

"Safeguarding Dignity: Unravelling the Tapestry of Muslim Women's Rights amidst the Shadows of Triple Talaq"

"The most hated of permissible things to Allah is divorce"

- Sunan Ibn Majah

Submitted by-

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1. Introduction.

The judicial system's stance on instantaneous triple talaq has always been negative. Before the landmark decision in *Shayara Bano v. Union of India*, the practice of instantaneous triple talaq had been interpreted in a variety of ways by separate High Court rulings. Others argued that Muslim law did not permit an instant and irreversible talaq without any effort to reconcile between the announcements, despite the fact that some thought the practice was terrible in theology but good in law. ¹According to the Quranic commandment, there must be just cause for a triple talaq and, if required, two arbitrators, one from each side of the family, must arbitrate disputes sometimes. The highest court in the land has ruled against the practice on many occasions. But the Court ruled definitively against it in the instance of *Shayara Bano* in August of 2017. The dissenting opinion in this case urged lawmakers to pass a legislation on the subject.

Subsequently, the Lok Sabha approved the Muslim Women (Protection of Rights on Marriage) Bill, 2017. That practice was said to be null and invalid and against the law in the proposed legislation. At the same time, it was declared that the use of the phrase "triple talaq" is illegal and carries a sentence of up to three years in prison. In the Rajya Sabha, the session ended while the Bill was still pending. The Bill eventually became an ordinance that was passed many times. Both chambers voted to approve the bill on July 30, 2019, despite persistent resistance and calls to have it reviewed by the Rajya Sabha Select Committee.

2. "Empowering Silence: The Mosaic of Rights in the Muslim Women's Protection Act, 2019"

According to Section 3 of the Act, a talaq by a Muslim spouse is null and illegal. Such a

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

statutory statement would have been enough to repair the husband's unilateral breach of contract if a Muslim marriage had been considered as a simple contract. However, this is not a simple issue to solve. Marriage is a social contract, yet it serves a sacred purpose and is respected as such because of this. Triple talaq is a common and widely accepted practice that has been ingrained in Muslim society for generations. This means that a statutory declaration of its invalidity alone will not necessarily change the situation. A woman who has internalised the notion of divorce by triple declaration may feel it damaging to continue living with her spouse despite the fact that such a divorce is not recognised by law.

Some things that Flavia Agnes has noticed:²

Rather than going to the courts, women from disadvantaged backgrounds, according to a number of studies, utilise community-based informal channels to advocate for their rights. Women often choose religion-based dispute resolution venues such as darulqazas than secular ones like courts and police stations since members of the underprivileged are often afraid of regaining access to these official institutions.

Even while society and the woman herself may see her as divorced, the law may make it impossible for her to protect her rights as a divorced woman via legal enforcement, thus clouding the situation. It has also been suggested that instead of pronouncing triple talaq, the Act may also empower men to purposefully leave their spouses. She may never marry again, and her family may be reluctant to accept her because of her tainted reputation. The rights of Muslim women were the driving force behind the law, therefore it's not far-fetched to say that the law isn't in keeping with societal standards that would lead to their poverty.

3. Exploration of Maintenance and Custody Rights for Muslim Women"

A woman who has been subjected to a triple talaq judgement is guaranteed financial support from her husband, as established by the court. The segment's wording is very remarkable. Just like previous pieces of law aimed at protecting women's rights, it simply ensures a "subsistence stipend" rather than a "maintenance." Subsistence allowance is the basic minimum required to meet daily costs, while maintenance is the amount of money needed to continue living according to a person's position in the society. The woman may still file for maintenance under Section 125 of the Criminal Procedure Code of 1973, since the provision is "without prejudice to the breadth of the requirements stated in any other legislation." Nafaqah, or maintenance, is a right granted to every Muslim woman who is married, regardless of her ability to provide for herself. The purpose of this clause is thus unclear in the context of a subsistence stipend.

² Flavia Agnes, *The Politics Behind Criminalising Triple Talaq*, 53, Economic & Political Weekly(2018).

Another issue that emerges is the potential for criminal prosecution under this Act. Where a spouse is found guilty of pronouncing triple talaq and is subsequently convicted and imprisoned, the Act provides that his wife is entitled to a subsistence stipend.

A married Muslim woman is legally entitled to custody of her minor children if her husband pronounces talaq against her. This is stated in Section 6 of the Act. Indeed, she has a legal right to such custody.

When a marriage ends in separation but not divorce, the first thing that comes to mind is usually the welfare of any children involved. Making such a provision mandatory is also unjust. In other divorce laws, the courts make custody decisions. Other considerations, such as what is in the best interest of the children, are given priority. This rule does not allow for any kind of deviation or suitable criterion to be used when determining who gets custody of the kids. There are situations in which a mother cannot provide for her kid, either emotionally or monetarily, or in which the youngster does not choose to live with the mother. This phrase was written without considering the possibility of such exceptional situations.

4. The Criminalisation Conundrum of Triple Talaq

Punishment for a husband's proclamation of triple talaq is laid forth in Section 4 of the Act and includes up to 3 years in prison and penalties. This provision of this Act has been the primary source of debate. The authors of this article recognise that there are reasonable arguments for both sides of the debate and make an effort to address all views in equal measure.³

Various mechanisms control human behaviour. Despite the fact that civil measures are sufficient to manage most human behaviour, deterrence is frequently vital when civil law is unable to control behaviour that displays a serious divergence from standards and has the potential to violate the lives of others.

5. "Beyond the Veil: Private Conduct Criminalisation - A Jurisprudential Contribution"

Since the release of the Wolfenden Report in 1957, and the following assertions made by Patrick Devlin and H. L. A. Hart on the role of the state in imposing morality in the private sector, there has been debate over the criminalization of private concerns. Embedded in a liberal democratic framework, the Homosexuality and Prostitution Study established the parameters within which criminal law should function.⁴

³ Section 4. Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine

⁴ John Fedrick, *Home Office, Scottish Home Department, Report of the Committee on Homosexual Offences and Prostitution*, London : Her Majesty's Stationery Office, 1957

"We believe the law should not make an effort to regulate the personal choices of its individuals or to establish uniform standards of behaviour. The concept was that private morality is a realm that must be beyond the scope of legislation.

Thus, whereas Devlin claimed that the State should enforce morality in the best interest of society,⁵ According to Hart, the government has no business demanding people follow a consensus of morality.⁶

6. Examining the Controversies Surrounding the Penalisation of Triple Talaq"

The main issue with making the immediate triple talaq declaration a criminal act is that it is the legislature that is imposing criminal and criminal punishments for a lawful mistake. In Islam, a couple is legally bound together by their wedding vows. In a perfect world, criminal sanctions would not be an incentive to commit contract violations. In terms of punishing citizens, the government should use a light touch. Limiting someone's freedom should be an absolute last option. Criminal law is just one weapon available for regulating society's tolerance for unacceptable behaviour. The most severe punishment and condemnation should be reserved for the most serious violations, such as criminalization. Since a stronger rationale is required when a crime is penalized by imprisonment, the State must take a minimalist approach in criminalizing offences.⁷

In his work *An Introduction to the Standards of Morality and Law*, JJeremy Bentham outlined four conditions under which an action might not be considered a crime. To begin, if it's unfounded, it signifies there's no danger to be averted. If immediate triple talaq is null and void and serves no practical purpose, then there is no need to make it a crime. Second, in situations when it fails and the resulting harm cannot be avoided. In the event of quick triple talaq, sending the husband to prison may make the marital crisis much worse and discourage the woman from coming forward with the occurrence. And keeping it hidden from the public eye won't do anything to discourage its use, either. The final sign of unprofitability is a loss that surpasses any prospective benefit. When it's not essential, it's because there are alternative ways to address the issue at hand. Verification of immediate triple talaq may also be accomplished via legal channels. When all other options for resolving the issue have been explored, criminal charges may be considered.

⁵ Sir Patrick Devlin, *The Enforcement of Morals*, Maccabean Lecture in Jurisprudence, March 18, 1959

⁶ L. A. Hart, *Law, Liberty and Morality* (1963); *The Enforcement of Morality* (Lecture II in *The Morality of the Criminal Law* (1965))

⁷ Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, Researchgate, 21 June 2017
file:///C:/Users/hp/Downloads/Is_Criminal_Law_Reform_a_Lost_Cause.pdf

Minimalists argue that criminal punishment should be avoided if it is not likely to deter the behaviour in question or if doing so will result in more damage to society than would be avoided by not taking any action at all.⁸

A Thoughtful Conclusion on the Criminalisation of Triple Talaq"

That is to say, punishment of a person should not become counterproductive. The criminalization of quick triple talaq is the most probable scenario in which this will occur. The goal of the Act is to ban immediate triple talaq and guarantee the rights of Muslim women who are married. Keep in mind that if the guy were to go to jail, his whole family, including his wife, may end up in poverty. Additionally, section 3 of the Act has already deemed the act of proclamation unconstitutional. Such a statement would therefore have no implications whatsoever and would have no impact on marriage. Marriage will continue to exist as long as the state recognizes it. It is a bit foolish to believe, however, that the marriage will not suffer. If the spouse is behind bars, the pair may become distant and eventually break up. After his release, the husband could legally separate from his wife in accordance with Islamic law. Because of their religion, a Muslim married couple would have their conjugal rights violated if they were detained. Women wouldn't disclose these kinds of mishaps out of fear of repercussions. That means such a provision would have minimal effect as a deterrence. This leaves the lady with no legal options. Officers have the authority to make an arrest based only on their observations if the offence is cognizable. This is a surgery in which the lady will have no say.

More importantly, neither the courts nor the Shariah law have declared the practice to be illegal. The Hanafi School permits this kind of divorce, however it is seen as wicked and abhorrent by other branches of Islam.⁹ Theologically speaking, it's wrong but not a crime.

As an added downside, the proposed punishment is out of line with the gravity of the error. A fair criminal punishment must be based on the 'just deserts' idea. Many more serious offenses, such as sedition, fostering hostility amongst classes of people, rioting armed with dangerous weapons, etc., have a mandatory minimum sentence of three years in prison under the Indian Penal Code. Such a severe punishment seems excessive for such a little offense.

⁸ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, 213, (Oxford University Press, Oxford, 2013)

⁹ Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, 147 (Oxford University Press, Oxford, 2008)