judges, each of India's five core faiths were represented: Hinduism, Christianity, Islam, Sikhism and Zoroastrianism. Although the panel was all the same gender, it did represent each of India's predominant religions and a wide array of India's citizens.

In their dissent, Chief Justice JS Khehar and Justice S. Abdul Nazeer argued the practice of "instant talaq" should be changed through the government- specifically by law passed within the next six months to regulate the "instant talaq." They noted Parliament should remedy the issue, rather than the court system, and even went so far as saying the instant talaq law was not binding because it was up to Parliament to regulate.[200]

Shayara Bano has become "the face of the movement challenging triple talaq." Her victory has inspired other wives to stand up against the use of instant divorce and file similar petitions.

The majority based their decision on Article 14 of the Constitution of India-citing equal protection rights. Article 14 of India's Constitution addresses equality and prohibits "discrimination on grounds of religion, race, caste, sex or place of birth." Specifically, the Supreme Court reasoned the triple talaq law violated a fundamental right because"
It is obvious that this type of Talaq is simply arbitrary in the sense that a Muslim man can sever the marital tie capriciously and whimsically without any effort at reconciliat ion in order to save it. The Supreme Court also struck down Section 2 of the 1937 Act, which addressed personal law, as "void to the extent that it recognizes and enforces Triple Talaq," but did not completely strike down Muslim personal law.[201]

[200] Supreme Court Scraps Instant Triple Talaq: Here's What You Should Know About the Practice, Hindustan Times, https://www.hindustantimes.com/india-news/ahead-of-supreme-court-verdict-on-triple-talaq-here-s-a-primer-on-the-case/story-OJ6jjgGTRR988P , 28 March 2020
[201] Katelyn L. Dryden, *India's Highest Court Strikes Instant Divorce Law Available To Husbands Only - Previously Protected By Personal Law*, North Carolina Journal of International Law, 2018

BACKGROUND LAW

In India, certain areas of law are permitted to follow religious law. This concept is called personal law. Marriage and divorce fall within the scope of personal law and are thus subject to religious regulation. Parliament also has the authority to legislate family relations.[202]

Personal law is protected by several sections of the Indian Constitution, including, for example, Article 21. Personal law is also fiercely guarded by religious rights advocates.[203] Furthermore, Article 25(1) of India's Constitution states: "All persons shall be equally entitled to freedom of conscience and the right freely to profess , practise and promote religion, subject to public order , morality and health an d other provisions of this Part."[204]

Though India codified many laws to prevent personal laws from infringing on certain group rights, instant divorce remained unchallenged. In addition, India does not have laws that uniformly apply to marriage and divorce. Courts in India typically proceed with caution when striking down laws which implicate areas traditionally protected by personal law.[205] However, in cases of severe inequality, such as gender inequality, the intersection of these rights highlights the need for the Supreme Court to address the prejudicial impact on vulnerable groups.[206]

Under the Sharia Act of 1937, wives shall not "pronounce triple talaq and are required to move a court for getting divorce." This Act codified religious law in India, leavin a

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[202] See Mohammad Ghouse, Personal Laws and the Constitution in India, in ISLAMIC LAW IN MODERN INDIA 50, 55 (Tahir Mahmood ed., 1972)
[203] Lamat R. Hasan, *Battle to Pass Bill Banning Instant Divorce by Indian Muslim Men is On*, DAWN (Jan. 31, 2018)

[204] V N Shukla, CONSTITUTION OF INDIA, Eastern Book Company, Jan 2019
[205] See Michael Safi, India Court Bans Islamic Instant Divorce in Huge Win for Women's Rights, GUARDIAN https://www.theguardian.com/world/2017/aug/22/india-supreme-court-bans-islamic-instant-divorce-triple-talaq , 29 March 2020, 12:22 pm
[206] Women left destitute by the instant talaq practice

gap between religious practices and governmental law, particularly pertaining to the evaluation of fundamental and equal rights issues.[207]

Triple talaq has been banned in much of the Islamic world including Pakistan and Bangladesh. Fundamental Muslim schools have criticized the law and many countries rooted in Islamic tradition have banned the instant divorce practice. However, it has continued in India because of the religious freedoms in India. India maintains Muslim, Hindu, and Christian communities which the government allows to abide by their own beliefs in matters such as marriage, divorce, inheritance, and adoption.[208]

Under instant divorce laws, Muslim men maintain all the contractual power for divorce. Due to the discriminatory personal and family laws in a significant amount of Muslim countries, women have routinely been "deprived of the right to initiate divorce; this discrimination exposes women to repudiation, unilateral extra judicial divorce by the husband, legal insecurity, and total absence of control over their matrimonial situation."[209] In cases of a contingent dowry, men have been incentivized not to invoke the instant divorce, because a divorce would cancel the dowry.

SIGNIFICANCE OF THE CASE

One argument against personal law is that many religions have traditional practices considered gender discriminatory and the specific circumstances which led to the Shayara Bano case are not unique to Islamic practices in India. In such cases, and specifically in this case, competing liberty interests -personal law and gender inequality-clash due to the disparate effect on Muslim women. Here, the Court delicately and explicitly limited the decision to the practice of triple talaq law, rather than striking down personal law completely.[210]

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[207] Rohan Venkataramakrishnan 'Religion a Matter of Faith, not Logic': CJI Khehar's Dissenting Opinion on Triple Talaq, SCROLL.IN , https://scroll.in/article/848076/religion-a-matter-of-faith-not-logic-cji-khehars-dissenting-opinion-on-triple-talaq , 29 March 2020, 12:56 pm

[208] Michael Safi, India Court Bans Islamic Instant Divorce in Huge Win for Women's Rights, GUARDIAN.

[209] Alaq-1-Tafwid: *The Muslim Woman's Contractual Access To Divorce: An Information Kit* (Lucy Carroll & Harsh Kapoor), Women Living Under Muslim Laws (1996)

[210] Vibhuti Patel, All Personal Laws in India Are Discriminatory, LIVE MINT, , 29 March 2020 https://www.livemint.com/Opinion/SpzJHXDZYhrrtlRwu2f2xHP/All-personal-laws-in-India-are-discriminatorypublished-fro.html ,

While other women had challenged the triple talaq practice for decades in India, this case was the first in which the plaintiff challenged the law on the basis that her "fundamental rights had been violated" and requested the Court to reconsider allowing men to treat their wives like "chattels." This case was the first nationwide victory to pave the way towards gender equality.[211]

India is the twenty-third country to outlaw the triple talaq practice and is finally catching up to the worldwide trend of ending such discriminatory practices.[212]

Following Bano's victory, other women followed her lead to challenge their own marriages that had ended from instant talaq.[213] Not all responses were positive. The All India Muslim Personal Law Board (AIMPLB), a nongovernmental board with the purpose to promote Muslim personal law in India, has stated that the Court did not have jurisdiction to decide the issue. The AIMPBL did not feel it was appropriate for the Court to interfere in matters pertaining to religion.[214]

Despite general public support for ending the practice of instant talaq, the legal impact of the Court's decision has yet to be determined given that enforcement issues remain. The issue of enforcement posits a question of separation of powers: does there need to be a separate legislative act, even though the highest court deemed the law unconstitutional? After India's apex court rules a law unconstitutional, without any enforcement mechanism, those who violate the law cannot face punishment.[215]

From a public policy perspective, the government has an interest in keeping marriages intact when possible and in protecting individuals that may be severely disadvantaged if husbands decide to end their marriages on a whim. In particular, the unequal impact based on gender would have left women in vulnerable positions without any notice if the law had continued to stand. Additionally, religion encourages marriages to remain

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[211] e Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle, BBC (Aug. 22, 2017), https://www.bbc.com/news/world-asia-india-40484276 , 29 March 2020
[212] Id
[213] Gulam Jeelani, Triple Talaq Verdict: Meet the Five Women Who Fought to Stop Instant Divorce, HINDUSTAN TIMES, 22 August, 2017
[214] Triple Talaq: India Court Bans Islamic Instant Divorce, BBC, https://www.bbc.com/news/world-asia-india-41008802, 29 March 2020
[215] Swapan Dasgupta, Still on the Statutes: The Bill Against Instant Triple Talaq Has Led to Parliamentary Doublespeak, TELEGRAPH INDIA, https://www.telegraphindia.com/opinion/still-on-the-statutes/cid/1462718 , 20 March 2020

intact and to avoid divorce when possible. After all, the original reasoning behind encouraging a "triple talaq" was so that the husband was sure of his decision, hence the requirement of saying it three times. Both government and religious leaders should have a stake in promoting gender equality and preventing the destitution of women suffering the consequences of triple talaq in India.

MUSLIM WOMEN [PROTECTION OF RIGHTS ON MARRIAGE] BILL, 2017

The 2017 Muslim Women (Defense of Marriage Rights) aims to declare illegal the pr actise of 'talaqbiddat' and other forms of instant talaq, while also adding provisions for the defence of married Muslim women for whom talaq is proclaimed.

The Government of the Union argues that the law will help ensure the wider constitutional objectives of gender justice and gender equality for married Muslim women and help sub-serve their fundamental rights of non-discrimination and empowerment.[216]

HIGHLIGHTS OF THE BILL[217]

"The Bill's preamble reads as" To protect the rights of married Muslim women and to prevent divorcing by Talaq by their husbands and to provide for or incidental matters associated with it.

Sections 3 and 4, which criminalise the practise of Triple Talaq, are the main highligh ts of the bill. Section 3 of the Bill states that 'talaqbiddat' is 'vacant' and 'unlawful'. Thi s is accompanied by the effect of such an invalid action pursuant to Section 4 thereof, which states that whoever pronounces talaqbiddat shall be punishable by imprisonmen t of up to three years and fines. Section 7 of the Act further makes the offence cogniza ble and non-bailable.

The said Bill has gained appreciations at the same time the Bill has been heavily criticized by many.

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[216] Pushraj Deshpande, Triple Talaq, Judgment Of Hon'ble Supreme Court And The Most Anticipated Triple Talaq Bill, Montaq, 5 February 2018, https://www.mondaq.com/india/Family-and-Matrimonial/670318/Triple-Talaq-Judgment-Of-Hon39ble-Supreme-Court-And-The-Most-Anticipated-Triple-Talaq-Bill, 30 March 2020

[217] Id

In addition, the Bill provided for the offence to be cognizable and nonbailable.
In and outside Parliament, however, there have been apprehensions about the provisio ns of the pending Bill that allow any person to provide information to an officer in cha rge of a police station to take cognizance of the offence and make the offence non-bailable.[218]
As the Bill was pending for consideration in Rajya Sabha and the practise of tripletala q divorce (i.e., talaqbiddat) continuedthere was an urgent need to take immediate actio n by making strict provisions in the law to avoid such practise. Since Lok Sabha and RajyaSabha Parliament were not in session and there were circumstances that made it appropriate for the President to take urgent action on the matter, the 2018 Muslim Wo men (Protection of Rights on Marriage) Ordinance (Ord. 7 of 2018) was promulgated on 19 September 2018 with the aforementioned amendments.[219]

The Muslim Women (Protection of Rights on Marriage) Bill, 2018 was introduced on 17 December 2018 in Lok Sabha to replace the said Ordinance and was passed by that House on 27 December 2018. The bill could not, however, be taken up in Rajya Sabha for consideration and Lok Sabha and Rajya Sabha were adjourned. As both Houses of Parliament were not in session and the practise of divorce by triple talaq (i.e. talaqbiddat)continued, the Muslim Women (Protection of Rights on Marriag e) Ordinance, 2019 (Ord. 1 of 2019) was promulgated on 12 January 2019 to give con tinued effect to the provisions of the aforementioned Ordinance.

Subsequently, in Rajya Sabha, required official amendments to the Muslim Women (Protection of Rights on Marriage) Bill, 2018 were moved to replace theMuslim Wom en (Protection of Rights on Marriage) Ordinance, 2019. The bill could not, however, b e taken up in Rajya Sabha for consideration and both houses were suspended. As Lok Sabha and Rajya Sabha were not in session, the Muslim Women (Protection of Rights on Marriage) Se cond Ordinance, 2019 (Ord. 4 of 2019) was aired on 21 February 2019 to carry on the provisions of the aforementioned Ordinance. Subsequently, on 25 May 2019, the Sixteenth Lok Sabha was dissolved and the Muslim Women (Marriage Rights Protecti

[218] See https://www.livelaw.in/pdf_upload/pdf_upload-362529.pdf , Bill no.82 of 2019
[219] Id

on) Bill, 2017 and the Muslim Women (Marriage Rights Protection) Bill, 2018 lapsed , pending in Rajya Sabha.
Consequently, the Muslim Women (Protection of Rights on Marriage) Bill, 2019 is being introduced in Parliament to putback the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019.

The law will aid in ensuring the broader Constitutional objectives of gender justice an d gender equality of married Muslim women and aid subserve their basic rights of non -discrimination and empowerment.

SALIENT FEATURES OF THE BILL[220]

- Talaq Declaration as Invalid and Illegal: Here, "talaq" refers to talaq-e-biddat or any sort of talaq that has an effect on a Muslim husband's pronounce ment of instant and irrevocable divorce. The Bill declares to be invalid and ille gal any such pronunciation of talaq by husband to his wife, in spoken or writte n or electronic form or any other way.
- Punishment for pronouncing Talaq: The person who pronounces talaq shall be punished with imprisonment of up to three years and a fine as a result of the de claration of the practise as unlawful.
- Subsistence allowance to cover the rights of married Muslim women: For hers elf and her dependent children, a married Muslim woman against whom talaq was pronounced would be entitled to a subsistence allowance from her husban d.The Magistrate (Magistrate of First Class exercising authority under the Cod e of Criminal Procedure) may decide the amount in question.
- Custody of minor children: If talaq is pronounced,custody of the minor childre n of the couple will be on the married Muslim woman .
- Offences to be cognizable and NonBailable: Every offence within this Act wo uld be cognizable and Nonbailable within the scope of the 1973 Code of Crimi nal Procedure.

SHORTCOMINGS OF BILL[221]

[220] Id
[221] file:///C:/Users/hp/Downloads/Brief-Note-on-Muslim-Women-Bill-2017_Swaniti-Initiative.pdf Swanithi Initiative, 2 April 2020

The salient characteristics illustrate the Bill 's strengths in providing Muslim women with a safe structure and promoting the cause of women's rights. There is strong agree ment that the concept of talaq-e-biddat is undesirable.

Nevertheless, criticism raised against the Bill seeks to find more efficient ways to disc ontinue this activity.

- Criminalisation of the Practice: As per section 3 and 4 of the 2019 Act which defines criminalisation of talaq, face some operational and legal challenges while itending to protect marries women.
    - As marriage under Islamic law is a legal contract, legal procedure must be followed by the Bill. Given the essence of the subject, the present st atutory essence of the offence is, in this sense, unacceptable.
    - In addition , scholars argue that the statute should have incorporated th e crime instead of full criminalization within the scope of the Domestic Violence Act. In this way , women will enjoy several more benefits wh ich are not available under the current laws, such as protection against abuse and the right to live in marital homes.[222]
    - Scholars have questioned how talaqbiddat can be called an offence und er Sections 4 and 7 because it has been made invalid and inoperative o n the basis of Section 3.[223]
- Discriminatory treatment of Muslim men: Under the constitution, even withou t the permission of a partner, Muslim men may be punished on the basis of a st atement of illegality. Except in the case of similar offences in other religions, without the permission of the woman, men will not be punished.This will be th e unequal treatment of men of varying sects.
- Removal of Judicial Oversight: The Bill allows the pronouncement of talaq a c ognizable crime under section 7, meaning that the police have the power to ma ke an arrest without a warrant and to launch inquiries without the court's permi ssion. This opens up the risk of abuse of the law against Muslim citizens.[224]
- Contradiction in custody and allowance provision: The Bill states, under

[222] Priya, NEED FOR RECONSIDERATION OF TRIPLE TALAQ BILL, LIVE LAW, https://www.livelaw.in/need-reconsideration-triple-talaq-bill/ , 2 April 2020
[223] A. Faizur Rahman, THE TROUBLE WITH THE TRIPLE TALAQ BILL, THE HINDU, https://www.thehindu.com/opinion/op-ed/a-very-flawed-law/article22288659.ece , 2 April 2020
[224] Supra 28

section 3, that talaq has been declared invalid, suggesting that talaq can not lead to divorce. Nevertheless, under sections 5 and 6, the Bill goes on to resolv e postdivorce problems relating to custody of minor children and subsistence a llowance.[225]

MUSLIM WOMEN [PROTECTION OF RIGHTS ON MARRIAGE] ACT, 2019

The Muslim Women (Protection of Marriage Rights) Act, 2019 declared the practise of instant triple talaq illegal and void and also defined that up to 3 years of imprisonm ent will be punishable by any husband who engages in such practise. The questions of maintenance and custody are also involved. In this Act, the bone of contention was th e criminalisation part of the Act, which is basically civil in nature.[226]

This legislation stands to protect the rights of married women and prohibits divorce by pronouncement of talaq by their husbands and provide remedies for matters connected with such matters. This Act contains eight sections which are laid down through three chapters.

Except for the State of Jammu and Kashmir, it shall apply to the whole of India and sh all be deemed to have entered into force on the 19th day of September 2018.[227]

CONCLUSION

While India's highest court's decision is a good start, more is needed to protect women's rights in India. Courts must tactfully handle issues of intersecting and competing rights. In this case, the Court was faced with an intersection of religious and gender equality issues. Overall, the public opinion is that men should abstain from the instant divorce practice. The only differences in public opinion stem from which type of organization-the government or religious groups-should regulate and enforce the prohibition on instant divorce law.

There are still gender equality issues that put women in subordinate positions and inevitably force them to surrender all of the marital power to their male counterparts.

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[225] Supra 29

[226] Eesha Shrotriya & Shivani Chauhan, *Instant Triple Talaq And The Muslim Women (Protection Of Rights On Marriage) Act, 2019: Perspectives And Counter-Perspectives*, ILI Law Review, (Summer Issue 2019)

[227] THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019 ACT NO. 20 OF 2019, 31 July 2019.

Was the law "nothing but patriarchy masquerading as religion"? The marginalization of Muslim women in India still plays a role in their daily lives.

Overall, human rights issues should be at the forefront of the concerns of the government in India and around the world. In countries that practice personal law, the government may need to intervene when that law allows for the severe marginalization of a quasi-suspect class. In this case, India is setting an example for other countries in similar situations with issues of gender inequality.

Introduction of Muslim Women [Protection of Rights on Marriage] Act, 2019 seemed to bring a slab of equalisation between men and women or it was a bridge which resulted in upholding the equality status where by our legislators added another piece of legislation which sought to remove the discriminatory provisions in personal laws. But the criticisms and shortcomings of the Act has aroused a great deal of doubts and confusions in the mind of layman. Also there is a necessity to check if the Act actually benefits woman for whom the legislation has been created.

One point which can be drawn from the debates regarding the validity of triple talaq is the coming of age of Indian Muslim women hurled to the centre of the triple talaq debate, and unwilling to remain mute spectators anymore as others ink their destiny for them. This marginalized minority within a minority are finally asserting themselves to seek their space in a male-dominated society teeming with bigots and hypocrites.

CHAPTER VI

MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019: CRITIQUE

INTRODUCTION

In India, personal law is a law for persons of different religions and is applicable according to the individual's religion. Muslim women have been fighting for gender equality in Islamic law for several decades, regulating rights relating to marriage , divorce and property rights. One of the most well known bodies in the Muslim community is the All-India Muslim Personal Law Commission. There is a lot of hold up for this board, as well as criticism. The plan to amend Muslim personal law has been rejected several times by this board as they believe it would breach Islam's fundamental values. In addition, in that specific board, there are several male members who are dominant. Whereas the Qur'an does not accept a structure controlled solely by a structure of patriarchy. The rights of Muslim women to marriage, divorce and inheritance have inspired many Muslim women to fight for their rights. As arbitrary and against the principles of Islam, the controversial Islamic divorce tradition of instant triple talaq (Talaq-e-Biddat) has been struck down. The Supreme Court ruled that the practise was against Article 14 of the Constitution, which guarantees the right to equality.[228]

Triple talaq is considered to be an especially unapproved but legally legitimate form of divorce in traditional Islamic jurisprudence. Since the early 20th century, changing social circumstances around the world have led to growing discontent with traditional Islamic divorce law, and various changes have been undertaken in different countries. Muslim couples in India are not expected to register their marriage with the civil authorities, contrary to procedures followed in most Muslim majority countries. Unless the couple wishes to register their marriage under the Special Marriage Act of 1954, Muslim marriages in India are considered a private matter. Because of these historical reasons, the controls imposed by governments of other countries on the husband's unilateral right to divorce and the triple talaq ban were not enforced in India until 2019.[229]

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[228] R Ghattaiah, *Triple Talaq : The Indian Constitution*,2330, 5 IJCRT, December 2017

[229] J Esposito & Delong-Bas, *Women in Muslim Family Law, 30,31* (Syracuse, N.Y., Syracuse University Presss, 2001)

Matrimonial alliance is a social contract in Islam, and divorce is considered a natural corollary of marital law. Although at the same time, marital relations are attributed to the highest order of piety and divorce, which is considered a necessary evil, to be used only as a last resort. Triple talaq is only one of several types of divorce under Muslim law , particularly instant triple talaq..[230]

On 1 August 2019, triple talaq became illegal in India, replacing the triple talaq ordinance passed in February 2019.

On 26 July 2019, the Muslim Women (Protection of Rights on Marriage) Bill, 2019 was passed after a very long debate and opposition to all women finally obtained the verdict (the August 2017 Indian Supreme Court judgement mentioned below). It makes immediate triple talaq (talaq-e-biddah) in any form – spoken, written, or by electronic means such as email or SMS – illegal and void, with up to three years in jail for the husband.[231]

INDIAN JUDICIARY AND TRIPLE TALAQ

The judiciary's attitude toward the practise of immediate triple talaq has always been critical. Prior to the watershed judgement of Shayara Bano v. Union of India, various High Court judgments gave different interpretations of the practise of immediate triple talaq. While some considered the practise to be bad in theology but good in law, others held that in fact, Muslim law does not allow an immediate and irrevocable talaq without any attempt to reconcile between the pronouncements.[232] Triple talaq must, according to the Quranic injunction, be on fair grounds and there must be occasional mediation mediated, if necessary, by two arbitrators, one from either side of the family. In a number of cases, the practise was also declared to be unacceptable by the Supreme court. In the case of Shayara Bano in August 2017, however, it was struck down conclusively by the Court. In this decision, the minority opinion instructed the legislature to come up with a law in this respect. The Muslim Women (Protection of Rights on Marriage) Bill, 2017 was subsequently passed in the Lok

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[230] Eesha Shrotriya & Shivani Chauhan, *Instant Triple Talaq And The Muslim Women (Protection Of Rights On Marriage) Act, 2019: Perspectives And Counter-Perspectives,* ILI Law Review, Summer Edition 2019

[231] Adithi Singh, TRIPLE TALAQ, Researchgate : https://www.researchgate.net/publication/338477315 , 25 April 2020

[232] See generally, *Jiauddin Ahmed v. Anwara Begum,* (1981) 1 GLR 358, *Rukia Khatoon v. Abdul Khalique Laskar*, (1981) 1 GLR 375, *Nazeer v. Shemeema*, 2017 (1) KLT 300.

Sabha. The bill claimed that the practise was void and unlawful. At the same time, triple talaq was also pronounced as an offence punishable by a maximum of three years in gaol. The session came concluded when the Bill was pending in the Rajya Sabha. The Bill was later enacted several times as an ordinance. Despite consistent opposition and demands to submit the Bill to the Rajya Sabha Select Committee, the Bill was ultimately passed by both houses on July 30 , 2019.

MUSLIM WOMEN [PROTECTION OF RIGHTS ON MARRIAGE] ACT, 2019

Status of Muslim Wife

Section 3 of the Act states that it is void and unlawful for a Muslim husband to pronounce talaq on his wife. If a Muslim marriage had been viewed as a plain and simple contract, such a declaration by statute would have been sufficient to remedy the husband's unilateral breach of contract. The problem isn't that easy, though. Marriage, even though it is a social contract, has a sacrosanct function and is regarded as such in society. For centuries, the practise of triple talaq has been popular and accepted in Muslim culture and is deeply rooted in their thought. Therefore, only a declaration of it being invalid by statute does not necessarily affect the circumstances. Though not recognised as divorce by law, a woman who has internalised the concept of divorce by triple pronouncement may think it harmful to live with her husband. Flavia Agnes has observed:[233]

"Several studies have shown that women from underprivileged sections use informal community-based processes to fight for their rights instead of addressing the formal systems of law. As there is a general fear among the deprived secions of retrieving these formal systems, women find religion-based conflict resolution platforms like darulqazas more available than courts and police stations."

As observed in the case of *Harvinder Kaur v. Harmender Singh Chaudhary*,[234] the implementation of constitutional law in a marriage home by the Delhi High Court is like "introducing a bull in a Chinese shop." The law can also be said to have muddled things further as the woman's status would be in a oblivion, where, on the one hand, society and she may consider her divorced, but the law would not, therefore, make it

[233] Flavia Agnes, *The Politics Behind Criminalising Triple Talaq*, 53, Economic & Political Weekly (2018).
[234] AIR 1984 Delhi 66

difficult to enforce her rights as a divorced woman by legal enforcement. It has also been proposed that instead of pronouncing triple talaq, the Act may also allow husbands to intentionally leave their wives. Her blood relatives may even be hesitant to take her back because of the muddy state of the disempowered woman, since she may not marry again. It is not far from arguing that the law is not in line with social norms that would contribute to the destitution of Muslim women, whose rights were the primary aim of the legislation.

Maintenance and Custody

Section 5 of the Act ensures that, as determined by the magistrate, a woman on whom triple talaq is pronounced is entitled to subsistence allowance from her husband.[235] The language of the segment is noteworthy. As in other legislation concerning women's rights, it guarantees only a "subsistence allowance" and not "maintenance." Maintenance means the amount of money needed to continue living according to the status of a individual in the community, whereas subsistence allowance is the bare minimum amount necessary to cover the daily living expenses. However, the clause is 'without prejudice to the generality of the requirements found in any other statute,' meaning the the woman is still free to initiate maintenance proceedings pursuant to Section 125 of the 1973 CrPC. A married Muslim woman is also authorised to maintenance, regardless of whether or not she can support herself, known as Nafaqah. Hence, in the context of a subsistence allowance, it is unclear what the object of the given section is.

The aspect of criminalisation under this Act is another concern that arises. Since the Act criminalises the pronouncement of triple talaq and entitles a wife to a subsistence allowance in the same breath, where the husband is recorded and sentenced to imprisonment, where does the entitled allowance come from?

Section 6 of the Act specifies that, in the case of the pronouncement of talaq by her husband, a married Muslim woman is entitled to custody of her minor children. Thus, as a matter of fact, she is entitled to such custody. The first concern that occurs is about the need for child custody arrangements when the marriage is still going on and

[235] Section 5. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate

no divorce has taken place. Additionally, it is unfair to make such a clause obligatory. In other laws regulating divorce, children's custody is left to the courts for determination. Other variables are granted paramount interest, such as children's best interest. No exceptions and no proper criteria for assessing the custody of the children are provided for in this provision. There may be cases where the mother herself is not prepared to take care of the child financially or emotionally, or the child does not want to live with the mother, etc. During the drafting of this clause, such extraordinary circumstances were not taken into account.

Criminalisation

Section 4 of the Act specifies the penalty for a husband's pronouncement of triple talaq, viz. up to three years in gaol and fines.[236] This point in this Act has largely been the bone of contention. On both sides of the discussion, there are valid points and the writers have sought to discuss both aspects of this essay.

Human activity is governed by different means. Although civil measures are adequate to control most human behaviour, deterrence is often important when civil law does not control behaviour that demonstrates a severe deviation from norms and is capable of violating the lives of other people.[237]

Private Conduct Criminalisation: Jurisprudential Contribution

The discussion on the criminalisation of private problems dates back to the publication in 1957 of the Wolfenden Report[238] and the subsequent claims put forward by Patrick Devlin and H. L. A. Hart on the state's role in the imposition of morality in the private sphere. The Homosexuality and Prostitution Study was embedded in the liberal democratic system and defined that the roles and boundaries under which criminal law should operate exist. "In our opinion, it is not the duty of law to interfere in citizens' private lives, or to attempt to impose some clear pattern of

[236] Section 4. Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.
[237] Supra 3 at 168
[238] John Fedrick, *Home Office, Scottish Home Department, Report of the Committee on Homosexual Offences and Prostitution,* London : Her Majesty's Stationery Office, 1957

conduct." The idea was that private morality is a space that must be outside the domain of law.[239]

Thus, while Devlin argued that the State should impose morality in the better interest of society, [240] Hart argued that the State had no right to enforce compliance with collective moral value.[241]

Criticism

The key problem with criminalising the pronouncement with instant triple talaq is that the legislature imposes criminal and criminal consequences for a legal wrong by doing so. Marriage is a contract under Islam. Ideally, violation of a contract does not contribute to the lure of criminal penalties. The state should follow a minimalist policy as far as criminalisation is concerned. Curtailing a person's rights should be the last resort. Only one of the tools for censoring and avoiding deviant activity is criminal law. Only the most extreme breaches, i.e. criminalization, should attract the most punitive and condemnatory method of rule.[242] In the criminalization of crimes, the State must follow a minimalist approach since a stronger argument is necessary when a crime is punishable by imprisonment.[243]

JJeremy Bentham enlisted four criteria in his book, An Introduction to the Standards of Morality and Law, where an act could not be treated as a criminal offence. First of all, where it is groundless, that means there is no mischief that needs to be avoided. With respect to instant triple talaq, it seems to be groundless to criminalise it, since the act is invalid and inconsequential. Second, where it is unsuccessful, and so the mischief would not be preventable. Putting the husband behind bars can exacerbate the marital discord in the case of instant triple talaq and thus deter the wife from reporting the incident. And there will hardly be any deterrent effect if it is not published. Thirdly, if it is unprofitable, it means that the loss produced is greater than the benefit. Finally, when it is unnecessary, it means that the problem can be solved by other means. It is also possible to verify the practise of instant triple talaq by civil

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[239] Supra 3 at 169
[240] Sir Patrick Devlin, *The Enforcement of Morals*, Maccabaean Lecture in Jurisprudence, March 18, 1959
[241] H. L. A. Hart, Law, Liberty and Morality (1963); *The Enforcement of Morality* (Lecture II in The Morality of the Criminal Law (1965))
[242] Andrew Ashworth, *Is the Criminal Law a Lost Cause*?, Researchgate, 21 June 2017 file:///C:/Users/hp/Downloads/Is_Criminal_Law_Reform_a_Lost_Cause.pdf
[243] *Joseph Shine v. Union of India*, 2018 (11) SCALE 556

means. When the civil remedies have been exhausted, criminalisation may be the last resort.

The minimalist approach advocates for leaving out of the purview of criminal sanction, such conducts where prohibition is unlikely to be effective, or where it would cause greater social harm than not penalizing it.[244] In other words, it should not become counterproductive to punish an individual. This is most likely to happen in the event of criminalisation of instant triple talaq. The purpose of the Act is to prohibit instant triple talaq and secure the rights of Muslim women who are married. It is important to remember that it is very possible that all members of his family, including the wife, would become destitute if the man is imprisoned. Additionally, section 3 of the Act has already found the act of pronouncement invalid. Such a pronouncement would thus have no repercussions whatsoever and would have no effect on marriage. In the light of the state, marriage will always subsist. It is a little naive to conclude, however, that the marriage will not suffer. There is a risk that it could lead to irreconcilable discrepancies between the couple if the husband is incarcerated. Also, once he is released, the husband could very well divorce his wife by following the proper Quranic procedure. Such detention will also result in an unjust denial of the Muslim married couple's conjugal rights. The fear of such adverse effects would prevent women from reporting accidents of this nature. This will mean that the deterrent impact of such a clause would be little. The woman is, thus, left with no redress at all. If the crime is a cognizable one, without any formal investigation, police officers have the right to make an arrest. In the operation, the woman will have no say.

Also, the practise has not been ruled a crime by either the Courts or the Shariat Act. It is considered to be sinful and abominable by the Hanafi school, which acknowledges this form of divorce. [245] In theology, it is evil, but not a crime.

In addition, the penalty recommended is not proportionate to the severity of the mistake. The provision of the 'just deserts' principle is the cornerstone of a justifiable criminal penalty. Under the Indian Penal Code, the penalty of three years has been prescribed for many more severe crimes, including sedition, spreading enmity among

[244] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* , 213,(Oxford University Press, Oxford, 2013)
[245] Asaf A.A. Fyzee, *Outlines of Muhammadan Law,* 147 (Oxford University Press, Oxford, 2008)

classes of citizens, rioting armed with deadly weapons, etc. It does not seem justified to impose such a penalty for an inconsequential act.

LACUNAE IN THE ACT

A. AMBIGUITY IN MARITAL STATUS ON PRONOUNCEMENT OF TRIPLE TALAQ

Section 3 of the Act merely makes pronouncement of Unapproved Talaq illegal and void. However, the Bill does not clarify the status of the marriage on pronouncement of Unapproved Talaq. It is unclear whether the marriage would subsist or dissolve.

It may be assumed that the marriage survives the Unapproved Triple Talaq, since the Legislature's intention was to end instantaneous divorce. However, the Act also provides for subsistence allowance[246] and custody of children,[247] which are typically enacted in divorce law. Herein lies the inherent contradiction in the Act.[248]

The consequences of Unapproved Talaq prescribed in the Act- such as immediate arrest and imprisonment up to 3 years- do not make for continuity of a marriage. The husband's imprisonment is likely to negatively impact the family's financial stability. This will, in fact, create more hardship on the Muslim wife, than solve her problems. The Act does not consider how intricately imprisonment is linked with livelihood and maintenance.[249]

It is also unclear what recourse the Muslim wife may take while her husband is in prison. Her husband's imprisonment will force the wife to live as a single woman while he is in jail.[250] She can neither divorce him nor can she remarry. The Dissolution of Muslim Marriages Act,[251] 1939 grants divorce upon imprisonment only if the sentence is for 7 years or more. Under the Bill, the maximum sentence is for 3 years. Therefore, the wife will not be able to divorce her husband on this ground. The other grounds for dissolution of marriage may also not be applicable to her in this

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[246] Section 5 of Muslim Women [Protection of Rights on Marriage] Act, 2019
[247] Section 6 of Muslim Women [Protection of Rights on Marriage] Act, 2019
[248] Manasi Chaudhari, *Triple Talaq Bill: Lacunae and Recommendations*, 5(2) NLUJ Law Review 49 (2018)
[249] Esita Sur, *Triple Talaq Bill in India: Muslim Women as Political Subjects or Victims*?, 5 , 12 SPACE AND CULTURE, INDIA (2018).
[250] Aravind Kurian Abraham, Bill Criminalising Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking, THE WIRE (Dec. 30, 2017) https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking 4 May 2020
[251] Dissolution of Muslim Marriages Act, 1939, No. 8, Acts of Parliament, 1939.

case. As a consequence, the Muslim wife will be left alone in an empty marriage, with possibly no steady source of income, and no way out.

Further, even though the Act declares Unapproved Talaq void, it cannot compel the husband to have a loving marriage with his wife.[252] Thus, the Muslim wife is forced to remain married to a man who attempted to divorce her instantaneously and irrevocably. She is not granted any say on her marriage, despite being an equal stakeholder. This seriously subverts her ―individual choice and autonomy.

B. CRIMINALISATION OF A CIVIL WRONG AND OVERCRIMINALISATION

Muslim marriage and divorce are both civil acts, just like marriage and divorce in other religions. However, the Act makes Unapproved Talaq a criminal act. The declaration of objects and reasons for the Act justifies the criminalisation of Unapproved Talaq on the ground that it is essential to prevent Triple Talaq.[253]

In Shayara Bano, the Supreme Court anyway set aside the practice of Triple Talaq.[254] As a result, Triple Talaq is no longer a valid form of divorcing a Muslim wife. Even if pronounced by the Muslim husband, it will not dissolve the marriage. As a result, the harm that is sought to be remedied by Section 4 of the Act[255] has already been rendered inconsequential. Further, mere criminalisation of Unapproved Talaq will not serve as an effective deterrent against it. For example, even cruelty by husbands is a crime punishable with three years of imprisonment.[256] The crime rates charged under cruelty are increasing day by day. Hence, the efficacy of the three year imprisonment for Unapproved Talaq is questionable.[257]

Moreover, the Act does not just criminalise Unapproved Talaq- it over-criminalises Unapproved Talaq. There is no rationale or justification given for prescribing 3 years imprisonment for Unapproved Talaq. Three years imprisonment is reserved for crimes which have the potential to threaten public peace and security of the country.

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[252] Supra 26 at 65
[253] The Muslim Women (Protection of Rights on Marriage) Bill, 2017, No. 247-C, Bills of Parliament, 2017, http://164.100.47.194/Loksabha/Legislation/billintroduce.aspx 4 May 2020
[254] 2017 (9) SCC 1
[255] Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.
[256] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, section 498A
[257] Supra 26 at 67

Examples of these crimes are sedition,[258] rioting with deadly weapon,[259] counterfeiting Indian coins,[260] promoting enmity between classes of people[261] etc. Other serious crimes, such as, causing death by rash and negligent act,[262] rioting,[263] bribery,[264] wrongfully restraining a person,[265] etc., have a maximum of two years imprisonment. Therefore, the 3 years for Unapproved Talaq do not fit into the scheme of the Indian Penal Code, 1860 (IPC).

C. DIFFICULTY IN IMPLEMENTATION

The thumb rule in criminal law is that the burden of proof lies on the prosecution.[266] The accused is considered innocent until proven guilty beyond all reasonable doubt.[267] Proving Unapproved Talaq may become extremely difficult. Since Triple Talaq may be declared orally without any witnesses, it may not always be supported by evidence. At least if it is documented, in the form of email, text message, hand written, etc., it can serve as documentary evidence.[268] Consequently, conviction rate may become very low. This may serve as a disincentive for the Muslim wife to report the act of Unapproved Talaq by her husband.[269]

i. Mens Rea or Strict Liability:

It is also unclear whether the Act requires mens rea or seeks to impose strict liability (that is, mens rea is not required). The essential ingredients of a crime are actus reus- wrongful act and mens rea- wrongful intention.[270] Actus reus is the physical action of the person.[271] Mens rea is his mental condition.[272] Mens rea is a necessary ingredient of a crime because the objective of criminal law is to punish a person only if he has a

[258] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, section 124A
[259] Id section 148
[260] Id Section 233
[261] Id section 153A
[262] Id section 304A
[263] Id section 147
[264] Id section 171E
[265] Id section 341
[266] Id section 101
[267] *Vijayee Singh v. State of Uttar Pradesh*, (1990) 3 SCC 190
[268] The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, section 61
[269] Pramit Bhattacharya, An epidemic of crimes against women?, LIVE MINT (2013), https://www.livemint.com/Opinion/xvSrDvJQWT5Qd2KrhMRLgK/An-epidemic-of-crimes-against-women.html 4 April 2020
[270] PSA PILLAI, CRIMINAL LAW 22, LexisNexis (9 ed. 2000)
[271] Id., ch. 4 at 22.
[272] Id

guilty mind.[273] The IPC, in most cases, describes the kind of mens rea that is required for a crime.[274] It uses terms like- dishonestly,[275] voluntarily, has reason to believe, criminal knowledge[276] etc. to show mens rea. However, for certain crimes, the Indian Penal Code, 1860 (IPC) by-passes the element of mens rea and imposes strict liability. That is, the person may be considered guilty even without intention to perform the crime. Strict liability can be gathered from the words used in the statute. For example, Section 292 of the IPC makes sale of obscene books, etc. a punishable offence, irrespective of knowledge or intention.[277] Courts have interpreted this section as imposing strict liability.

Section 3 of the Act does not prescribe mens rea for the husband pronouncing Unapproved Talaq. This would mean that, even if the husband does not intend to divorce his wife, utterance of Talaq thrice will be held as pronouncement of Unapproved Talaq.[278] The Act does not consider that sometimes, such utterances could be made in the heat of the moment.[279] Under extreme anger, the husband may not realise what he is saying. It is argued that imposing strict liability for Unapproved Talaq is excessive and unnecessary.

Further, criminalisation may prevent Muslim women from reporting Unapproved Talaq. This is because her disclosure could land her husband in prison. Most Muslim women would not want this especially due to their socio-economic backwardness.[280] This will defeat the very purpose of the Act.

D. VAGUE PROVISION FOR SUBSISTENCE ALLOWANCE

The provision of subsistence allowance in Section 5 is also vague and arbitrary.[281] The Act does not define subsistence allowance. No guidelines are laid down for the

[273] Id., ch. 5 at 39
[274] Id. at 40.
[275] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, section 24
[276] Id section 26
[277] Id section 292
[278] Faizan Mustafa, Why Criminalising Triple Talaq Is Unnecessary Overkill, THE WIRE (December 15, 2017), https://thewire.in/gender/why-criminalising-triple-talaq-is-unnece 4 May 2020
[279] Id
[280] Aravind Kurian Abraham, Bill Criminalising Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking, THE WIRE (December 30, 2017), https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking 4 May 2020
[281] Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.

Magistrates for determining subsistence allowance.[282] Basic factors such as, the amount of subsistence to be given, schedule of payment, which law will this subsistence fall under, etc, are left to the Magistrate's discretion.[283] Since Muslim personal laws (including property and inheritance) are not codified, the Act should have prioritised determination of the subsistence allowance. This would have helped to safeguard the Muslim woman's right to receive an allowance.

Further, the Act is unclear about payment of subsistence allowance when the husband is incarcerated. Upon imprisonment, the husband's income will discontinue. There is no provision about how the husband will pay the subsistence allowance without any recurring income. Further, the Muslim wife will also be deprived of day-to-day sustenance, without a constant source of income.[284] This anomaly will especially affect the lower strata of society, which depends on daily income for survival.[285] The Act is thus, indirectly placing additional hardship on the already 'hapless married Muslim woman.' By imprisoning her husband instantly, it is depriving her of sustenance and income. This seems too harsh a repercussion for three inconsequential words.

The Act is also silent about when the subsistence allowance is to be paid- whether as an interim relief or only upon the husband's conviction.[286] Since this is left to the Magistrate's discretion, it could swing either way. If the allowance is permitted only after the husband's conviction, it would mean a long waiting period for the Muslim wife. Without laying a framework for these basic issues on subsistence allowance, the Bill leaves too much scope for the Magistrate's discretion.[287]

E. ARBITRARINESS- CUSTODY

In the Shayara Bano case, Justice Nariman reiterated that arbitrariness has always been a premise to strike down a law as unconstitutional. The Act, in its present form,

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[282] Deva Bhattacharya, *Triple talaq bill: Draft law is more focused on victimising Muslim women rather than empowering them*, FIRSTPOST (2018), 22 June 2020, https://www.firstpost.com/india/triple-talaq-bill-draft-law-is-more-focused-on-victimising-muslim-women-rather-than-empowering-them-4281477.html
[283] Id
[284] MULLA, PRINCIPLES OF MOHAMMEDAN LAW, 338, LexisNexis, (22nd ed. 2017)
[285] Id
[286] Id
[287] Supra 26 at 73

may not pass this test of arbitrariness. It is liable to be struck down for the exact reason for which the Supreme Court set aside Triple Talaq- manifest arbitrariness.[288]

For instance, Section 6 gives automatic child custody to the Muslim wife if her husband pronounces Unapproved Talaq on her.[289] It is unclear whether this custody is provided in the interim (when the husband is incarcerated), or permanently. Unless criminal proceedings are initiated against the husband, there is no need to determine custody. Moreover, if the husband is incarcerated, the custody of the child will anyway lie with the mother, as the natural guardian.[290] These are questions of fact, which courts determine on case-to-case basis. However, a blanket provision for custody to the mother, in all cases, seems arbitrary and excessive. This may set problematic precedents for further laws.

F. PREVENTS RECONCILIATION

The Act suffers from the same problem which the Supreme Court had with Triple Talaq- there is no scope for reconciliation. This is because of the long 3 year imprisonment period,[291] and classification of the offence as non-bailable. With the husband forcibly incarcerated, the door for a possible reunion is shut.

An attempt at reconciliation is a fundamental requirement for divorce under the Quran. Divorce laws of other religions, such as the Hindu Marriage Act, 1955 also prioritise reconciliation before seeking a divorce. For example, even in a divorce by mutual consent, the couple should have lived separately for at least a year.[292] Further, the court can decree a divorce only after a 6 months waiting period.[293] This time is intended to encourage the parties to reconsider because the breakup of a marriage is a serious issue and has serious repercussions for the parties and the children..[294] Unlike other divorce laws, the Act has prioritised criminalisation over reconciliation. This deprives the Muslim couple from the opportunity to save their marriage.

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[288] Id
[289] Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate.
[290] *Ms. Gita Hariharan and another v. Reserve Bank of India and another*, AIR 1999 SC 1149 (India).
[291] Section 4 of Muslim Women [Protection of Rights on Marriage] Act, 2019
[292] The Hindu Marriage Act, 1955, No. 2, Acts of Parliament, 1955 section 13B (India).
[293] Supreme Court held in *Amardeep Singh v. Harveen Kaur*, (2017) 8 SCC 746 (India) that the 6 months‘ waiting period is directory and not mandatory. It can be waived by the courts.
[294] Smt. Suman v. Surendra Kumar, AIR 2003 Raj 155 (India); see also Sureshta Devi v. Om Prakash, AIR 1992 SC 1904

Further, it also victimizes the Muslim wife. Divorce is heavily stigmatised in Indian society. The taboo against divorce is higher on women. The Act with limited scope for reconciliation, sets up the Muslim woman to live the life of a divorcee. If she has children from the marriage, her situation as a single mother will be even more precarious.

LEGISLATION WITHOUT AIM

In August 2017, a landmark judgement was issued by the Supreme Court of India ruling the practise of Triple Talaq unconstitutional and violating Article 14 of the Constitution. Not only was it an ecstatic victory for Shayara Bano and thousands of Muslim women whose rights had been abused, it was another step towards empowering the nation as a whole with women. The Honourable Supreme Court pronounced the judgement after which it was the responsibility of Parliament to draught the statute. The resulting rule, i.e. The 2019 Muslim Women (Protection of Rights on Marriage) Act was in no way compatible with the intent it was supposed to serve. The law that was meant to ensure equality and security of women's rights seems more likely to be a legal clean chit for the imprisonment of Muslim men and for the aggrieved women to be unconcerned. In the law, the numerous erroneous legal and logical loopholes make its intent vague and perplexing.[295]

The fundamental incongruity with this Act is that it stands on the edge of divorce by annulling instant triple talaq as per the Supreme Court's order, but at the same time effectively legitimising it by guiding custody and maintenance, which if the talaq does not occur does not come into the frame. The criminalization, i.e. the gaol sentence for the man pronouncing triple talaq, is again a logical fallacy with severe implications for the aggrieved woman's future, since first of all, if the marriage breakup never takes place, because triple talaq is called 'vacant' so what is actually criminalised by the legislation? Is it the 'intention' of dissolution (amounting to oppression) or is it three times the mere utterance of the word 'talaq' (which has no meaning now, legally)? Nor does the rationale behind criminalization fail to explain it. As the WCD Ministry has already proposed to the union cabinet, if the bill attempts to criminalise

[295] Shivani Shukla, TRIPLE TALAQ- FEMINIST POINT OF VIEW , Academia, https://www.academia.edu/40678931/triple_talaq?sm=b , 6 May 2020

the purpose of injustice, it will fall within the framework of Section 498A of the Indian Penal Code..[296]

In policymaking, there is a popular jurisprudential principle, "Cessante ratione legis, cessat et ipsa lex," i.e. if the justification for a law ceases to exist, the law also ceases to exist. By abolishing the evil practise of triple talaq, the Supreme Court's judgement left no excuse to over-expand it to anything that can be misused. Some see the criminalization of triple talaq as a cognizable crime on the façade as a powerful force defending the rights of women, but only a deeper understanding vindicates that it is entirely anathema to the intent of the Act , i.e. empowering women.[297]

REFORMING PERSONAL LAWS

Personal law reforms in India have been and continue to be a sensitive issue because they may potentially impinge on the right to religious freedom of various religious groups in the country. In contrast to this, several practices continued through the personal law system pose serious threats to constitutional values of equality and dignity of individuals as well as groups of individuals falling within the broader category of a religion, such as women. While dealing with the question as to the status of personal laws in independent India, the Constituent Assembly considered it prudent to continue the personal law system.[298] Nonetheless, the idea that personal laws needed to be reformed so as to meet the constitutional goals was not lost in the post-independence period.

In the early years, the thrust to reform the personal laws came from the executive and the Parliament. This is exemplified by the various attempts to enact what came to be known as the Hindu Code. The first Prime Minister, J.L. Nehru, was of the opinion that task of reforming personal laws must begin from the majority as it would demonstrate that the reforms were not political tools to suppress the minorities.[299] However, legislative attempts to reform personal laws of other religious communities came much later.[300] In the meantime, judicial attempts to bring the personal laws in

[296] Id 17
[297] Id
[298] Marc Galanter & Jayanth Krishnan, PERSONAL LAW AND HUMAN RIGHTS IN INDIA AND ISRAEL IN RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 273, Israel Law Review, (1st ed., 2002)
[299] ARUN K THIRUVENGADAM, THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS 195, Hart Publishing, (2017)
[300] Id 197

consonance with the constitutional mandate had already begun, and it created huge social and political divisiveness in the country.

While dealing with personal laws there needs an important question to be answered i.e., whether the social reality of the Indian society changed merely by bringing about changes in the personal law system. The answer is clear. .Rather than uniformity, what women need are an accessible and affordable justice delivery system and inclusive models of development that will help to eliminate their poverty and destitution and help to build an egalitarian world.[301] This comment was given by Flavia Agnes in the plight of Hindu women is in the context of Hindu personal law reform, it is equally true of reforms in the personal laws of other religious groups. This chasm between the social and legal reality reveals that the top-down approach of reforming personal laws has not worked well in India. This is clearly exemplified by the *Sarla Mudgal v. Union of India,*[302] wherein the issue of polygamy within Hindu religion was raised despite the fact that not only the Narasu[303] judgment but also The Hindu Marriage Act, 1955 prohibits it and the Indian Penal Code, 1860 makes engaging in it a criminal offence.[304] Evidently, in order that the personal law system is reformed, a more comprehensive and co-operative attempt is required to be made. Therefore, balance of this section, we discuss briefly an approach for personal law reform which we believe is more inclusive as it demands cooperation and strengthens the bond between State and religious groups.

The charactyer of the State in reforming personal laws would be no less than that of the members of religious groups. The State cannot effectively lead this process pursuing a positivistic frame of mind and imposing its standards of human rights upon the religious communities. Therefore, it will be necessary for the State to appreciate the centrality of religious laws in order to support the process of internal reformation because personal laws are directly related to and are important aspects of distinct

[301] *Flavia Agnes, Liberating Hindu Women*, 50(10) ECONOMIC AND POLITICAL WEEKLY(March 07, 2015)
[302] AIR 1995 SC 1531.
[303] *State of Bombay v. Narasu Appa Mali* [AIR 1952 Bom 84] where the court held that the personal laws are outside the ambit of judicial scrutiny under article 13 and because of which even today, after 65 years of developed constitutional jurisprudence, some of the discriminatory personal laws continues to be in practice.
[304] See The Hindu Marriage Act, 1955, section 5; The Indian Penal Code, 1860, section 494.

identities of religious group.[305] Moreover, since religious laws operate independently of State structures and mechanisms, if the State engages with them in a hard-fashioned way, it will be able to transform the content of these laws only superficially without bringing about a social change.

Therefore, if this road to reforming personal laws is to reach the desired end, then it is crucial that the State in spite of acting in a hostile and intrusive way towards religious personal laws act in a supportive capacity. One way to do this is to encourage the religious groups to engage in internal consultations about reforming their practices by developing programs and incentives that inspire the process of reformation.[306] Moreover, as this process would require cautious progress, therefore, classifying religious laws as being discriminatory, patriarchal and harsh must be done by the members of the groups themselves in order to avoid rift amongst different religious groups.[307]

CONCLUSION

Rights should be analysed in the light of fundamental and constitutional right which are granted under the Constitution of India. No act should be the violative of the constitutional framework of the India. Rights if granted then it should not discriminate whether male or female. The Muslim Women(Protection Of Right On Marriage) Act 2019, should have some of changes, amendments in it which is far to both men and women. Under this Act the room for reconciliation between husband and wife should be there so that the decision which they have been onto does not let them regret what they had in their marriage. Imprisonment of husband because of giving of divorce to his wife does not sought thing rather it complicates more and more as whatever space which would have been there for them to reconcile in their marriage would be gone. Due to which not only will husband suffer but wife will also has to face many problems in her married life and also it will strain the relationship between wife and her in- laws.

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[305] WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 325-336,Oxford University Press, (2014).

[306] Andra Nahal Behrouz, Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative, COLUMBIA LAW REVIEW 1156-61(2003).

[307] Abdullahi Ahmed An-Na'im, State Responsibility under International Human Rights Law to Change Religious and Customary Laws in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, Researchgate, 176 (1st ed., 1994).

Also the most important point which one should not forget about is the children out of wedlock; the effect that children will have due to the complications between their parents. As children want their family together not torn apart as they grasp everything around them but this kind of situation puts them in a difficult positions whether they are minor or they have attained the age of majority. As provided under article 14 of the Constitution of India there should be not inequality on the basis of caste, class, gender, sex, colour, etc.

Although, when legislators devise laws they confront a vast decision problem, but it is important that they proceed with what is often called 'the total evidence requirement'. It is also necessary that they tread cautiously in the scene of criminalisation. This is more so when the legislature appears to have a tendency of criminalising a human conduct which essentially arises out of a civil obligation, in the present case instant triple talaq. This reasoning applies with similar intensity to Indian courts as well.

CHAPTER VII

CONCLUSION & SUGGESTIONS

Our Country expresses its uniqueness through its diversity. We are diverse in every corner; language, culture, religion, festivals, customs, practices, beliefs etc. In order to protect these diversities we have respective laws which are also different from one another. Our Constitution makers have taken keen interest in drafting laws accordingly so that no religion comes over another. Our Preamble itself put forward Equality principle to avoid discrimination in every stage. All the legislations must go through a set of principles before which it is officially accepted. Our judiciary has also been working as a third eye by scrutinizing legislations; whether they keep up the standard and also directing legislators to draft legislations where ever necessary.

Religion is a factor which makes our country diverse. It is labeled as dangerous opium which can stimulate the feelings of people, thus affecting the equilibrium in society. Our judiciary has also acted wisely while delivering judgments related to the same. In order to bring peace and equality in society among people we have several legislations which rule the procedures and practices governing each religion and also sort out confusions and discriminations among two gender.

Triple Talaq or Talaq-e-biddat was a custom followed among Mohammedans husbands' to divorce their wives. It remained as a custom and no specific law existed which described the mode of pronouncement of divorce or the rights of divorced wife. Religious scholars had given their suggestions in professing such practices; some for and some against. Nobody took the hurdle in solving this issue unless a woman named Shayara Bano approached the Supreme Court raising issue over the discriminated sections of women who were facing the outcome from the pronouncement of talaq. The case delivered its judgment in 2017 where the honorable Supreme Court made Triple Talaq void.
After the decision of the Supreme Court, uttering the words' talaq 'three times does no t break the union, but it would definitely be possible to file criminal charges against th e husband for pronouncing these words. Over a span of 90 days, an angry husband wo uld either pronounce talaq in the permitted form or simply desert her like Hindu husba nds do, leaving her high and dry. There after Parliament passed the Muslim Women [Protection of Rights on Marriage] Act, 2019 which declared triple divorce as void

and prescribed punishment for those husbands who divorce their wives by pronouncing divorce.

While our Constitution was adopted even though the concept of secularism was not ad opted by the Constitutionmakers, the same is reflected in Articles 25 to 28, which enc ourage freedom of conscience and free profession, practise and propagation of religio n, the freedom under Part III, i.e. the chapter which deals with Fundamental Rights in the Indian Constitution, to administer its religious affairs. Similarly, Part III of the Co nstitution also guarantees its citizens the right to equal treatment or equal protection o f laws, the prohibition of discrimination on grounds of faith, caste, sex, etc., the right to citizenship, which includes the right to live with dignity within itself, and, let alone, the Article 25, which grants freedom of religion, is also subject to freedom of religion . This theory has helped our society to wipe out the 'religious practises' of social evil s uch as sati, polygamy, devdasi, dowry, triple talaq, child marriage or any other.
Certain religious practices are tagged as personal law which remains under the category of custom without any legislationThe category of personal law may well have originated in colonial India, bu t this category was strengthened, reconstituted and strengthened after independence. I n fact, the reforms to Hindu law were one of the key social laws that were implemente d in independent India. These amendments caused enormous protests in many parts of India, and the Hindu Mahasabha formed the most notable and vociferous opposition. The Hindu Law Committee continued to contemplate reforms under the stewardship o f Nehru and Ambedkar, despite sustained protests.

Shayara Bano v. Union of India's Supreme Court decision outlawing the practise of tri ple talaq has taken a first step towards ending practises of personal law that are patriar chal against women, but primarily on the basis that triple talaq is also not an important Islamic practise that implies that bad theology should not be successful in law.The court has not delved on the supremacy of fundamental rights in case of a conflict between the personal law and fundamental rights and the premise of Narasu Appa Mali[308] has not been overturned.

[308] The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84, Personal laws were not included in the expression 'laws in force' used in Article 13(1)

While taking the example of two genders, it is a known fact that women are more discriminated than men. There is the approach that in order to promote the empowerment of women, the realities of her religion and culture must be negated. This would however reduce the quest for her rights to a myth for she exists within the two and has to establish her identity between those two realities of her religion and culture. Women must thus learn to create their identity and seek their rights while existing in this cocoon of religion and culture which is their habitat.

Muslim Women [Protection of Rights on Marriage] Bill was introduced in the Parliament in the year 2017 which was later passed and adopted in the year 2019. Since Muslim Law remained as personal law, the bill contained certain provisions which were new to the beliefs followed by the followers. The Act punished men and aimed to protect women and provide benefits to them. But in reality it just punished men and no benefit can be seen to be showered on women rather they put women in more complex stage. As the provisions of the Act suggests, men would be behind bars for divorcing their wives by pronouncing triple talaq. Simultaneously they have the liability to provide maintenance to their wife which is never possible for a men living in such a situation. Also divorce does not happen and they are still living as a husband and wife and the relationship continues even after the husband comes out of jail. No men would be ready to forgive their wife because of whom they had to go behind bars. This is a not a smooth solution to the problem which is ought to be cured through this piece of legislation. Also, there is a chance that this Act can be easily misused by women who want to destroy or who have enmity towards their husband.

Talaq is definitely a social evil which need to be cured. There is no discussion that this type of practice is discriminating women and has made them suffer a lot. There are numerous instances were such sufferings were described by the victims. Court has earlier interrupted similar practices by prohibiting them. There is no doubt that the Legislature and Judiciary has the authority to put an end to such customs and empower women to fight against such evils. Society has been urging for legislation as Muslim Women [Protection of Rights on Marriage] Act 2019 since a long time. There is no doubt that the aim of this legislation must be benefitting women. But what happened to this piece of legislation is that it provided benefits under a cloud of hopes. Benefit was just though the words establishing triple talaq void but was not

enough to enhance the position of women. Even after establishment of the Act the position of women is never going to change.

From the statement and Objects it can be asseted that the Act helps to ensure that married Muslim women have wider constitutional objectives of ge nder justice and gender equality and helps sub-serve their fundamental rights of non-discrimination and empowerment.

But just the provisions itself make this statement negative. For example, The terminology of “sustenance allowance” used in the Bill adds insult to injury. Today, asperlaw married woman shall be entitled to an equal share of the family wealth and s hall be entitled to reside in a dwelling house (matrimonial residence) free from or thre atened by crime.

As Muslim personal law denies Muslim women right over their kids above a certain age, the provision granting rights over their children is hailed as a positive step. It's a fallacy here. The courts are bound by single principle the best interest of the childduri ng custody battles. Courts also conclude that the child's best interest rests with themot her. A Muslim couple is regulated by the 1890 Act of Guardians and Wards. The mer e terms "subsistence allowance" and "child custody" appear to convey that the utteran ce of the terms talaq three times has actually dissolved the union, a stance contradictor y to the judgement of the Supreme Court.

With the Supreme Court ruling triple talaq invalid, it effectively suggests that triple tal aq pronouncement is considered as a single talaq as such, as was thought from time i mmemorial, but the man will still have the iddat cycle to either take it back or pronou nce it again. No other distinction exists. It makes no sense in the circumstances to plac e criminal responsibility on anything that has no legal ramifications.

As a matter of good public policy, unless there is an urgent basis for it, such as physic al abuse, criminal law must not intrude into the personal lives of people.For divorce, c ertain grounds of cruelty within a marriage are adequate, but definitely do not qualify for criminal prosecution.

The judgment in Shayara Bano case was appreciated all over the country being a major step taken by the Supreme Court empowering women to come out of the veil. It

was the fight of a woman Shayara Bano which resulted in such a judgment on a suit filed in 2015. She has narrated the instances through which she had to pass which was the result of her husband's act. Society considered a divorced woman as a curse. She was the one who was always considered at fault for the divorce that happen. Even with the technological advancement the mode of pronouncing talaq had changed. Messages through social media by pronouncing talaq were also considered as a mode of divorce. Women were not given a platform to show the reason for divorce.

Countries like Egypt, Pakistan, Bangladesh, Sri Lanka, Tunisia, Morocco etc. has abolished triple talaq through certain legislations which are in such a way that would not strike the rights of both men and women. Proper procedure through legislations has been followed by the respective governments in erasing out this social evil.

Our Legislature has always looked forward in uplifting the under privileged. We have Sati Regulation Act 1829 which marked the first legislation in unveiling the gender injustice. Gradually our legislation has adopted a variety of legislations like Dowry Prohibition Act, 1961; The Child and Adolescent Labour (Prohibition and Regulation) Act of 1986, in 1939 we adopted Muslim Women Dissolution of Marriage Act which cleared confusions regarding effect of renunciation of Islam by a married woman and regarding the marital relationship. All these legislations directed the society ensuring equality among the two genders.

The last piece of legislation we have is The Muslim Women [Protection of Rights on Marriage] Act 2019 which was supposed to have the same effect as that of the above mentioned legislations. Unfortunately this piece of law couldn't create such a positive impact rather could only lead to more trouble in place of cure. There is no debate as to the importance of such an Act which our society has been urging to long. But this is not the one.

Muslim marriage always remains as a civil contract. Imparting criminal punishment for a civil wrong itself is wrong. Under Hindu Marriage Act, 1955 section 13 defines divorce. As per section 13(ib) desertion is a ground for divorce. If the petitioner has been deserted by either spouse for not less than two years preceding the petition, it is a ground for seeking divorce. No criminal liability is imposed on either spouse for doing such an act. Similarly triple talaq creates way for desertion of wife by husband. Apart from imprisoning husband what requires more is the life of the spouse who is

being deserted. A solution must be found out for maintenance of the wife and children. Imprisonment of husband is never going to aid the living expenses of the family, but would increase the hassle of the family without any earning member aiding the family expenses.

A legislation which is not cent per cent effective or efficient is never going to help the society or its people in resolving confusions. It would rather create more. The intention of creating this Act is noble. Act can be made more effective through certain amendments in order to make it more inclusive and empowering Muslim women. The provisions which lack stability must be removed in place of which promising provisions must be included.

SUGGESTIONS

- **STATUS OF MARRIAGE**

Status of marriage is to be made clear in the Act upon pronouncement of triple talaq. Supreme Court in Shayara Bano case has set aside the pronouncement of triple talaq to be void. When the pronouncement itself is invalid, it cannot have any consequence on the marriage.

The Act should clearly state that Unapproved Talaq will not affect the marriage in any manner. Further, if either partner seeks a divorce, they may do so through any of the legally approved methods of divorce under Muslim personal law. Alternatively, the Act could also state that pronouncement of Unapproved Talaq will count as a single pronouncement towards divorce by Talaq Ahsan or Talaq Hasan. This will take away the immediate and irrevocable character of the Unapproved Talaq.

On pronouncement of Unapproved Talaq, any of the following situations may arise:

- ✓ The couple sets aside the pronouncement and continues with the marriage
- ✓ The Muslim husband seeks divorce through other approved methods
- ✓ The Muslim wife seeks divorce either on the ground of pronouncement of Unapproved Talaq by her husband, or other ground/method available to her. She may also seek civil penalties from her husband, like- Mehr, damages, or any other civil penalty prescribed by law
- ✓ Both husband and wife seek divorce mutually.

In the first situation, the law need not interfere. However, in the remaining situations, the questions of subsistence allowance and custody of minor children, during the pendency of the divorce proceedings, will arise. Therefore, the Act needs to clarify that the provisions for subsistence allowance and custody of minor children in the Bill are interim measures until the courts finally decree the divorce.

- **AID MUSLIM WOMEN TO SEEK DIVORCE**

In case a Muslim woman needs to seek divorce there must be an agency supporting them. Preponderance of Probability principle is necessary to support this claim. Socio-economic conditions of Muslim wives need to be considered while dealing with this provision. There is a chance that women may not disclose the pronouncement of talaq in order to safeguard the marital status. There may be some wives who don't want to see their husband behind bars because of them. In such situations what requires most is the financial stability to such families. Most women are dependent on their husband for livelihood. In such cases if the wife need to have divorce from their husband, there must be some institution to hear their grievances, learn about their hardships and ready to provide financial assistance from their husband. If the wife hopes to dissolve her marriage, there should have the right to seek the same.

- **REMOVE CRIMINAL LIABILITY OF TALAQ**

Instead of focusing on criminal liability, the state's focus should be on reconciliation and reformation in marriage. Imposing criminal liability is not going to help either spouse, but would worsen the relationship. A Muslim husband's failure to perform his marital obligations or to maintain his wife is unlawful. However, the above two acts only attract civil consequences, in the form of divorce. Similarly, Unapproved Talaq should also be treated as a civil wrong and not made a criminal offence. There is no need to add onto and give undue importance to Unapproved Talaq, especially when it has no consequence on the marriage. If they are not ready to move with each other, then there should be a solution which could be through divorce. Both parties should be ready for this and there must be a solution for meeting the family expenses.

Introducing heavy penalties for pronouncement of Unapproved Talaq may be an effective way to prevent it. The Mehr should be high enough to deter the husband

from divorcing his wife. If he pronounces divorce, he will have to pay the stipulated amount.

If the Parliament insists on criminalizing Unapproved Talaq, it should at least remove the strict liability on it. The provision should require intention or knowledge of the husband while pronouncing Unapproved Talaq. It should criminalize unapproved Talaq only if the husband clearly and unambiguously intends to pronounce it. The Parliament could also create certain exceptions when pronouncement of Unapproved Talaq will be ineffective. For example, if the husband is inebriated, mentally unsound, insane, provoked, uncontrollably angry, etc. Countries like Egypt, Morocco, Iraq, Kuwait, Sudan, Jordan, and Syria have carved out such exceptions via reform legislations.264

Moreover, the nature of the offence should be changed from cognizable and non-bailable to non-cognizable and bailable. This will make the offence more proportionate to the harm it seeks to remedy. It will reduce the severity of the offence and give the Muslim couple scope to reconcile their marriage.

- **IMPROVISING NIKAH-NAMA**

The nikah-nama is like a civil contract entered into between the husband and wife. In modern terms, it may be understood as a prenuptial agreement. It lays down all the terms and conditions of the marriage, including the amount of Mehr payable. If the Act really seeks to uplift Muslim women, it should make it compulsory for the nikah-nama to have a provision against Unapproved Talaq. This will make pronouncement of Unapproved Talaq a civil wrong. The wife will become entitled to civil remedies.

- **COOLING OFF PERIOD**

As provided in Hindu Marriage Act, 1955 cooling off period should be provided in this Act. Section 13B(2) provides for compulsory cooling off period of six months between the first and last motion for demanding divorce by mutual consent to explore the possibility of cohabitation and settlement. On similar lines, the Act should provide a reasonable amount of time before which the Court, cannot decree divorce. This should apply equally for divorce proceedings by either party- the husband or the wife. In the interim, it should be the couple‘s discretion whether to live together or

separately. After the reconciliation period, the courts should not hesitate to look into the question of divorce.

It is, however, important to carve out an exception to the compulsory cooling off period, like in instances of- domestic violence, rape, sexual assault, cruelty, etc. against the wife. Determining the existence of these circumstances should be left to the discretion of the court. The Parliament may choose to create a presumption about their existence in favor of the wife, for the purpose of this exception.

- **SUBSISTENCE ALLOWANCE**

✓ **Subsistence Allowance as an interim intercourse**

The Muslim wife is already entitled to Mehr amount upon divorce, along with maintenance under Section 125 of the Criminal Procedure Code, 1973 (CrPC). Therefore, the legislative intent behind the subsistence allowance provision would have been to provide for the woman (and child's) sustenance during the pendency of legal proceedings. The Act must clarify this so that the husband does not take advantage of the ambiguity in law to deny the Muslim wife her interim rights.

✓ **Schedule of Payment**

The Bill must provide for the schedule for paying the subsistence allowance- whether it is to be paid as a lump-sum, or recurring periodically. Alternately, the Act could also leave the determination of schedule to the Magistrate on a case-to-case basis, considering the preference of the parties. But, the Act must at least lay down these two options.

✓ **Allowance**

Whether a minimum amount (such as- that equivalent to Mehr amount) should be set. The amount should be determined keeping in mind the husband's standard of living. It should enable the wife and children to maintain the status quo.

✓ **Payment when husband is behind bars**

If the husband is imprisoned under the current provisions of the Act, he may lose his steady income. The Act should make alternate provisions for the wife and children to receive subsistence allowance. This could be through the husband's personal property, other sources of income like rent, interest, etc., or through the other heirs and immediate family members of the husband. If

Unapproved Talaq is de-criminalized, the need for this provision will not arise.

- **DETERMINATION OF CUSTODY**

The current Act gives the child's custody automatically to the mother. Also, it is vague about whether the custody is given for the interim period, during the pendency of criminal proceedings against the husband, or permanently. The author recommends that the child's custody should be given to the mother during the pendency of the criminal proceedings against the husband. However, if the proceedings are merely civil in nature, then custody may be determined on a case-to-case basis. The law cannot turn a dark eye to the possibility of misuse of the Act, especially if Unapproved Talaq continues to be a cognizable and non-bailable offence. In case of misuse of the Act, the father will be wrongly deprived of his child‘s company. The author recommends that, after the interim period, the custody should be determined by the appropriate court.

- **EMPOWERING MUSLIM WOMEN**

Rights themselves do not empower women. Financial and social considerations restrain women from seeking divorce. Their social and economic positions must be uplifted in order to empower them. Lack of education and employment must be solved at the grass root level. This requires a change from punishing husband to empowering women. Such measures must be adopted by government which can secure life of vulnerable and underprivileged women.

Thus the step taken by the Legislature intending to protect the life of women by enacting the legislation- Muslim Women [Protection of Rights on Marriage] Act, 2019 is lacking its fruitfulness in protecting women. Even though this legislation is created with all its good intention in uplifting women, the provisions are not complete and there is a need for elaborate, standardise and equalize the sections.

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