INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 6 | Issue 4

2024

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Criminalization of Triple Talaq: A Critical Analysis

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ABSTRACT

This article aims at investigating the criminalization of Triple Talaq in India through a critical analysis of The Muslim Women (Protection of Rights on Marriage) Act, 2019. Triple Talaq, a practice wherein a Muslim husband can divorce his wife by uttering the word 'Talaq' three times has been a subject of intense debate and legal scrutiny. This article explores the landmark case of Shayara Bano v. Union of India to understand the constitutional debate that disseminated before the declaration of the unconstitutionality of Triple Talaq by the Apex Court of India. The paper mainly focuses on the examination of the legislative response to this judgment of the Supreme Court which culminated in the enactment of The Muslim Women (Protection of Rights on Marriage) Act, 2019 and its alignment with the principles of equality and gender justice. It focuses on the socio-legal implications of the Act in order to provide a comprehensive understanding of its effectiveness. It further provides various suggestions for the policymakers in order to effectively address the identified loopholes and drawbacks in the legislation.

Keywords*: Triple Talaq, Shayara Bano v. UOI, The Muslim Women (Protection of Rights on Marriage) Act, 2019, Gender equality.*

I. INTRODUCTION

In India, divorce is a concept which is governed by various personal laws. Marriage under Muslim law is considered a civil contract. Divorce under Muslim law can be effectuated under various modes known as Talaq, Khula, Mubarat and Faskh.[2]

Talaq is an Arabic word which literally means "taking of any tie." It particularly refers to the repudiation of the marriage on behalf of the husband. A talaq can be effectuated in different ways either orally, by spoken words or by a written document which is known as 'Talaqnama.'[3]

A Muslim husband can effectuate a Talaq by two modes: Talaq-ul-Sunnat and Talaq-ul-

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[2] Hiba Raza, 'Divorce under Muslim law' (2022) 4(5) *International Journal for Multidisciplinary Research* https://www.ijfmr.com/papers/2022/5/875.pdf accessed 10 July 2024.

[3] S.M. Marjina Sultana 'Criminalisation of instant Triple Talaq and empowerment of Muslim women: A critical appraisal' 6 (3-4) *Law mantra* https://journal.lawmantra.co.in/wp-content/uploads/2019/09/14-1.pdf accessed 10th July 2024.

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Biddat.[4] Talaq-ul-Sunnat is considered as the approved form of Talaq as it aligns with the traditions and dictates of the Prophet. It is further divided into *Ahsan* which is the most approved form and *Hasan* which is simply an approved form.

Talaq-ul-biddat which is also known as triple talaq, is a practice followed under Muslim Personal Law that allows the Muslim husbands to divorce their wives instantly, unilaterally and irrevocably. It is considered as the most disapproved form of divorce under the Islamic law. This neither commands the sanction of the Holy Quran nor does it have the approval of the holy prophet. It was recognized by the Umayyads in order to escape the strict restrictions imposed under the Islamic law. This form of Talaq is also known as talaq-ul-bain as it becomes irrevocable as soon as it is pronounced irrespective of the Iddat period. Under this form of divorce once a complete separation takes place, the parties cannot remarry without the performance of Nikah-Halala i.e. the divorced woman marrying another man and being divorced by him. This practice, which has roots in Islamic jurisprudence, faced criticism for its perceived injustice towards women, leaving them vulnerable and often without any legal recourse.

This practice of triple Talaq was invalidated by the Apex court of India in the year 2017,[5] following which the Government of India enacted The Muslim Women (Protection of Rights on Marriage) Act, 2019, which criminalized the practice of triple talaq.

II. DEBATING THE CONSTITUTIONALITY OF TRIPLE TALAQ: SHAYARA BANO V. UNION OF INDIA

A full bench of the Apex court of India heard six petitions from Muslim women who had been divorced by triple talaq concurrently in 2017; these cases resulted in a single ruling. According to this ruling, triple talaq was declared unconstitutional since it conflicted with the fundamental rights protected by the Indian Constitution.[6]

Ms. Bano and the other petitioners argued that the Indian Constitution's fundamental rights, namely, the rights to equality under Article 14[7], non-discrimination under Article 15[8], and right to life under Article 21[9] were violated by the practice of triple talaq. Whether triple talaq

[4] Das, S.s & Singh, Keertika. (2017). 1(76-83) 'Triple Talaq in the Contemporary World: A Critical Study (With special reference to Shayara Bano Case)' *Journal of Department of Law of Patna University* https://www.researchgate.net/publication/370498107_Triple_Talaq_in_the_Contemporary_World_A_Critical_Study_With_special_reference_to_Shayara_Bano_Case accessed 10th July 2024.
[5] Shayara Bano v Union of India (2017) 9 SCC 1.
[6] Shayara Bano v Union of India (2017) 9 SCC 1.
[7] Constitution of India 1950, art 14.
[8] Constitution of India 1950, art 15.
[9] Constitution of India 1950, art 21.

violated constitutional safeguards or was a necessary religious ritual under Islamic law was the main legal question posed in this case. Although it was outlawed or severely restricted in many other nations, the practice had persisted in India since the country's independence.

The legal arguments against triple talaq were mainly centered on gender equality. According to Indian Constitutional law, the practice of instant divorce was considered discriminatory and a violation of women's rights. Through an analysis of women's rights and gender justice, the petitioners built a compelling case against triple talaq in accordance with constitutional law which drove the Supreme Court to examine whether triple talaq was an arbitrary custom that unjustly harmed Muslim women or if it was a necessary component of Islam. This prepared the ground for the Court's historic ruling.[10]

Given that triple talaq was not stated in the Quran and was seen as sinful by certain Islamic scholars, the Court came to the conclusion that it was not a necessary religious practice and thus was not covered by the Indian Constitution's Article 25[11] which guarantees Freedom of Religion. Further, in accordance with Articles 14, 15, and 21, The Court also looked into triple talaq from the standpoint of gender justice and equality. It concluded that the practice was blatantly arbitrary and allowed Muslim wives to be unilaterally divorced without taking into account their legal rights. It was held that it would be against the constitution's provisions of equality and non-discrimination based on sex to permit such an arbitrary practice.

Upon closer examination of the ruling, it becomes clear that the petitioners and the judgment had two intentions. Firstly, to uphold the right to equality by restructuring the unequal power relations between men and women that were fostered by this practice and secondly, to support the welfare role of the Indian state by reducing the destitution that stems from this practice's instantaneous nature.[12] However, in the light of the principles that the Constitution of India protects, the judgment was divided into a ratio of 3:2 about whether the practice should be abolished or modified by way of a judicial decree or if the legislature should take the initiative to do so. The practice was ultimately ruled unconstitutional by the Supreme Court and the judgment's operational part added that it should be followed by a legislation to concretise its

[10] Herklotz, Tanja (2017) 'Shayara Bano versus Union of India and Others. The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice' 50 (300-311) https://www.researchgate.net/publication/322335780_Shayara_Bano_versus_Union_of_India_and_Others_The_Indian_Supreme_Court's_Ban_of_Triple_Talaq_and_the_Debate_around_Muslim_Personal_Law_and_Gender_Justice accessed 10th July 2024.

[11] Constitution of India 1950, art 25.

[12] Kalindi Kokal, 'Living By Religion, Playing by Law: Early Glimpses of The Ban On Triple Talaq' (2022) 18(1) *Socio-Legal Review* https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1099&context=slr accessed 10th July 2024.

ratio.[13]

III. A CRITICAL ANALYSIS OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

Following the landmark judgment by the apex court of India in the S*hayara Bano v. Union of India,*[14] The Muslim Women (Protection of Rights on Marriage) Act was enacted in the year 2019 in order to criminalize the practice of triple talaq and to provide legal protection against triple talaq to Muslim women. The Act declares the practice void and illegal.[15] It further imposes a punishment of imprisonment which may extend up to three years and also imposes a fine.[16] The act is a significant step and an important legislative intervention which is aimed towards gender justice. However, the Act is not free from certain potential shortcomings and has certain legal, social and practical loopholes which need to be critically analyzed and addressed.

The Supreme Court through its judgment has ruled against the efficacy of the practice of triple talaq. The Act on the other hand goes beyond declaring the practice ineffective and declares it a criminal offense by imposing a punishment.[17] The primary problem here is that the legislature is imposing a penal sanction for a criminal wrong.

Marriage under Muslim Law is considered purely a civil contract[18]. A breach of such a contract should not result in criminal sanctions and curtailing the liberty of the person must be the last resort.[19] It is pertinent to note that necessary steps to provide a civil remedy was not taken by the government to prevent triple talaq before making it a crime.[20] They have to demonstrate that every civil remedy has been ineffective, save for making it a crime. If punishment is truly required, civil law may also be used to carry it out. For instance, the Protection of Women from Domestic Violence Act of 2005 is a civil law; yet, if the husband disobeys the protection orders, there is a provision that stipulates penalty.[21]

Under the Indian Penal Code, there are much graver offenses for which a punishment of three

[13] Ibid
[14] Shayara Bano v Union of India (2017) 9 SCC 1.
[15] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 3.
[16] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 4.
[17] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 4.
[18] Justice Mahmood observed in Abdul Kadir v Salima (1886) ILR 8 All 149.
[19] Kalindi Kokal,' Living By Religion, Playing by Law: Early Glimpses of The Ban On Triple Talaq' (2022) 8(1) *Socio-Legal Review* https://www.jlsrjournal.in/analysis-of-the-muslim-women-protection-of-rights-on-marriage-act-2019-by-aarya-kumar-jha/#_ftn9 accessed 10th July 2024.
[20]S.M. Marjina Sultana 'Criminalisation of instant Triple Talaq and empowerment of Muslim women: A critical appraisal' 6 (3-4) *Law mantra* https://journal.lawmantra.co.in/wp-content/uploads/2019/09/14-1.pdf accessed 10th July 2024.
[21] The Protection of Women from Domestic Violence Act 2005, s 31.

years has been prescribed such as sedition,[22] Rioting, armed with deadly weapon,[23] etc. These crimes are far graver than the instantaneous talaq and providing the same punishment for it is gross particularly when the same pronouncement can lawfully be made within a period of three months by not attracting any penal consequences.[24]

While the main aim of the act is to deter Muslim men from practicing triple talaq, the penal provisions prescribed under the act shall also have a deterrent effect on reconciliation and discourage amicable settlements. This approach may thus not effectively address the issues of gender inequality and can further lead to hostility between the married couples exacerbating the marital conflicts. The criminalization of Triple Talaq and the potential imprisonment of the men who pronounce it can further lead to a scenario where women may be put in a situation where their husbands have been imprisoned and the women are both not able to remarry nor able to secure any sort of financial support for their family. Although the act makes a provision for the subsistence allowance to be paid to the Muslim woman by the husband[25] no measures for the financial protection and security of the woman are made when the husband is imprisoned. This makes the woman more socially and economically vulnerable than she was before.[26]

It is also relevant to note that the act attempts to reduce the likelihood of malicious prosecution through three mechanisms. Firstly, it restricts the prosecution of the husband to the wife or her blood relative.[27] Secondly it grants the woman on whom the talaq is being pronounced the ability to end the legal proceedings.[28] Thirdly by allowing for bail if it is deemed appropriate by the magistrate after hearing the Muslim woman on whom the talaq has been pronounced. However, despite the inclusion of these mechanisms there are concerns that the Muslim women who may pursue this litigious route will be subjected to further ostracization and there might arise situations where these women could find themselves in situations where they are considered married according to the legislation however divorced religiously.

Furthermore, the clause relating to the custody of minors in the act[29] is ambiguous and contradictory as it talks about a post-divorce situation while stating that triple talaq would be

[22] The Indian Penal Code 1860, s 12A.
[23] The Indian Penal Code 1860, s 148.
[24] S.M. Marjina Sultana 'Criminalisation of instant Triple Talaq and empowerment of Muslim women: A critical appraisal' 6 (3-4) *Law mantra* https://journal.lawmantra.co.in/wp-content/uploads/2019/09/14-1.pdf accessed 10th July 2024.
[25] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 5.
[26] Sohaira Z Siddiqui 'Triple Divorce and the Political Context of Islamic Law in India' (2021) 2(1) *Journal of Islamic Law* https://journalofislamiclaw.com/current/article/view/siddiqui accessed July 10th 2024
[27] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 7(a).
[28] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 7(b).
[29] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 6.

considered void. Thus, it can be seen that the act merely provides rights which have been passed in the previous legislations and does not introduce any new procedural provisions to check the Muslim husband's unilateral right on divorce while not affording the Muslim women a right to divorce as well.

Thus, it can be seen that although The Muslim Women (Protection of Rights on Marriage) Act, 2019, is an extremely significant step towards empowering the Muslim women and ensuring that their rights are protected, it suffers from certain legal and practical drawbacks that needs to be addressed through comprehensive measures in order to achieve the main objective of ensuring gender equality and protecting the rights of the Muslim women.

IV. SUGGESTIONS

1. Alternative Dispute Resolution Mechanisms

The act mainly focuses on heavily penalizing the husband without providing mechanisms for either reconciliation or counseling. The act can instead introduce mandatory counseling and mediation provisions before the instigation of criminal proceedings. This can help in amicably settling the disputes between the couples and in turn reducing the burden on the judicial system.

2. Clarity on maintenance and Subsistence allowance

Even Though the Act mandates that the woman shall be entitled to maintenance it lacks clarity on the amount of the maintenance and the procedure to determine it. Amendments in order to specify and provide clear and standardized guidelines for the calculation of the maintenance and subsistence allowance can ensure fair application of the section.

3. Provisions for protection of women

There must be provisions for immediate protection and support of the Muslim wives post the arrest of the husbands through orders for temporary shelter of children and women affected by such arrest. Further the government must undertake various skill development programs and provide employment opportunities for the affected women in order to make them economically independent.

4. Repeal of Revision of Related Personal Laws

The Act is merely a duplication of the rights provided to the Muslim women through previous legislations and does not focus on other discriminatory practices in the personal laws that affect the rights of the Muslim women. It is necessary that a broader review and revision of such personal laws must be considered in order to ensure the comprehensive protection for Muslim women in all aspects of family and marital relations.

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V. CONCLUSION

It can be observed that the criminalization of Triple Talaq in India marks a significant shift in the Indian legal system with regard to the rights of the Muslim Women. The long-standing problem of gender disparity in the personal laws has been imperatively addressed through this legislation which safeguards the rights and dignity of the Muslim women by making the practice of instantaneous Talaq illegal and giving the Muslim women access to a legal recourse which was previously not made available.

Nevertheless, this piece of legislation is not without controversies and loopholes. While it highlights the legislature's commitment to gender justice, it has raised various concerns regarding its socio-legal implications and the potential for misuse. Hence it is significant to scrutinize the loopholes of the act and effectively address them. Further, it is important to consider this legislation as a component of the larger initiative to revise personal laws and explore other challenges that impact the lives of Muslim women such as access to legal aid, socio-economic inequality, educational possibilities, etc.

Thus, in conclusion, although the decision to make triple talaq illegal is a remarkable step towards abolishing gender inequality and achieving equality, it needs to be supported by continuous attempts to uplift the women by providing justice under all personal laws. There must be a change in the society as well as the legal arena in order to create an atmosphere where each person’s dignity and rights are respected and valued.

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