

## ANALYSIS OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

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### INTRODUCTION

Matrimonial alliance or Marriage in Islam is a social contract and divorce is considered to be the natural outcome of marital right. But at the same time, marital ties are considered as holy relations of the highest order and divorce is considered as a necessary evil which has to be employed only as a last resort.

#### Forms of Talaq

Mulla has categorized the practice of divorce under Muslim law in three levels.<sup>2</sup> The marriage contract may be dissolved in one of the following ways under Mahomedan law.

1. *By the will of the husband without any intervention of a Court;*
2. *By mutual consent of the husband and wife without the intervention of the Court;*
3. *By a judicial decree at the suit of the wife or husband.*

Divorces under these three levels are called as *talaq*, *mubara'at* and *faskh*. Divorce at the instance of wife is called *khula*.

### INSTANT TRIPLE TALAQ AND INDIAN JUDICIARY

The attitude towards the practice of instant triple talaq has always been critical. In *Mohd.Ahmed Khan v. Shah Bano Begum and Ors.*<sup>3</sup> Supreme Court specifically underlined that the triple talaq cannot take away the maintenance right of a divorced Muslim women who is not in the condition to maintain herself or her children when she is disowned or divorced. The Supreme Court applied the Section 125(3) of Cr.P.C. on Muslims too without any discrimination.

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<sup>2</sup> *Mulla, Principles of Mahomedan Law, Chapter XVI (LexisNexis India, 20th Edn., 2013).*

<sup>3</sup> *AIR 1985, SCR (3) 844*

There are various High Court judgements which gave different interpretations about the practice of instant triple talaq. In *Jiauddin Ahmed v. Anwara Begum*,<sup>4</sup> the court held that Muslim law does not allow an instantaneous and irrevocable talaq without any attempts at reconciliation in between the pronouncements.

In the landmark judgement of *Shayara Bano v. Union of India*,<sup>5</sup> the petitioners challenged Section 2 of the Act,<sup>6</sup> 1939. The Constitution Bench by a majority of 3:2 declared the practice of instant triple talaq as not permissible under law. Among the majority the two learned judges has declared the practice of instant triple talaq under Section 2 as unconstitutional while one declared it as against the Islamic Law.

According to Quranic injunction, triple talaq must be on the reasonable grounds and there must be mediation facilitated by two mediators one from each side of family, if needed.

When instant triple talaq was struck down by the Court in *Shayara Bano* case in 2017 the court guided the Legislature to come up with a law in this matter. Subsequently, the Bill<sup>7</sup> was passed in both the Houses and became the Act, declaring the practice void and illegal under Section 3<sup>8</sup> and provides punishment of imprisonment which may extend up to 3 years and shall also be liable for fine under Section 4<sup>9</sup> of this Act.

### STATUS OF MUSLIM WIFE

The practice of triple talaq is accepting and prevailing in the Muslim society from centuries. By declaring the practice void by law doesn't change the circumstances immediately and effectively. However, the problem is not that much simple. The women who has kept the idea of divorce by pronouncement of triple talaq may think it *haram* to live with her husband despite it is not being recognized as divorce by law. So a reform must come in personal laws within the religious community. As observed by Delhi High Court in the case of *Harvinder Kaur v. Harmender*

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<sup>4</sup> [(1981) 1 GLR 358]

<sup>5</sup> [2017 (9) SCC 1]

<sup>6</sup> *Muslim Personal Law (Shariat) Application Act, 1939*

<sup>7</sup> *Muslim Women (Protection of Rights on Marriage) Bill*

<sup>8</sup> *Section 3, Muslim women (Protection of Rights on Marriage) Act, 2019*

<sup>9</sup> *Section 4, Muslim Women (Protection of Rights on Marriage) Act, 2019*

*Singh Chaudhary*,<sup>10</sup> that introducing Constitutional Law in a matrimonial home is same as “introducing a bull in a china shop.”

The Act might encourage husbands to willfully abandon their wives rather than the pronouncement of triple talaq. Because of the status of the disempowered woman, the family members or relatives may also be reluctant to take her back as she can't marry again.

### MAINTENANCE AND CUSTODY

Section 5 of the Act<sup>11</sup> empowers the woman to whom the triple talaq has been pronounced shall be entitled to receive the subsistence allowance for her and dependent children as determined by the Magistrate. The term ‘Maintenance’ means the amount of money required to continue living according to a person’s status in the society while the ‘Subsistence Allowance’ stands for the minimum amount required to meet the expenses of day-today living.

However, the provision is without prejudice to the generality of provisions contained in any other law, which means the woman is still free to initiate the proceedings for maintenance under Section 125.<sup>12</sup> A married Muslim woman is also entitled to maintenance known as *Nafaqah*, but the condition exists whether she can maintain or not. Hence it is unclear what the suppositional of the given section is, in the form of subsistence allowance.

**The question arises that after punishing the husband for imprisonment and women for getting subsistence allowance, the husband will be in jail, then when does the proposed allowance will come?**

According to Section 6 of the Act,<sup>13</sup> a married Muslim woman is entitled to custody for her minor children after the pronouncement of triple talaq. Thus, she is entitled for the custody as a matter of law.

**Here the question arises about the need of the provision for the custody of a child when no divorce has taken place and the marriage still exists.**

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<sup>10</sup> AIR 1984 Delhi 66

<sup>11</sup> Ibid

<sup>12</sup> Cr.P.C. 1973

<sup>13</sup> Ibid

Making such provision as mandatory is unreasonable i.e. the determination of the custody of a child must be in the hands of courts. This section provides no exceptions and also no proper criteria to determine the custody of the children.

### **CRIMINALIZATION AND JURISPRUDENTIAL ENGAGEMENT**

Section 4<sup>14</sup> deals with the punishment on husband. Human conduct is regulated by various means. Civil means are enough to regulate the human behaviour. If criminal laws should be retained, we must consider its proper limits.

The primary problem is that the legislature is imposing penal for a civil wrong. Marriage under Islam is a contract and breach should not result in criminal sanction. Curtailing the liberty of a person should be the last resort.

State must adopt a minimalist approach in criminalization of offences because a stronger justification is required where an offence is made punishable with imprisonment. The act should not be classified as criminal offence when it is groundless.<sup>15</sup>

In case of instant triple talaq criminalizing seems to be groundless because the act is void in nature. Putting the husband behind the bars might aggravate the marital discord and thus discouraging the wife from reporting the incident. The practice of instant triple talaq can be checked by civil means. Criminalization can be the last resort when the civil remedies are exhausted.

The marriage still exists in the eyes of law as the pronouncement is declared void and illegal.<sup>16</sup> There is a possibility that imprisonment would lead to differences between the couple also leads to divorce his wife with the proper procedure. The fear of such adverse consequences would describe women from reporting such incidents. The punishment of 3 years has been prescribed for much graver offences under the Indian penal code which includes sedition, rioting arms with deadly weapons etc. Imposing such a punishment for an act does not seem justified.

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<sup>14</sup> *Ibid*

<sup>15</sup> *Joseph Shine v. Union of India [2018 (11)]*

<sup>16</sup> *Section 3, The Muslim women (Protection of Rights on Marriage) Act, 2019*

Our Constitution grants the ‘Right to Equality’<sup>17</sup> but the Act discriminates between Hindu and Muslim males as it makes divorce a criminal act while leaving it as a civil act for the former. It must be understood that the equality conferred by Article 14 applies to equal not to unequals. There is an intelligible differentia between the Hindu and Muslim in regard to the practice of divorce. The Hindu law restricts unilateral divorce. The grounds of divorce under the Act<sup>18</sup> are under circumstances of cruelty, adultery, desertion or the consent of both spouses.

The aim of the law is to protect the rights of the unempowered female section of the society. The major difference between the Hindu and Muslim personal laws to be the detriment of the wife is exception to Section 494 of the IPC.

Section 494<sup>19</sup> punishes Bigamy and there are no exceptions on the pretext of religion and due to constitutional guarantee of freedom to practice religion under Article 25, Muslim men are treated as an exception to this provision and there are some instances of bigamy by the Muslim husbands even in the present day.

The instant triple talaq is a form of cruelty on the Muslim wife. It must be penalized under the Section 498-A of the IPC and as per the definition of Domestic violence given in the Act,<sup>20</sup> pronouncement of triple talaq as a ‘verbal and emotional abuse’ under Section 3 of the Act, thus penalizing the husband for the same.

Any man resorting to unilateral divorce should be penalized, imposing a fine and punishment as per the provisions of the Act,<sup>21</sup> and anti- cruelty provisions of IPC, 1860 especially Section 498.<sup>22</sup>

The practice is considered as irregular and bad in theology but has been continued from centuries and no hope exists for its change as there are objections against banning it. Under Section 7,<sup>23</sup> the discretion to initiate criminal proceedings lies completely in the hands of the Muslim wife or

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<sup>17</sup> Article 14, Constitution of India, 1950

<sup>18</sup> Hindu Marriage Act, 1955

<sup>19</sup> Section 494, Indian Penal Code, 1860

<sup>20</sup> Protection of Women from Domestic Violence Act, 2005

<sup>21</sup> Protection of Women from Domestic Violence Act, 2005

<sup>22</sup> Enticing or taking away or detaining with criminal intent a married woman.

<sup>23</sup> Cr.P.C, 1973

her relatives by blood or marriage. This section provides the discretionary power to the women's of the society.

### CONCLUSION

The Act consists of contradictory and inconsistent provisions. There are various forms of talaq under the Muslim law but the unapproved form prevails in the society.

Muslim women became helpless as the talaq can be done easily without her will. The Act at one place empowers the unempowered women and at the other the women left with nothing. The marriage in the Islam is a civil contract so, how the punishment can be similar to the criminal offence.

Under IPC the three years imprisonment has been given to the grave offences like rioting with armed forces etc. So, mere a divorce which is void and illegal is fair to give husband the imprisonment for three years and also the husband will give the subsistence allowance to wife.

The question arises, if the husband is sent to imprisonment by the wife then what is the guarantee that after being free from jail the husband will not give the divorce with proper proceedings?'

Section 4 deals with the subsistence allowance. Here the question arises, if the husband will be in jail then who will provide subsistence allowance?

Section 6 deals with the custody of minor, but the marriage still exists, then why the custody of minor being given only to the women. What are the provisions and exceptions to it?

The Legislature must take overview of the conditions of Muslim women before altering provisions in the Act. There is the need to amend the provisions which provides adequate information. No such punishment should be given to husband for a civil wrong. The conditions, exceptions and specific grounds must be provided for the custody of the minor to the women.