

CRITICAL STUDY ON MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL 2018

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Abstract

As India is a secular and diverse country, their own personal laws govern people belonging to different religions. Shariat law governs Muslims in India, practice of triple talaq by the Muslim men for repudiation of marriage is increasing day by day, and society has witnessed many instances to this regard. Muslim men are misusing the practice of instant triple talaq by pronouncing it through social media platforms for repudiation of marriage by which the Muslim women are facing many issues since their rights are grossly violated. Though the Supreme Court upheld the rights of Muslim women in its landmark judgements, the legislature was not successful coming out with supportive legislations in supportive of above-mentioned judgements. Though the preamble of the Muslim Women (Protection of Rights on Marriage) Bill 2018 aims to protect the rights of Muslim married woman, the same is not reflected in the provisions of the above-mentioned Bill. The enactment of the Bill is bound to open a Pandora's Box resulting in never ending grievances and tears of Muslim woman, which in turn will end up at the doors of our already overburdened judicial establishment. Therefore, the author in this paper would like to critically analyse the provision of the bill and suggest the possible options to achieve the desired outcomes enshrined in the preamble of the present Bill.

Keywords: Muslim Women (Protection of Rights on Marriage) Bill 2018, Triple talaq, Muslim Marriage, Divorce in Islamic law

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Introduction

In the recent years, the validity of the triple talaq became a burning issue among the Indian jurists, the lawyers and the Muslim religious heads. Muslim women were always deprived of their rights in the matters of triple talaq, polygamy, nikah-halala, custody of children and inheritance. Muslim women do not enjoy rights as compared to those enjoyed by the women belonging to other religious groups in matters of marriage and divorce. The rights of Muslim women were dealt under the Shariat Act 1935, which was enacted by then colonial government. Since the Union of India did not come up with any other legislations after independence regulating the personal laws of Muslims, the judiciary has been solely relying on the Shariat Act to decide cases.

The Shariat law allows Muslim men to divorce their wives by pronouncing the 'talaq' thrice. In 1984, for the first time, a Muslim woman approached the court to protect her rights as her husband abandoned her at the age of 62 by pronouncing triple talaq. In this case, the Hon'ble Supreme Court held that every Muslim woman who is unable to maintain herself has a right to get maintenance or alimony under section 125 of Cr.PC.¹ Later the government of India enacted Muslim Women (Protection of

Rights on Divorce) Act, 1986 to protect the rights of the divorced Muslim women.

All these years Muslim men have taken advantage of the concept of triple talaq and divorced their spouses according to their whims and fancies. Many instances of Muslim men misusing this concept and divorcing their wives by pronouncing instant talaq even through social networking platforms were reported. Following the petitions by Muslim women in the Supreme Court, there has been an ongoing debate about triple talaq and the need for its abolition. Prevalence of triple talaq is the most pre-eminent illustration of legal discrimination against Indian Muslim women.

Constitutionally speaking, it is clear that triple talaq is a gross violation of the rights of Muslim women. The right to religious freedom applies equally to man and woman. It nowhere gives male citizens the permission to oppress female citizens. Muslim women have been denied their Quranic rights owing to misinterpretations and interference of patriarchal orthodox bodies. The constitutionality of triple talaq was challenged in *Shayara Banu v Union of India*² in which the Supreme Court declared that triple talaq is unconstitutional and

¹ *Mohd. Ahmed Khan v. Shab Bano Begam And Ors.* AIR 1985 SC 945

² *Shayara Banu v Union of India* 2017 SCC online SC 963

observed that the practice of triple talaq is not fundamental to Islam.

Sensing a need to bring a new legislation to invalidate the practice of triple talaq, the government of India came up with a Bill namely the Muslim women (protection of rights on marriage) Bill 2018 with an aim “to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands”. In the light of these circumstances, the author would like to critically analyse the effects of the bill and its implications on Muslim women.

HISTORICAL BACKGROUND OF THE BILL

For almost 65 years the use and status of triple talaq has been a subject of controversy throughout India as there have been instances where Muslim men have been found misusing the practise of triple talaq and divorcing their wives by pronouncing talaq even through a text message. Such nonchalant acts have attracted the ire of the apex court to examine its constitutional validity.

For the first time a social justice movement against triple talaq started on April 18, 1966 in Maharashtra to protect rights of Muslim women.³ The Parliament enacted Muslim Women (Protection of Rights under

Divorce) Act in 1986 to overturn and subvert an earlier Supreme Court ruling in *Mohd. Ahmed Khan vs. Shab Bano Begam and ors*⁴

The Supreme Court in *Shab bano* case held that “it is also a matter of regret that Article 44 of our Constitution has remained a dead letter.” It is the state which is charged with the duty of securing a Uniform Civil Code for the citizens, and unquestionably, it is the legislature that has the competence to do so. The apex court stated that a divorced Muslim women is well within her rights to claim maintenance under Section 125 of Cr.PC from her spouse.

Later, due to pressure from Muslim fundamentalist groups, the central government passed the Muslim Women’s (Protection of Rights on Divorce) Act, 1986, which diluted the right of maintenance to Muslim women under section 125 of Cr.PC. Section 5 of the above mentioned Act, allows the husband to restrict his wife from approaching the court under section 125 and 127 of CrPC. Thereafter one of the counsel in *Shab Bano* case ,i.e, Danial Latifi challenged the above Act, claiming that it was unconstitutional and in violative of Article 14 and 21.

³ K. Ramakanth Reddy, triple talaq decision: finally some justice for Muslim women, manupatra, [http://](http://www.aequitasjuris.com/assets/uploads/files/d116e-triple-talaq.pdf)

www.aequitasjuris.com/assets/uploads/files/d116e-triple-talaq.pdf, dated : 24.02.2018

⁴ 1985 SCR (3) 844

In *Danial Latifi and Another v. Union of India*⁵, the petitioner argued that the said Act is unconstitutional and has the potential of suffocating the Muslim women, and undermines the secular character of the nation, which is the basic feature of the Constitution. There is no reason to deprive the Muslim women of the applicability of section 125 of Cr.PC and present Act is in violation of Article 14 and 21. To this, the respondent said that personal laws are a legitimate basis for discrimination and therefore do not violate article 14 of the constitution. The court thereby held that the said Act was not in violation of Article 14 and 21 of the Indian constitution.

Though, the supreme court protected the rights of Muslim woman through the historical Judgement in Shah Bano Begam case and also upheld the right to maintenance for Muslim woman till re-marriage in Daniel latifi case, the SC court missed the opportunity and failed to address gender inequality in both the cases.⁶

The first notable judicial pronouncement came in 2002 in the *Shamim Ara vs State of UP*⁷, though talaq was not held invalid in this case, yet, Justice RC Lahoti said that talaq must be pronounced on cogent plausible and reasonable grounds. This verdict also said

that prior to talaq; the spouses must appoint two arbitrators, who would make all efforts for reconciliation. Once all efforts having failed, talaq shall come into effect. This verdict though did not invalidate the triple talaq yet tried to give it a process.

In the same year, the Aurangabad Bench of Bombay High Court in *Dagdu Pathan vs Rahimbi*⁸ invalidated the triple talaq by referring to Quran and declared that a Muslim husband cannot repudiate the marriage at his will and has to prove that all stages conveying the reasons of divorce, appointment of arbitrators and conciliation proceedings between the parties were followed. This judgement served the basis of several later rulings and thus invalidated the instant talaq.

On October 16th 2015, the Supreme Court questioned whether practices of marriage and divorce under Muslim personal laws reduce women to mere chattels. In a rare move, Supreme court registered a Suo Motu public interest litigation (PIL) petition titled '*In Re: Muslim Women's Quest for Equality*' to examine the concepts of arbitrary divorce, polygamy and nikah-halala (where a Muslim divorcee marries a man and divorces him to get re-married to her former husband) as these concepts violate women's dignity.⁹ However,

⁵ (2001) 7 SCC 740

⁶ Krishnadas Rajagopal what is triple talaq, the Hindu 27 may 2017, [https:// www. thehindu. com/ news/ national/ the-hindu-explains-triple-talaq/article18590970.ece](https://www.thehindu.com/news/national/the-hindu-explains-triple-talaq/article18590970.ece)

⁷ Appeal (crl.) 465 of 1986

⁸ 2003 (1) BomCR 740

⁹ Ibid at 3

the Constitutional bench has confined only to examine the practice of talaq-e-biddat but not polygamy and nikah-halala.

The major issue regarding triple talaq arose in August 2017 when the Supreme court came out with its historical judgement in the landmark case of *Shayara Bano v. Union of India*¹⁰. In this case the petitioner Shayara Bano was married to Rizwan Ahmed for 15 years. In 2016, he divorced her through instantaneous triple talaq (talaq-e-biddat). She filed a Writ Petition in the Supreme Court asking it to prohibit three practices talaq-e-biddat, polygamy, nikah-halala as unconstitutional. After accepting the Shayara Bano's petition, the Apex Court formed a 5 judge constitutional bench on 30th March 2017. On 22nd August 2017, the 5 Judge Bench of Supreme Court by a 3:2 majority pronounced its decision, declaring the practice of triple talaq as unconstitutional.

THE DISSENTING OPINION

While the majority found that the practice was unconstitutional and violative of Article 14 of the Constitution, which guarantees equality before law, Justice Khehar's decision, along with Justice S Abdul Nazeer, conclude that the Supreme Court does not have the power to strike it down. The dissenting judges were of the opinion that:

“They took the position that triple talaq is not regulated by the 1937 Act, rather it is an integral and constituent part of personal law. They went on to hold that since the practice of triple talaq was not contrary to public order, morality and health. It enjoyed the constitutional protection granted by Article 25. They also held that this practice is not violative of Article 14, 15 and 21 because these provisions are limited to State actions, whereas the practice of triple talaq regulated the conduct of private parties. The minority held that this practice is not in derogation to the constitution values and fundamental rights.”¹¹ The dissenting opinion instead calls for an injunction on the practice of instant triple talaq for six months, while also prodding the legislature to take up the matter.

Since the Supreme Court judgement, some of cases of alleged triple talaq have been reported in the country. “On September 23, 2017, a 23 year old women and mother of a three year old son, lodged a complaint with the Rajkot Mahila police station against her husband for giving her triple talaq and throwing her out of the house 18 months ago. On October 26, 2017, an NRI husband divorced his wife through an advertisement in the newspaper. a case was registered by the Hyderabad Police against the quasi who had advised the husband to give triple talaq .On November 12, 2017, Yasmeen Khalid, the wife of Aligarh Muslim University professor

¹⁰ 2017 SCC online SC 963

¹¹ Ibid at 3

Khalid Bin Yusuf Khan, alleged that her husband divorced her first and then via a text message. On December 10, 2017, a woman in Uttar Pradesh's Bareilly had alleged that her husband gave her triple talaq after she went to thank PM Modi for bringing in legislation to ban instant triple talaq but her husband claimed that he divorced her because of her extra-marital affair.”¹²

HIGHLIGHTS OF TRIPLE TALAQ BILL 2018

To protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands, the central government came up with a new Bill called the Muslim women (protection of rights on marriage) Bill 2018.

- According to section 3 of the Bill, if a man pronounces talaq upon his wife, by words, either spoken or written or in electronic form it is illegal and punishable crime.
- As per section 4 of the Bill, a man who pronounces talaq upon his wife shall be punished with imprisonment for a term, which may extend to three years and shall also be liable to fine.

- As per section 5 and 6, married Muslim women upon whom talaq is pronounced, shall be entitled to receive subsistence allowance for her and dependent children from her husband. A victim can also seek the custody of her minor children from her magistrate.
- As per section 7 of the Bill, it is non-bailable.

“Days after the Bill criminalising triple talaq was passed in Lok Sabha, a woman in Bengaluru was allegedly given instant divorce by her US-based husband through a WhatsApp message. The woman sought help from External Affairs Minister.

Considering the matter, the Ministry of Women and Child Development also assured full help to the woman. “First instance post passing of Triple Talaq Bill, criminalising the act of instant divorce in Muslim community will be dealt with and we’ll ensure justice is done,” the ministry said.¹³

OBJECTIONS TO THE BILL

Main objection is from All India Muslim Personal Law Board (AIMPLB), a non-government organisation constituted in 1973,

¹²Times of India, 100 cases of triple talaq in the country since the SC judgement, <https://timesofindia.indiatimes.com/india/66-cases-of-triple-talaq-in-the-country-since-the-sc-judgement-law-minister/articleshow/62279519.cms>, dated: 28 Dec 2017.

¹³ Kanimozhi sudhakar, India news, 29 December 2018, <https://www.india.com/news/india/triple-talaq-bengaluru-woman-seeks-help-from-eam-sushma-swaraj-after-husband-divorces-her-through-whatsapp-message-3501634/>

for the protection and continued applicability of Muslim Personal Law in India. Their objection is that through this bill government is trying to cross the limit and intervene in the personal and religious activities, and they said they were not consulted while drafting the Bill. AIMPLB clearly stated that husband just cannot say talaq three times in a row and it should be delivered in three settings with a gap of at least one month each.

All India Progressive Women's Association (AIPWA) Secretary Kavita Krishnan asked, "How the law can be different for different communities. Why such an offence (abandoning wives) when committed by a non-Muslim man is considered to be a civil offence and the same is being criminalised when committed by a Muslim man? She asked."¹⁴

"AIMM MP Asaduddin Owaisi pointed to what he called irony that homosexuality, adultery (women) have been decriminalised but Divorce is being criminalised."¹⁵ In addition, he alleged that the Bill does injustice to woman, violates their right to freedom and Muslims were not consulted in its drafting.

DRAWBACKS AND SUGGESTIONS

- The Muslim Women (Protection of Rights on Marriage) Bill, 2018, which makes the practice of instantaneous triple talaq a criminal offence with three years of imprisonment for the husband, lost out on its core purpose of protection of Muslim woman as it does not resolve the daunting task that lies ahead of a divorced woman of finding economic, social and emotional support for herself and her children.
- The provision of subsistence allowance in the Bill does not seem necessary because Muslim women are already entitled to full lump sum maintenance to be provided within the iddat period that is 90 days after divorce under the Muslim Women's (Protection of Rights on Divorce) Act, 1986.
- It is not clear whether the sustenance allowance would be subtracted from the maintenance amount or will be in addition to it. Putting the husband behind bars for three years just postpones the divorce, which the husband is sure to obtain once he is out of jail.
- It penalizes the already aggrieved wife and children by keeping them in limbo and stuck in an unwanted

¹⁴ DC Correspondent, Deccan chronicle, 28 Dec 2018, <https://www.pressreader.com/india/deccan-chronicle/20181228/281479277534064>

¹⁵ The times of India, loksabha passes triple talaq bill amid opposition walkout, <https://timesofindia.>

[indiatimes.com/india/lok-sabha-passes-triple-talaq-bill-amid-opposition-walkout/articleshow/67279837.cms](https://www.indiatimes.com/india/lok-sabha-passes-triple-talaq-bill-amid-opposition-walkout/articleshow/67279837.cms), dated: 28 Dec 2018.

marriage for three years depending on the not-yet-defined sustenance allowance.

- The Triple Talaq Bill has no provision of providing free legal aid to the victims of instantaneous triple talaq.
- There is no rationale to criminalize the practice of talaq-e-biddat and imprison Muslim men. Now, the Muslim men will be incarcerated, thus violating the rights of conjugality of the spouses.
- Both Shayara bano judgement and the Bill are silent to the extent of providing legally valid procedure and forum to conduct effective divorce proceedings for Muslim community.
- The bill is even silent in recognising the right of the Muslim woman to Divorce her spouse.

CONCLUSION

The author is of the opinion that the present Muslim women (protection of rights on marriage) Bill lacks in its core objective of protecting the rights of Muslim women. Though, the Supreme Court has taken a great step towards protection of rights of Muslim women through its land mark judgments, the parliament has failed in enacting supportive legislations to accentuate the judgement. The proposed triple talaq Bill does not fulfil its main purpose of enactment; rather it is just

focuses on criminalizing the practice of triple talaq. The provisions of the bill if enacted would create more problems to Muslim women with regard to their economic & social status in the society. The present Bill makes the triple talaq a punishable offence by putting Muslim men behind the bars for three years but the issue does not end here, because the social status and economic stability of the wife and her children without an earning male member is a question mark.

The author is also doubtful if the imprisoned husband would give subsistence allowances to wife during the jail term as mentioned in the present Bill. The author opines that the bill is lacking in its core purpose of protection of rights of Muslim women because the Bill concentrates only criminalising the act of triple talaq. Author stresses on the fact that the bill should specify an alternative caretaker for the wife and children in absence of her husband. At the end, the author would like to conclude that the proposed legislation needs to be modified in order to make it more comprehensive as to the needs of present day Muslim woman by including more specific provisions by which it would successfully achieve its sole purpose of protecting the rights of Muslim married woman.