

STATUTORY RIGHT OF MUSLIM WOMEN TO DISSOLVE MARRIAGE

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ABSTRACT

According to the 2011 census report, India has over 84 million Muslim women compared to over 88 million Muslim men, indicating that females have a 5% lower birth rate than males in Islam. When we look at the demographics and statistics from 2011, we can see that only 1.7 million females are graduating out of a total population of 84 million Muslim women, while more than 3 million men have graduated. When we look at the marriage pattern in Muslims, we can see that nearly 43 million women marry and only 37 million men marry. Not only in India, but all around the world, Muslim women's rights are being blatantly violated. When we look at the rules that apply to Muslims in different countries, we can see that India allows them to enjoy both personal and legislatively enacted laws. Muslim women have access to Indian courts and can take use of Indian rights and personal laws. This is not available in every country. For example, Article 2 of Egypt's constitution declares sharia to be the country's law source, implying that they only follow Islamic law. As a result, Egypt's women's maintenance rights are severely restricted, and their marriage age is set at 16, with polygamy permitted if the husband informs the rest of his wives. This is true in many other Muslim countries as well¹. The Shariat Application Act, 1937, gives all Indian Muslims the opportunity to choose their own personal rules. Among Muslims, there are statutes that deal with succession, divorce, and marriage. Women have the right to file for divorce in a court of law.

INTRODUCTION

- According to Ameer Ali, Prophet Mohammad's reforms constituted a turning point in the history of eastern legislation. Divorce is supposed to be the most odious of all things authorised by Allah, and towards the end of his life he effectively prohibited its use by mankind without the involvement of an arbitrator or a court. If there is a schism between them (the husband and wife), the Quran orders the appointment of an arbitration from his family and an arbiter from her family. If they want to change, Allah will bring them together. The Quran permits divorce for a variety of reasons, including some regard for custom and the

¹<https://www.legalserviceindia.com/article/l338-Muslim-womens-right-for-dissolution-of-marriage.html>

ability for males to end an ugly partnership. Prophet Mohammad limited the authority of divorce and granted women the opportunity to seek separation on justifiable reasons. According to the Prophet, if a marriage prejudices a woman, it should be broken up. Many distinct laws control people at the same time: laws recognised by the state, such as codified and uncodified laws, and informal laws, such as customary practises, which change depending on the cultural, social, and political environment. The Shariat Application Act, passed in 1937, was a half-hearted attempt to apply Shariat, rather than conventional rules, to the Muslim community. The Act stated that Shariat laws, not customary norms, would govern Muslims in all personal concerns, Nevertheless, it did describe the precise elements that would make up this Sharia rule. In actuality, each Muslim group maintained to adhere to its own traditions and practises. A codified rule for all Muslims was also opposed by those groups who benefited from the traditional ways of life. As a result, the earliest attempts to pass a codified Muslim personal law failed. The only benefit of this Act was its attempt to unify the diverse Muslim population under one set of laws. It also highlights the fact that Muslims in India have not made any significant efforts to codify the practises of their various schools of thought and jurisprudence since the country's independence.

With the Dissolution of Muslim Marriage Act, a second effort was made in 1939. It outlined nine reasons on which a Muslim woman might petition the court for divorce. Then, according to Islamic law, a husband could divorce his wife whenever he wanted, but a wife had no legal authority to grant or request a divorce. Their only option was to change their faith in order to void her marriage. The Ulemas persuaded the British government to adopt this Act because they were alarmed by this tendency. The Act did not restrict a man's power to divorce his wife verbally and unilaterally, even if it permitted a woman to file for divorce through the court. This rule established a Muslim woman's right to maintenance upon divorce. Different courts applied the legislation differently, and some women even continued to seek maintenance by using the criminal procedure code section 125 (Cr. P.C. 125). The legislation that were passed in 1939 and 1986 were not the outcome of an organised reform effort. They were more the product of conservatives' responses, who perceived changes to the legislation regarding individuals as an infringement on their ability to practise their faith and a danger to their masculinity².

The Muslim women (protection of rights on Divorce) act 1986

The Muslim (protection of rights of divorce) act was enacted in 1986 in parliament of India by Rajiv Gandhi government. In this act 1986 consist of 7 section with subject of the

² <https://www.legalserviceindia.com/article/l338-Muslim-womens-right-for-dissolution-of-marriage.html>

provision. *Mohd. Ahmed Khan v. Shah Bano Begum*³ is a significant case that addressed the issue of "Triple Talaq Verdict." This case is commonly referred to as the "Shah Bano Case." In India, it is seen as a contentious and difficult legal battle. This lawsuit has proven to be a watershed moment in the campaign for Muslim women's rights and freedom. It's all about Shah Bano daring and valiant fight against the Triple Talaq regime. She faced the disgrace of the community and her husband rather than creating a history or myth of an oppressed woman. Despite the fact that she was in such a dire situation, she chose to battle against her husband and face a world where everyone was on her side, and most all, she heroically chose to fight against a male-dominated culture. She fought the Triple Talaq system for years, and in the end, her efforts were not in vain; she was able to get what she wanted and forever changed the system. This act was enacted to ensure that providing maintenance to women after a divorce is legal and mandatory, subject to the conditions set forth in the act, and that she can seek maintenance from the court under section 125 of the Criminal Procedure Code (CRPC), which includes provisions for the maintenance of wives, children, and parents regardless of religion⁴.

The main provisions of the act states that:-

After a divorce, the husband is required to provide maintenance to the wife until the iddat period expires. In the case of a divorced woman, Section 2(b) of the Muslim Women (Protection of Rights on Divorce) Act of 1986 defines "iddat period,"—

- (i) I three menstrual cycles following the divorce date, if she is menstruating,
- (ii) if she is not menstruating, three lunar months after her divorce; and
- (iii) if she is pregnant at the time of her divorce, the time between the divorce and the birth of her child or termination of her pregnancy, whichever comes first;

If the woman does not have sufficient means of subsistence beyond the iddat period, the husband will continue to support her, but the amount of support must be reasonable and equitable. As a result, a husband is required to provide maintenance to his wife until she is able to support herself on her own, although the amount should be acceptable. It is legal to pay alimony to a kid [legitimate or illegitimate] for up to two years after the divorce.

The divorced lady has a right to maintenance from the State Wakf Board in specific rare circumstances. *Shabana Bano v. Imran Khan*⁵ The Supreme Court held that a Muslim divorced woman who is unable to support herself is entitled to maintenance from her former

³Mohd.Ahmed khan v. Shah Bano Begum, AIR 945 1985 SCR (3) 844.

⁴Summary of Muslim women (protection of rights on Divorce) act 1986, India, available at: <https://www.lawcolumn.in/summary-of-muslim-women-protection-of-rights-on-divorce-act-1986/>

⁵Shabana Bano v. Imran khan, AIR 2010 SC 305 (2009) 1 SCC 660.

spouse even after the iddat period has ended, and that she can file a claim under section 125 of the Criminal Procedure Code.

*Daniel Latifi v. union of India*⁶ After the act was passed, it was stipulated that maintenance would be provided until the end of the iddat period, but this was in conflict with the provisions laid down or described under section 125 of the Criminal Procedure Act, so the court in this case upheld the rule of "reasonable and fair" amount so that the maintenance would be provided indefinitely, subject to certain conditions. This case decision struck a compromise between the act's and section's rules on maintenance. *Jabir Kaur Sehgal v. District judge Dehradun*⁷ The Supreme Court established the following conditions for determining the liability and amount of maintenance payable to women for maintenance: the court must consider the parties' status, their respective needs, the husband's ability to pay having regard to his reasonable expenses for his own maintenance and those to which he is obligated under the law and statutory, and the amount of maintenance fixed for the wife should be such that she can live. the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case.

The Act has implemented to preserve the rights of the Muslim Women because in India Muslim community has treated the Women as a property and marriage as a civil contract. The women has faced many challenges to survive in the conservative nature and environment which in actual hinders the development of Muslim women in Society. The major change in Muslim Personal Law happened after the infamous Shah Bano case which led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. This measure effectively stripped Muslim women of their right to maintenance under Section 125 of the Criminal Procedure Code, causing a major political turmoil in India. It gave the appearance that the then Rajiv Gandhi government, in order to keep an eye on the Muslim vote bank, permitted itself to be influenced and pressured by the Muslim leadership. Several Muslim women's organisations, as well as other women's and progressive organisations, protested, but were unable to stop it. The Act went into effect, and at first glance, it appeared to be infringing on constitutional provisions of right to equality. However, in the Daniel Latifi case, the Supreme Court ruled that the Act is constitutionally valid, and that its goal is not to punish the husband, and that a separate law for a community based on personal laws applicable to

⁶ Daniel Latifi v. union of India, AIR 2001 SC 3958

⁷ Jabir Kaur Sehgal v. District judge Dehradun (1997) 7 SCC 7

such community cannot be considered discriminatory. This point was addressed in my first research issue. The other aspect of the study is reasonable and fair provisions and maintenance. Although this act has established proper rules for receiving dower or mahr, gifts, and any other object or item that belongs to a divorced woman, she is entitled to receive it back, which is reasonable and fair provisions, whether providing maintenance only during the Iddat period and then relying on relatives is fair or not will be discussed in the second research issue.

Women, regardless of religion, can seek maintenance under the Code of Criminal Procedure if they are unable to support themselves and have not remarried. Only a wife is entitled to maintenance from a husband, according to the CRPC (formerly under section 488). The husbands asserted that once a marriage is dissolved, a woman ceases to be a wife and thus is not entitled to support. However, in Muslim law, getting a divorce is much easier, which has resulted in situations where spouses have abused the system. In 1973, an amendment was introduced to close this loophole, allowing a divorcee to receive maintenance until she remarries under section 125⁸. Because this clause is secular in character, it applies to all women, including Muslim women. However, this statute has an effect on the Right to Equality by restricting the provisions of the Code of Criminal Procedure to exceptional instances. This type of problem will be addressed in the third research issue.

The Supreme Court's most recent innovation or advancement is the triple talaq decision, which provided significant relief to Muslim women in terms of post-divorce rights protection and aided in the empowerment of women in all sectors of society. With the Supreme Court's landmark decision declaring unilateral divorce (also known as triple talaq or talaq-e-biddat) unconstitutional, it is now unmistakably established that the practise – which runs counter to the Supreme Court's gender jurisprudence, the constitution's equality principles, international human rights law, and the Quran – is not fundamental to Islam in India. The Supreme Court studied and quoted the legislation of 19 countries that have outlawed triple talaq, including Egypt, Pakistan, Turkey, and other Arab Peninsula, Southeast Asian, and South Asian nations. United Arab Emirates, Egypt, Kuwait, Algeria, Iraq, Jordan, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, and Yemen are among the Arab countries that have passed legislation prohibiting triple talaq. Triple talaq is not Islamic, and it is a departure and divergence from the Quran's precepts in order to deprive Muslim women of their rights. This type of research will be the subject of my fourth research question, which will be addressed later.

Scope and objective of the act, 1986

⁸Order for maintenance of wives children and parents Act, 1978 (Act 45 of 1978).

The study's main goal is to focus on reasonable and fair provisions for Muslim divorced women in regard to their post-divorce rights, which is very analytical in nature, and the study has also expanded its scope to include the applications of each and every section of the above act, as well as their critical and legal implications. The test of the Act on the basis of constitutional validity is part of the research. The study looks at the politics of Muslim personal law, as well as Muslim women's fight for dignity and justice. The study concluded with a suggestion to liberalise the current act and to fairly justify the constitutional provisions, based on a comparison of the current act's maintenance policy and the criminal process act of 1973. The study concentrated on the act's flaws as well as its favourable aspects in terms of Muslim divorced women's rights.

In comparison to women of other religions, Muslim women's lives are somewhat conservative, and this has given rise to patriarchal rule in this religion. Some provisions in this religion clearly violate women's rights, such as oral divorce, polygamy, and the right to maintenance; laws need to be modified to address these issues⁹.

I discovered that Muslim women themselves sought this change in regulations after conducting a nationwide survey in 1996. Among the "families surveyed, 7% practised polygamy; 30% had one or more divorced women with clear evidence of oral talaq; the period of marriage after which talaq was pronounced ranged from less than one year to four to five years; and the reasons given by these women were dowry (44 percent), anger (32 percent), second wife (16 percent), and no son/daughter (16 percent) (4 percent). 92 percent of the responders were divorced women who had to leave their homes right away. They all stated that they require regular maintenance. In 76 percent of the cases instances, the mehr — the money the husband is obliged to return after talaq — was less than Rs 500¹⁰.

The Shah Bano judgement clarified that the maintenance of divorced Muslim women will be seized post Iddat period only where the women is capable of maintaining herself, but if the husband is liable to pay post Iddat period, women can claim maintenance under the Code. This resulted in a lot of solidarity between the personal law boards and their communities, and they began exerting pressure on the then government, resulting in the 1986 act, which was more about gaining political advantage than protecting the rights of Muslim divorced women. The act's provisions restrict Muslim women's options, confining their post-divorce rights only to this Act, which is a hindrance to women's right to equality in comparison to women of

⁹Srivastava symbiosis Law school, The Muslim women (protection of right on Divorce) Act, 1986..

¹⁰ (Telangana, India) 81 Muslim Personal Law and Women, "A Report of the national Conference" (Bombay: Awaz-e-Niswan, 1999)

other religions, which is very regrettable for a democratic country like India, which adheres to the principle of secularism but allows personal law to override the constitution due to political interests of the parties.

The Act was enacted to provide protection to Muslim women who married under the obligations and rituals of Muslim laws and then divorced under the same marriage's obligations under Muslim laws. This act will protect the rights of Muslim women post-divorce. This Act specifies the definition of divorce, including Talaq, Ila, Zihar, Talaq-i-Tafweez, and other types of divorce¹¹.

Divorce rights were not intended to be harmed or abolished by this Act. The research will focus on the challenges that Muslim women faced prior to the enactment of this act, and how they fought for the justice and dignity of their rights, and how the act has worked as a catalyst to lead a conducive lifestyle thereon, and how the act has provided options to the maintenance because it gave scope to move to statutory provisions of criminal procedure in some cases, which is a better option to preserve the legal rights of divorced as well as other women. The Act provides for a divorced Muslim woman's maintenance during and after the time of Iddat, as well as the enforcement of her claim to unpaid dower and other exclusive properties. As a result, it is critical to develop a correct philosophy for this Act, which, in my opinion, is as follows: -"When marriages end, a woman is left with emotional scars, fragmented feelings, a loss of economic and social stability, and, in some situations, insufficient survival necessities. A marriage is a fundamentally unique link between two persons, and when it fails, the feminine dignity is eroded. It is the law's duty to compensate, and the husband's.

Constitutional validity of Act 1986

Antithetical To Quran:

The Supreme Court ruled that the statute is unconstitutional because it violates Articles 14, 15, and 21 of the Indian Constitution. The first and most important ground on which it could be challenged is that it goes against what the holy Quran says, and where the husband is responsible for maintaining the wife after the Iddat period has expired, there would be no justification for putting the burden on the women's family or even the state wakf board.

Violative Of Right To Equality:

The second point raised in this discussion is that Section 125 is a statute that applies to women of all faiths, and that excluding Muslim women from its reach discriminates against Muslim women and women in general. The judgement in the Shah Bano Begum case was

¹¹ Arab Ahemadhia Abdulla v. Arab Bail Mohmuna Saiyadbhai, AIR 1988 Guj 141 (1988) 1 Guj LH 294

also overturned. Furthermore, it jeopardises our Constitution's secular nature. As a result, it violates Article 14's equal protection of the laws, as well as equality before the law. If the goal of Section 125 is to prevent vagrancy, Muslim women cannot be denied the solution it provides¹².

There are certain argument by the personal law board and state as well which are opposing the contention mentioned above in the Daniel latifi case They believe that the legislature's Act is constitutionally valid because it was enacted to respect and preserve Muslims' personal laws, which is a legitimate basis for making a distinction, and that a separate law for a community based on personal law applicable to that community cannot be considered discriminatory, and thus the Act does not violate Article 14 of the Constitution. The purpose of the Act is not to punish the spouse, but to prevent vagrancy and misery, and Section 4 of the Act addresses this issue. Even if the remedy is denied under Section 125 of the Code, such a course of action would not result in vagrancy under Section 4 of the Act. As a result, the fact that Muslim women have not received the benefits of Section 125 of the Code does not necessarily imply that there is no provision to protect Muslim women from destitution, or that the Act is illegal or unconstitutional. The Shah Bano case incorrectly interpreted the word "Mata," which is only obligatory in ordinary circumstances of divorce before consummation to the woman whose mahr was not mentioned and deals with mandatory maintenance rights for respecting the Iddat period or breast-feeding the child.

Application of Provision of Muslim Women's Act, 1986

Section-4. Order for payment of maintenance

Where a Magistrate is satisfied that a divorced woman has not remarried and is unable to maintain herself beyond the Iddat period, he may make an order directing such of her relatives who would be entitled to inherit her property on her death according to Muslim law to pay such reasonable sums. And for maintenance to her as he may deem fit and proper, having regard to the divorced woman's needs, the standard of living she enjoyed during her marriage, and the means of such relatives, and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. When a divorced woman is unable to support herself and has no relatives as defined in sub-section (1), or such relatives or any one of them does not have sufficient means to pay the Magistrate's maintenance order, or the other relatives do not have sufficient means to pay the shares of those relatives whose shares have been ordered by the Magistrate

¹²Mohd. Wasim, A Dissolution of Marital tie by a Muslim wife: rights and limitations (1999) (published ph.d thesis, Aligarh Muslim University).

to be paid by such other relatives under the second provision to sub-section (1), the Magistrate may, by order, direct the State to pay the maintenance ordered by the order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954 or under any other legislation in effect in a State that operates in the region where the woman resides, to pay such maintenance as he determines under sub-section (1) or, as the case may be, to pay the shares of any relatives who are unable to pay, at such times as he may designate in his order.

Application of section-5 of the Muslims women's Act

The parties have the option of being regulated by Sections 125 to 128 of the Criminal Procedure Code, 1973, under Section 5 of the Act. Parties to the dispute (i.e. divorced lady and her former husband) may seek relief under Sections 125 to 128 of the CRPC on the date of the first hearing of the application under sub-section (2) of Section 3 of the Act, according to Section 5 of the Act. The date fixed in the summons for the attendance of the respondent to the application for the purposes of this Section means the date fixed in the summons for the attendance of the respondent to the application pursuant to the explanation provided under Section 5 of the Act. Both parties must sign a 'affidavit' or 'declaration' in writing in order for Sections 125 to 128 to apply.

According to Section 5, a 'affidavit' or 'declaration' might be made jointly or separately. Because the term 'and' is used in the Section, both parties must sign an affidavit. Furthermore, because the word 'may' appears in Section 5 of the Act, the application of Sections 125 to 128 of the CRPC. 1973 is discretionary, and the parties have the option of being governed or not being governed by Sections 125 to 128 of the CRPC. 1973. Because Sections 125 to 128 of the Criminal Procedure Code of 1973 deal with criminal culpability, the Act's discretion to apply it under Section 5 has a number of negative legal and jurisprudential repercussions¹³.

Application of section-7 of the Muslims women's act, 1986

Every application by a divorced woman pending before a magistrate on the commencement of this Act under Section-125 or 127 of the CrPC shall be disposed of by such magistrate in accordance with the provisions of this Act, provided the parties have not opted under section-5 of the Act that they want their case to be decided under the CrPC. However, the Andhra High Court has ruled that the restrictions of sections 125 and 127 of the CrPC are no longer in effect as of the 1986 Muslim Women Act. The court stated that the application submitted under section 125 of the CrPC, which is currently before the magistrate, will be decided in accordance with the Act 1986's provisions. What does the word "pending application" mean? According to the Bombay High Court, it includes "revision applications"

¹³Dr.ashok k.jain, judicial service examination vol.1, 3 (Ascent publication, Delhi,2nd edn.,2008).

that were pending before the magistrate at the time the Act was enacted. Applications for revision are considered continuations of proceedings, and therefore will be dismissed under the Muslim Women Act.

Muslim women (protection of rights on marriage) act, 2019.

Mr. Ravi Shankar Prasad, Minister of Law and Justice, introduced the Muslim Women (Protection of Rights on Marriage) Act, 2019 in the Lok Sabha on June 21, 2019.

It takes the place of an Ordinance that was passed on February 21, 2019. The bill declares all talaq declarations, whether written or electronic, unlawful (i.e. unenforceable in law) and illegal. Talaq is defined as talaq-e-biddat or any other similar type of talaq uttered by a Muslim male that results in an immediate and irreversible divorce. The practise of a Muslim male pronouncing the word 'talaq' three times in one sitting to his wife leads in an instant and irreversible divorce, according to Muslim personal law¹⁴.

The Muslim Women (Protection of Rights on Marriage) Bill, 2019, also known as the Triple Talaq Bill of 2019, was the legal development from the landmark judicial pronouncement of Shayara Bano v. Union of India ((2017) 9 SCC 1) delivered by the five-judge constitutional bench of the Hon'ble Apex Court of India, which declared the observance of the Talaq-e-Biddat illegal.

Definition:-It defines talaq as talaq-e-biddat or any other similar form of talaq pronounced by a Muslim man resulting in instant and irrevocable divorce. Talaq-e-biddat refers to the practice under Muslim personal laws where pronouncement of the word 'talaq' thrice in one sitting by a Muslim man to his wife results in an instant and irrevocable divorce.

Concept of marriage and Dissolution under the shariya law:- Marriage is a vital part of every Muslim's life, according to the Shariya Law. A Muslim's life is thought to be complete only when he or she marries. Marriage is a civil contract between a husband and his wife in Islamic Law, which, like any other contract, can be broken, i.e., they can divorce. The Shariya Law, on the other hand, specifies several methods by which spouses might end their marriage. They are as follows:

Divorce by mutual consent

- Khulla
- 'Talaq-e-Hasan',
- 'Talaq-e-Ahasan',
- 'Talaq-e-Biddat',

¹⁴Women protection of rights on marriage, India, Available at: <https://prsindia.org/billtrack-the-muslim--women-protection-ofrights-on-marriage-bill-2019>

According to Sharia law, "Talaq" must be awarded for a justifiable reason and cannot be given arbitrarily. It can only be done after two arbitrators on each sides have attempted genuine reconciliation between the couple, and it must be done. If their reconciliation attempt fails, "Talaq" may be imposed, which is reversible but not permanent. This was the old form of Talaq, which was later politicised to produce instant Triple Talaq since certain Islamic Law academics believed the previous form was too cumbersome and time-consuming. This was known as "Talaq-e- Biddat"¹⁵.

Judicial Interference:- When her husband pronounced Triple Talaq, Shayara Bano, an Islamic woman, challenged the practise of Talaq-e-Biddat before the Hon'ble Apex Court in 2016. The case represents a judicial watershed moment in India's history. It was a writ petition challenging the practise of a Muslim man divorcing his wife by pronouncing multiple Talaq in a single Tuhr (the time between a woman's two menstrual cycles), claiming that this practise violated Articles 14, 15, 21, and 25 of the Indian Constitution. The argument was that the uttering of Triple Talaq was not an important element of Muslim religious belief, and hence could not be protected under Article 25 of the Indian Constitution. One of the defendants in the case, the All India Muslim Personal Law Board, argued that the Hon'ble Apex Court lacks authority to adjudicate on a Muslim Personal Statute matter since it is a Quranic law rather than a law passed by Parliament.

However, the Hon'ble Apex Court, by a majority, has rejected the All India Muslim Personal Law Board's reasoning, declaring that the contested practise infringes on Indian individuals' fundamental rights, and hence the Apex Court has entire authority over it. And, in a 3:2 split ruling, the five-judge constitutional bench knocked down Talaq-e- Biddat on the grounds that it violated Articles 14, 15, 21, and 25 of the Indian Constitution. It further instructed the government to enact necessary legislation in this regard¹⁶.

Journey of the triple Talaq Bill:- The Muslim Women (Protection of Rights on Marriage) Bill, 2019, was enacted by both Houses of India's Parliament and obtained Presidential assent on July 31, 2019, making it the first piece of law to address this heinous practice.

Main elements of the act:-

The Muslim Women (Protection of Rights on Marriage) Act, 2019, is a legislation that aims to protect the rights of married Muslim wives, as well as to prohibit divorce by the utterance

¹⁵ Women protection of rights on marriage,India, Available at: <https://prsindia.org/billtrack-the-muslim--women-protection-ofrights-on-marriage-bill-2019>

¹⁶Women protection of rights on marriage,India, Available at: <https://www.vaidhalegal.com/post/critical-analysis-of-themuslim-women-protection-of-rights-on-marriage-act-2019>

of Talaq by their husbands; it became operational retrospectively on September 19, 2018, and received President's assent on July 31, 2019.

The legislation is divided into eight sections and three chapters. The first chapter, divided into two sections, discusses the Act's applicability and explains key concepts such as electronic form, talaq, and so on.

For the purposes of this Act, Magistrate refers to a Judicial Magistrate of the First Class, and territorial jurisdiction is defined as the location where the married woman against whom Talaq is uttered resides.

The second chapter, "Declaration of Talaq as Null and Illegal," is divided into two portions. Section 3 of the act proclaims that a Muslim husband's pronouncement of Talaq against his wife in any means, i.e., by words spoken, written form, or electronic form, is not only void but also illegal; and Section 4 of the act specifies a sentence of imprisonment for up to three years with a fine.

Under section 7(a) of the Act, the recitation of Triple Talaq is a cognizable violation.

The Act makes this a bailable offence, and the Magistrate can provide bail to the accused husband only if the Magistrate believes there are adequate grounds to grant him bail after hearing the wife of the accused against whom he pronounced Talaq.

The Act further specifies that the crime is a compoundable offence, meaning that it can be resolved outside of the courtroom. However, such direction can only be given by the Magistrate at the request of the wife against whom the Talaq is issued, and the procedure must proceed as directed by the Magistrate; it also states that the Magistrate will determine the amount of allowance and the manner in which the minor children will be cared for.

Offence and penalty:- The bill makes talaq proclamation a criminal offence punishable by up to three years in prison and a fine. (A cognizable offence is one for which a police officer can detain a suspect without a warrant.) Only if information about the offence is provided by: (i) the married lady (against whom talaq has been pronounced), or (ii) any person related to her by blood or marriage, will the offence be recognised.

According to the bill, the Magistrate has the authority to issue bail to the accused. Only after hearing the woman (against whom talaq has been pronounced) and if the Magistrate is convinced that there are reasonable grounds for granting bail will bail be given. On the woman's request, the offence may be compounded by the Magistrate (against whom talaq has been declared). Compounding is a legal procedure in which the two parties agree to end their legal battle and resolve their differences. The Magistrate will establish the terms and conditions of the offence's compounding.

Allowance:-A Muslim woman who has been subjected to talaq has the right to ask her husband for a subsistence allowance for herself and her children. The Magistrate will decide how much the allowance will be.

Custody:- A Muslim woman who has been subjected to talaq has the right to seek custody of her minor children. The Magistrate will decide on the method of custody.

For decades, Muslim women have been subjected to horrors in the form of Triple Talaq, which has been outlawed in the majority of countries around the world. To put an end to this abuse of women in marriage, the Parliament passed the "Muslim Women (Protection of Rights on Marriage) Act, 2017," which went into effect on July 31, 2019 and will take effect on September 19, 2018.

Article 14 (Equality before the law), Article 15(1) (Prohibition of discrimination on the basis of gender), Article 21 (Right to Life), and Article 25 (Right to Information) were among the fundamental rights violated (freedom of religion).

Talaq, also known as talaq-e-biddat or any other equivalent form of talaq, is a Muslim husband's declaration of immediate and irreversible divorce. The practise of a Muslim male pronouncing the word "talaq" three times in one sitting to his wife results in an instant irreversible divorce under Muslim Personal Laws. The practise of a Muslim male pronouncing the word "talaq" three times in one sitting to his wife results in an instant irreversible divorce under Muslim Personal Laws.

Section 3 states that any talaq declaration made by a Muslim husband on his wife, whether spoken or written, in electronic form, or in any other means, is void and illegal. Section 3 of the Act establishes that a Muslim husband's declaration of talaq against his wife is null and void. If a Muslim marriage were recognised as a simple contract, such a pronouncement by law would have been sufficient to handle a unilateral violation of contract by the husband. However, the issue isn't as straightforward as it appears. Marriage has a sacred status in society and is treated as such, even though it is a social contract. For generations, the practise of triple talaq has been widespread and acceptable in Muslim society, and it is profoundly embedded in their minds. As a result, declaring it void by law does not immediately affect the situation. Despite the fact that divorce by triple pronouncement is not recognised by the law, a woman who has internalised the idea of divorce by triple pronouncement may believe it is haram to live with her husband. It's possible that society may continue to accept instant triple talaq as legal. As a result, it is commonly believed that personal law change must originate from inside the religious community rather than from the law imposing it from without.

*Harvinder Kaur v. Harmender Singh Chaudhary*¹⁷ by Delhi High Court, introducing Constitutional law in a matrimonial home is like “introducing a bull in a china shop.” The law may even be said to have muddled things further as the status of woman would be in a limbo, where, on the one hand, the society and she herself may deem her divorced but the law would not, hence, making it impossible to enforce her rights as a divorced woman through legal mechanisms. It has also been argued that the Act might as well encourage husbands to willfully abandon their wives rather than pronounce triple talaq. Because of the muddy status of the disempowered woman, her blood relatives may also be reluctant to take her back since she cannot marry again. It is not far off to argue that the law’s not being in sync with societal expectations would lead to destitution of Muslim womanhood, protection of whose rights was the sole objective of the legislation.

Section 4 any Muslim husband who pronounces Talaq on his wife as alluded to in Section 3 shall be punished by imprisonment for a time that may extend to three years, as well as a fine. Section 4 states that a Muslim husband who violates Section 3 shall face a three-year prison sentence and a fine. Section 4 of the Act specifies the penalties for a husband who issues a triple talaq, which include imprisonment for up to three years and a fine. ¹² This has been the main issue of disagreement in this Act. Both sides of the issue have compelling reasons, and the authors have attempted to investigate both perspectives in this article. Human conduct is regulated by various means. While civil means are enough to regulate most of human behavior, sometimes deterrence is required where civil law fails to regulate behavior which shows serious departure from norms and is capable of infringing on the lives of other citizens¹⁸.

Section 5 stipulates that Muslim women who have been subjected to talaq are entitled to subsistence allowances from their husbands for themselves and their dependant children. The magistrate will determine the amount of the allowance. Section 5 of the Act stipulates that a woman who has been subjected to triple talaq is entitled to subsistence allowance from her husband, as assessed by the magistrate. The language of the section is important to observe. It simply guarantees a "subsistence stipend," not "maintenance," as other women's rights statutes do. Subsistence allowance is the bare minimum amount required to fulfil day-to-day living expenditures, whereas maintenance refers to the amount of money required to continue living according to a person's social status. However, the provision is “without prejudice to the generality of provisions contained in any other law”, which means the woman is still free to

¹⁷Harvinder Kaur v. Harmender Singh Chaudhary, AIR 1984 Delhi 66

¹⁸The muslim women (protection of rights on marriage) act, 2019.

initiate proceedings for maintenance under section 125 of the CrPC, 1973. A married Muslim woman is also entitled to maintenance known as Nafaqah, irrespective of whether she can maintain herself or not. Hence, it is unclear what the purport of the given section is, in the form of a subsistence allowance¹⁹.

Section 6 A Muslim woman who has been proclaimed talaq is allowed to seek custody of her minor children under Section 6, and the mode of custody will be determined by the court. The offence will be cognizable if the following information about the offence is provided:-Any individual related to her by blood or marriage, or married women (against whom talaq has been issued). In the event that her husband issues a talaq, a married Muslim woman is entitled to custody of her minor children of the Act. As a result, she is legally entitled to such custody. The first question that emerges is whether a provision for child custody is necessary when the marriage is still intact and no divorce has occurred. Making such a provision obligatory is also unreasonable. In other divorce statutes, the custody of children is left to the discretion of the courts. Other considerations, such as the best interests of children, are prioritised. There are no exceptions to this rule, and there are no valid criteria for determining child custody. There may be circumstances in which the mother is not financially or mentally capable of caring for the child, or the youngster does not want to live with the mother, for example. Such unusual circumstances were not considered when this provision was written.

Section 7 The magistrate may issue bail to the accused under Section 7 sub clause (c) of the Act. Bail may be granted only after the magistrate has heard from the ladies who have been charged with talaq and is convinced that there are legitimate grounds for giving bail. Section 7 of the Act, Clause (b), states that the offence under this Act is compoundable, which means that the victim or complainant can seek a compromise, and the charges against the accused will be dropped at the request of the complainant or married Muslim woman, but only with the permission of the Magistrate, who will impose certain terms and conditions.⁹⁰ Triple talaq was deemed illegal and unconstitutional by the Muslim Women Second Ordinance of 2019. Furthermore, it was deemed a crime punishable by three years in prison and a fine under this ordinance. The law safeguarded married Muslim women's rights and prohibited triple talaq (i.e., talaq-e-biddat). It also covered living expenses and the care of tiny children²⁰.

Salient features of the this act, 2019

All talaq declarations, whether written or electronic, are declared void (i.e., not legally enforceable) and prohibited under the Act. Talaq is described as a Muslim male declaring

¹⁹Order for maintenance of wives children and parents Act, 1978 (Act 45 of 1978).

²⁰The muslim women (protection of rights on marriage) act, 2019.

talaq-e-biddat or another comparable sort of talaq, resulting in an immediate and irreparable divorce. Furthermore, Talaq-e-biddat is the process in Muslim personal law in which a Muslim man pronounces the word 'talaq' three times to his wife in one sitting, resulting in an instant and permanent divorce. The Act makes the claim of talaq a cognizable offence (a cognizable offence is one for which police may arrest an accused individual without a warrant) under the authority of a court, with a maximum sentence of three years in prison and a fine.

Additionally, if information identifying the offence is presented by (i) the woman (against whom talaq has been proclaimed), or (ii) any individual linked with her by blood or matrimony, the offence shall be cognizable.

Bail may be granted only when the Magistrate has heard the woman (against whom talaq has been proclaimed) and is determined that there are sufficient grounds for granting bail²¹.

At the woman's request, the offence could be compounded by the Magistrate (against whom talaq has been declared). Compounding is a legal process in which two parties agree to stop their legal dispute and settle their differences. The terms and conditions of the offence's compounding will be established by the Magistrate.

Alimony: A Muslim woman who has been subjected to talaq is entitled to subsistence alimony or a maintenance payment from her significant other for herself and her minor children. Similarly, the Magistrate will determine the amount of the remittance.

Custody: A Muslim woman who has been subjected to talaq is entitled to seek guardianship or custody of her minor children. The Magistrate will decide on the method of custody.

The Muslim Women (Protection of Rights on Marriage) Act of 2019 proclaims the immediate divorce issued by talaq three times to be null and void. It punishes the spouse who practises instant Triple Talaq with up to three years in prison and a fine. The Muslim woman who was granted Talaq also received custody of her children and a subsistence allowance from her husband. Muslim women now have legal protection against Triple Talaq's arbitrary and unreasonable proclamation. The Act also serves as a deterrent to husbands who want to divorce their wives this way.

Instant triple talaq and Indian Judiciary

The attitude of the judiciary towards the practice of instant triple talaq has always been critical. Various High Court judgments, prior to the watershed judgment of *Shayara Bano v.*

²¹ Muslim women (protection of rights on marriage) act 2019, India, available at: <https://vakilsearch.com/blog/the-muslimwomen-protection-of-rights-on-marriage-second-ordinance-2019/>

*union of India*²² gave different interpretations about the practice of instant triple talaq. While some held the practice to be bad in theology but good in law, some others held that Muslim law does not, in fact, allow an instantaneous and irrevocable talaq without any attempts at reconciliation in between the pronouncements. According to the Quranic injunction, triple talaq must be on reasonable grounds and there must be intermittent mediation facilitated by two arbitrators, one from each side of the family, if need be. The practice has been declared to be unacceptable by the Apex court in a number of cases, too. However, it was struck down conclusively by the Court in the case of Shayara Bano in August 2017. The minority opinion in this judgment directed the legislature to come up with a law in this regard. Subsequently, the Muslim Women (Protection of Rights on Marriage) Bill, 2017 was passed in the Lok Sabha. The bill declared the practice to be void and illegal. At the same time, it also made the pronouncement of triple talaq an offence punishable with a maximum imprisonment of three years. While the Bill was pending in the Rajya Sabha, the session came to an end. The Bill was then promulgated as an ordinance multiple times. The Bill was finally passed by both the Houses on 30th July, 2019 despite consistent opposition and demands to send the Bill to the Rajya Sabha Select Committee.

Status of the Muslim Wife

Section 3 of the Act states that a Muslim husband's declaration of talaq on his wife is unlawful and illegal. If a Muslim marriage were recognised as a simple contract, such a pronouncement by law would have been sufficient to handle a unilateral violation of contract by the husband. However, the issue is not so straightforward. Marriage has a sacred status in society and is treated as such, even though it is a social contract. For generations, the practise of triple talaq has been widespread and acceptable in Muslim society, and it is profoundly embedded in their minds. As a result, declaring it void by law does not immediately affect the situation. Despite the fact that divorce by triple pronouncement is not recognised by the law, a woman who has internalised the idea of divorce by triple pronouncement may believe it is haram to live with her husband. It's possible that society may continue to accept instant triple talaq as legal. As a result, it is commonly maintained that personal law reform must emerge from within the religious community rather than being imposed by the law. Flavia Agnes has observed, that Several studies have shown that rather than approaching the formal structures of law, women from marginalised sections use informal community-based mechanisms to negotiate for their rights. Women find the religion-based dispute resolution fora such as darulqazas more accessible than courts and police stations as there is a general fear among the

²²Shayara Bano v. Union of India, 2017 (9) SCC 1.

poor of accessing these formal structures. Anindita Chakrabarti and Suchandra Ghosh, amassed practical experience, doing fieldwork at a sharia court in a large Muslim ghetto in Kanpur for two years. They have argued that in issues related to family disputes, women are mostly concerned with kinship rules, household economies, and family intrigues.

In such scenario, the blunt instrument of law seldom works. As observed in the case of *Harvinder Kaur v. Harmender Singh Chaudhary*²³, by Delhi High Court, introducing Constitutional law in a matrimonial home is like “introducing a bull in a china shop.” The law may even be said to have muddled things further as the status of woman would be in a limbo, where, on the one hand, the society and she herself may deem her divorced but the law would not, hence, making it impossible to enforce her rights as a divorced woman through legal mechanisms. It has also been argued that the Act might as well encourage husbands to willfully abandon their wives rather than pronounce triple talaq. Because of the muddy status of the disempowered woman, her blood relatives may also be reluctant to take her back since she cannot marry again. It is not far off to argue that the law’s not being in sync with societal expectations would lead to destitution of Muslim womanhood, protection of whose rights was the sole objective of the legislation.

Maintenance and Custody

Section 5 of the Act stipulates that a woman who has been subjected to triple talaq is entitled to subsistence allowance from her husband, as assessed by the magistrate. The language of the section is important to observe. It simply guarantees a "subsistence allowance," not "maintenance," as other women's rights legislation does. Maintenance refers to the amount of money required to continue living according to one's social status, whereas subsistence allowance refers to the basic minimum required to pay day-to-day expenses. However, because the provision is "without prejudice to the generality of provisions contained in any other law," the woman can still file for support under section 125 of the CrPC, 1973. A married Muslim woman is also entitled to maintenance, known as Nafaqah, regardless of her ability to support herself. As a result, the purpose of the offered section, in the form of a subsistence stipend, is unclear.

In the event that her husband issues a talaq, a married Muslim woman is entitled to custody of her minor children under Section 6 of the Act. As a result, she is legally entitled to such custody. The first question that emerges is whether a provision for child custody is necessary when the marriage is still intact and no divorce has occurred. Furthermore, requiring such a provision is unreasonable. The custody of children is left to the courts in other divorce

²³Harvinder Kaur v. Harmender Singh Chaudhary, AIR 1984 Delhi 66

statutes. Other considerations, such as the best interests of children, are prioritised. There are no exceptions to this rule, and there are no valid criteria for determining child custody. In other cases, the mother may not be financially or emotionally capable of caring for the child, or the youngster may not want to live with the mother. Such unusual circumstances were not considered when this provision was written.

Criminalisation

Section 4 of the Act lays down the punishment for pronouncement of triple talaq by a husband, viz. imprisonment up to three years and fine. This point has mainly been the bone of contention in this Act. There are compelling arguments on both sides of the debate and the authors have tried to explore both the facets in this article.

Human conduct is regulated by various means. While civil means are enough to regulate most of human behavior, sometimes deterrence is required where civil law fails to regulate behavior which shows serious departure from norms and is capable of infringing on the lives of other citizens.

Perspective:-

The main issue with criminalising the declaration of instant triple talaq is that the legislature is imposing penal and criminal repercussions for a civil offence. Marriage is a contract in Islam. A violation of contract should not, in theory, result in the imposition of criminal penalties. In terms of criminalization, the government should take a limited approach. Restriction of a person's liberty should only be used as a last option. Criminal law is just one of several tools for punishing and preventing aberrant behaviour. Only the most serious infractions should be subjected to criminalization, the law's most coercive and punishing tool. When an offence is rendered punishable by imprisonment, the state must take a minimalist approach to criminalising it since a greater rationale is necessary.

In his book *An Introduction to the Principles of Morals and Legislation*, Jeremy Bentham outlined four situations in which an act should not be categorised as a crime. First, where it is without foundation, implying that there is no danger to be avoided. In the case of immediate triple talaq, criminalising it appears to be pointless because the act is empty and insignificant. Second, it is ineffective, and so will be unable to prevent the evil. In the case of an instant triple talaq, incarcerating the husband may exacerbate marital strife, discouraging the woman from reporting the crime. And there would be little deterrence effect if it was not revealed. Third, where it is unprofitable, meaning that the harm caused would outweigh the benefit. Finally, where it is unnecessary, implying that the problem can be solved by other ways. The practice of instant triple talaq can be checked by civil means as well. Criminalisation can be

the last resort when the civil remedies have been exhausted. The minimalist approach calls for exempting certain behaviours from criminal consequence where prohibition is unlikely to be effective or would create more social harm than not punishing them. To put it another way, penalising someone should not be counterproductive. This is quite likely to happen in the case of criminalising immediate triple talaq. The Act attempts to protect married Muslim women's rights by prohibiting instant triple talaq. It is important to highlight that if the man is imprisoned, his entire family, including his wife, will most certainly become homeless.

Counter-perspectives

Article 14 of the Constitution is the first argument against criminalization that must be addressed. The Conduct is said to discriminate between Hindu and Muslim males by making divorce a criminal act for the latter while keeping it a civil act for the former²⁴. It is important to remember that the equality envisioned by Article 14 only applies to equals, not unequal's. When it comes to the practise of divorce, there is a discernible difference between Hindus and Muslims. The husband's unilateral divorce is not recognised or permitted under Hindu law. Both spouses' permission or exigent circumstances, such as abuse, adultery, or infidelity, are grounds for divorce under the Hindu Marriage Act, 1955. Divorce does not cause a Hindu wife to become impoverished. If it is argued that purposeful desertion of the wife causes impoverishment and that the Act would encourage more Muslim husbands to do so, then desertion could be made a criminal offence for all faith communities.

The goal of the law is to defend the rights of women who are underrepresented in society, and it was long past time for the Muslim divorce law to catch up to the Hindu divorce law in order to end the practise of unilateral divorce at the whim of the husband. Another significant distinction between Hindu and Muslim personal laws that favours the husband is the exception to section 494 of the Indian Penal Code. Section 494 punishes bigamy and makes no exceptions on the basis of religion; however, due to the Constitutional guarantee of freedom to practise religion in Article 25, Muslim men are treated as an exception to this provision, and there are still at least some, if not many, cases of bigamy by Muslim husbands today. "...bigamous unions, where males are entitled to have more than one wife, is an obvious violation of equality," according to the Law Commission of India. "The Nikahnama itself should make it plain that polygamy is a criminal violation under section 494 of the Indian Penal Code, and it will apply to all communities," it added. This is not advocated

²⁴Kavita Krishnan, "Civil Offence for Hindus, Crime for Muslims: The Triple Talaq Ordinance is Plainly Discriminatory", available at: <https://scroll.in/article/895448/civil-offence-for-hindus-crime-for-muslims-the-triple-talaq-ordinance-is-plainlydiscriminatory/>

because of a moral position on bigamy or to praise monogamy, but because only a male is allowed to have numerous wives, which is unjust.

Conclusion

Following our examination of the research topics, we can infer that under Muslim law, postdivorce maintenance has been a contentious issue. The right to maintenance of a divorced Muslim woman was originally derived from two sources: section 125 of the CrPC and the Muslim Personal Law. The two clashed because, under CrPC, a woman's right to maintenance extended beyond the Iddat period, while under Muslim Personal Law, the husband was only required to provide maintenance during the Iddat time. Section 127 was put into CrPC to address the conflict, but it was ineffective in settling the conflict and serving as a substitute for maintenance.

The famous Shah Bano Case was determined, settling the legal position. The judgement upheld the CrPC over Muslim Personal Law, ruling that if a divorced woman lacks the financial means to support herself, the husband is obligated to support her for the rest of her life, well beyond the Iddat term. This created a lot of cohesion within the Muslim community, and under pressure from the government or the ruling party's political interests, the government passed the Muslim Women's Act, 1986, which didn't serve the purpose, even though it limited the use of criminal procedure. However, this Act is beneficial in providing quick justice in reclaiming the object given at the time of marriage.

Even after facing severe criticism, with the main aim of Gender Justice and Equality, the Government has passed the Triple Talaq Bill stating that Equality is an essential character of the Basic structure doctrine and non-compliance with it will give rise to disrespect to the civilized jurisprudence of the sovereign state. With all of its benefits and drawbacks, the Act remains a jumble of inconsistencies and procedural inconsistencies. It's a case of two steps forward, one step back, because its provisions establish a paradigm with no backward or forward path. It is undeniably a hastily enacted piece of legislation, enacted amid much hullabaloo over paternalistic values and little substance. In the clamour of right-wing and left-wing politics, the substance of the entire issue has been missed. It's unfounded and shortsighted, but it's a step in the right way for women's liberation. In the end, law is only as good as the institutions that put it into practise, and for the time being, we are seeing more violations than compliance with its provisions.

The vast majority of male legislators who barely scrape the surface of women's lived realities in a male-dominated society, let alone make place for their voices to be heard, continues to be the main component in the backdrop of all our women-centered legislations. It is a sad reality

that the country's largest minority, women, have a paltry 14 percent representation in the Lok Sabha, which is also the highest number of female MPs to date. The truth is that we won't be able to create a gender-just system unless we first deconstruct the patriarchy that has become ingrained in our culture. Strengthening and prioritising social reform movements that challenge orthodoxy and patriarchy is critical.