

Conceptualising the Rights of Muslim Women in Context of Islamic Personal Law

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Abstract

Despite the constitutional commitment for the gender-just laws and equal safeguards for minorities still Muslim women face considerable challenges as a member of largest minority and, are among the poorest, economically vulnerable, educationally and politically marginalized group in the country. Personal law, based on religious laws as modified by state legislation and judicial precedent, governs family relations including marriage, divorce, inheritance and maintenance and applies to individuals on the basis of their religious identity have become the benchmarks of a gender-just existence. According to Sacher Committee report media has extensively highlighted on select cases of Muslim women passionately in identifying the Muslim religion as the sole locus of gender injustice in the Community. In this paper author shall attempt to provide an exposition of statutory and judicial framework of India's religion-state relations and further illustrate the rights of Muslim women laid down under Holy Qur'an for the protection of Muslim Women. It also briefly look in to the legislative enactments of The Muslim Women (Protection of Rights on Marriage) Act, 2019 over the triple talaq.

Key Words:- Personal Law, Muslim Women, Triple Talaq, Marriage

1. Introduction

Muslim women in India face considerable challenges as citizens and as members of the largest minority because they have been broadly represented as passive victims. The status of Muslim women largely specifies the shortage of three essentials: knowledge (measured by literacy and average years of schooling), economic power (work and income) & autonomy (decision making power and physical mobility) as the defining feature of women's low status.² Zoya Hasan and Ritu Menon too pointed out in their survey that recent interventions on Muslim women in post-colonial India are caught up in misconceptions that usually leave Muslim women invisible.³ Muslim women's rights became a subject of considerable debate, because, two sets of notion existing in the society on the status of Muslim women: the tendency to see Muslims, particularly Muslim women, as a monolithic category; and the overwhelming importance attached to Islam, especially the Muslim personal law in defining Muslim women's status.

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² Kalpana Kannabiran (ed.) *Religion, Feminist Policies and Muslim Womens* (Sage Publications, New Delhi, 2014)

³ Zoya Hasan & Ritu Menon, *Unequal Citizens A Study of Muslim Women in India* 8 (New Delhi, 2004)

Personal law including marriage, divorce, inheritance, custody rights, etc. is a contested area for the women's movement as well as for Hindu and Muslim conservatives. It not only defines the relationship between men and women in marriage and family relations but also marks the relationship between women and the State. While civil and criminal laws in post-independent India are secular, on the other hand personal laws are governed by the respective religious laws. Accordingly, Muslim women came under the purview of Muslim personal family law. *Shah Bano*⁴ controversy brought Muslim personal law back into focus which had not been subject to any legislative changes since the 1937 Shariat Act and the 1939 Dissolution of Muslim Marriages Act. Despite the commitment for the gender-just laws and, the Constitution of India confers equal citizenship rights on all Indians and provides safeguards for minorities⁵ still Muslim women denies the limited visibility.

Islamic schools still provide training based on Islamic jurisprudence, which developed during the medieval ages, when women's role in public life was extremely limited and they were supposed to be subservient to patriarchal authorities. The body of laws developed by the Islamic jurists is known as *Shari'ah* and the methods followed and intellectual efforts made are known as Islamic *fiqh*. It is argued by the Muslim leaders that *Shari'ah* laws are divine, beyond human intervention and hence immutable and it is obligatory for every Muslim to follow them. However, this is not a correct view. The body of Islamic laws developed over several centuries by eminent jurists is a result of human engagement with divine pronouncements in the *Qur'an* and *sunnah*. Since the *Shari'ah* is a result of human endeavours to understand, it is as much human as it is from Allah and cannot be made immutable. The modernist, liberal and reformist Muslims have been campaigning for change to remove gender inequalities and give women equal rights; which is in line with what the *Qur'an* clearly stipulates. Thus one would see a clear difference between what the *Qur'an* stipulates and what *Shari'ah* laws require⁶. Ashgar Ali Engineer have always argued that women's rights are inherent in Islam but the patriarchal society has taken away rights from women.⁷ The Holy *Qur'an* had laid the framework for the laws protecting the rights of women.

⁴ *Mohd. Ahmed Khan v Shah Bano Begum* 1985 (2) SCC 556

⁵ Constitution of India, articles. 29 & 30

⁶ Asghar Ali Engineer, "Rights of Women and Muslim Societies" 7 Socio-Legal Rev. 44 (2011)

⁷ *ibid*

2. Origin and Development of Islam and the Advent of Muslim Law in India

Islam means peace and submission. The *Shari'ah* is the central core of Islam and is an infallible guide to ethics. But this is not the law in the modern sense. The Islamic jurisprudential law is called *fiqh*. According to Fyzee, "this is the name given to the whole science of jurisprudence. It is the knowledge and obligation derived from the four sources of Islamic law-the *Koran, Sunna, Ijma & Qiyas*".⁸

There are two broad sects of Islam, the *Sunnis* and the *Shia's*. In the course of time the majority and minority of the heyday of Islam came to be known as the (*Sunnis* and the *Shia's have their own law*) respectively. Though sharing all essential religious belief and practices, the two groups gradually developed their own theology and law. Among the *Sunnis* there have been four different schools of theology and law are *Hanafi, Maliki, Shafei & Hanbali*. The *Shia* did not recognize, the authority of any of *Sunni* jurists mentioned above. The most important among the *Shia* schools of law are *Ithna Ashari & Ismaili*.⁹ In India, the Bohras and Khojas (Agha Khani) are Shias belonging to the Ismaili sect.

Islamic law was gradually codified in India under the authority of Muslim monarchs of the past. The first State Code of Muslim law prepared in India was the *Fatawa-e-Ghiyasiya* promulgated under the authority of Ghiasuddin Balban who ruled India during 1266-1288 AD. Later in it was replaced by the *Fatawa-e-Qurakhania* of the Tuglaq rulers. The Mughals began with their first Code, *Fatawa-i-Babari* and ended with the celebrated 30-Volume *Fatawa-e-Hindiya* (Code of India) better known as *Fatawa-e-Alamgiri*. All these codes were based on Sunni Hanafi law.¹⁰

Before the British rule in India the local rulers, both Hindu and Muslim wherever they ruled, had adopted a system of community specific religion based system of law to be applied in the matter of religious rites, personal status, family relations and succession in the Muslim-ruled areas Hindus were governed by Hindu law and vice-versa. The British rulers of India inherited this system and retained it in force. The community specific law applied under this system eventually came to be known as 'personal laws'.¹¹

⁸ Flavia Agnes *Law and Gender Inequality The Politics of Women Right in India* 29 (Oxford University Press, 1999)

⁹ Tahir Mahmood and Saif Mahmood, *Muslim law in India and Abroad*, 8 (Universal Law Publishing Co., New Delhi)

¹⁰ *Id* at 19

¹¹ *Ibid*

Interestingly, the assumption was that Hindu law was the ‘laws of the Shastras’ and Muslim law ‘the laws of the Koran’. This focus on scriptural law was soon modified and by 1793 the Regulations referred to ‘Hindu law’ and ‘Mohammedan laws’. Significantly, in the actual administration of justice, from 1772 until 1864, Hindu and Muslim experts or assessors (pandits and maulvis) were enlisted to instruct the courts as to the nature of Hindu and Muslim laws. The British believed at this time that the personal laws were so interconnected with religious feelings that any attempt at large-scale reform or any endeavor to codify the personal laws would necessarily involve injury to religious susceptibilities. They were probably also worried about upsetting their colonial subjects and creating grounds for anti-colonial agitation.

Mainly for such reasons, legal reform was invoked only after considerable pressure from the communities themselves. Several of the few Acts dealing with Muslim law enacted by the British actually restored traditional Muslim law. The Mussalman Wakf Validating Act 1913 is perhaps the best example of this trend. It should be reiterated in addition that the orthodox Muslim community was responsible in part for the enactment of Muslim Personal law (Shariat) Application Act 1937, which sought to destroy the application of a considerable section of customary law. The only major liberalizing reform of the Muslim personal law in the British period occurred in 1939 with the enactment of the Dissolution of Muslim Marriage Act.¹²

3. Rights of Muslim Women in the Context of Islamic Personal law

Before the advent of Islam, women were treated like slaves or property; women were used for one purpose and then discarded. They had no freedom, could own no property and were not allowed to inherit. In times of war, women were treated as part of the prize. Outside Arabia conditions for women were no better. In Egypt, India and all European countries in the Dark Ages, women were treated worse than slaves. The Arabs were traders and had mastered the Law of Contract. The basic principle of contract was applied to other social relationships including marriage. Although *Shariat* is premised upon a patriarchal familial structure, it is not based on a feudal economic structure. The principles governing marriage transactions were similar to trade contracts-offer, acceptance and considerations forming its base. The Prophet converted the custom of bride price of tribal Arabia to *Mehr* which would be a future security to a married woman. In an era of unlimited Polygamy, the Prophet restricted the number of wives to four with an injunction that each wife be treated with equal dignity and affection.

¹² David Pearl & Werner Menski, *Muslim family law* 38 (Sweet & Maxwell, London, 3rd edn., 1998)

Islam was also the first legal system to grant women the right to inheritance.¹³

It prohibits wanton violence towards women and girls and is against duress in marriage and community affairs. Islam considered a woman to be equal to a man as a human and as a partner in his life.

3.1. Right in Respect of Marriage

Islam made major changes in the law of marriage and brought several reforms. Prior to the Islam the female had no choice in the marriage. So it was not the union of two equals it was a relationship of subordination. Even today under Hindu Marriage Act it does not reflect the union of two equals because father is giving the daughter in marriage as a *daan* and *daan* is always giving of a thing. Making marriage as a contract was a revolution and therefore, Islam is to be given the credit that rather considering marriage as a sacrament as under Hindu Marriage Act 1955 Islam treated it as a civil contract. Fysee stresses that “marriage among Muhammadans is not a sacrament, but purely a civil contract”. It is apparent, however, that a Muslim marriage also has religious elements and is not purely a matter of contractual arrangement between two individual. Indeed a contract before God, it has character of sanctity. The unique feature of the contract of marriage under Islamic law is that conditions can be stipulated within this contract. This is termed as *aqd-e-nikah* (conditions of marriage). During the British period, the Courts in India upheld various conditions stipulated in the *nikahnama*. There is also a scope for drawing up pre-nuptial agreement or *kasin-nama*.

Muslim man has undisputed legal right to marry up to four wives, so long as he is actually capable of treating his wives equally and justly “This implies that he should be able to give each of his wives an equal share of food, clothing, material comforts and whatever kind of treatment he can provide. It also implies that he should not be partial to one wife at the expense of another”¹⁴. Polygamy draws its validity from Verse 4:3 of Holy *Quran*,

“If Ye fear that ye cannot do justice between orphans, then marry what seems good to you of women, by twos, or threes, or fours or if ye fear that ye cannot be equitable, then only one, or what your right hand possesses”.

The practice of polygamy as dictated by the *Quran* is regulated by Ethical Codes than it was in the societies of pre-Islamic Arabia. Polygamy is neither

¹³ *Supra* Note 7 at.33

¹⁴ Rachel Jones, “Polygyny in Islam” 1 *Macalester Islam Journal* 64 (2006) available at: <https://digitalcommons.macalester.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1014&context=islam>

mandatory nor encouraged but merely permitted. The *Quran's* conditional endorsement of polygamy stresses that self-interest or sexual desire should not be the reason for entering into a polygamous marriage. It is a practice associated with the social duty of Islamic men have to protect the social and financial standing of the widows and orphans in their community. The permission to marry up-to four wives is discouraged unless the children of a widow are in danger of being disinherited or forced into unsuitable marriages. In addition to the charitable motivations described in the *Quran*, Islamic scholars have suggested other circumstances in which polygamy is acceptable. Some of these are backed by statements in the *Hadith* and *Quran*, while others are based more on social expedience. In common with the instructions given in Verse 4:3, these interpretations do not encourage polygamy but view it as preferable to the alternatives. In all the pre-Islamic civilizations Persians, Israelites, Athenians, Hindus¹⁵ all practiced polygamy with no restrictions however, *Quran* restricted the number of wives to four with the condition of equal justice between co-wives which implies that polygamy is not the normal condition of Muslim society. While this practice has been banned in several Muslim countries, in others there are checks in place to prevent degeneration of the practice. In South Asia, countries like Pakistan and Bangladesh require that all matters of extra judicial and arbitrary divorce and second and subsequent marriages be submitted before an arbitration council. They also require written permission of the first wife before a second marriage can be contracted. This kind of arbitration councils are missing from the Indian scenario. Increasing incidence of polygamy has impelled the Islamic courts of *Dar-ul-Qaza* to lay down the condition that polygamy will be allowed only if a person shows sufficient cause, and satisfies the authorities that he will be able to bear additional economic burden and not divorce the first wife.¹⁶

Allahabad High Court Court in *Itwari v Asghari*¹⁷ S.S. Dhavan, J. observed that:

“...Muslim Law as enforced in India has considered polygamy as an institution to be tolerated but not encouraged, and has not conferred upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances. A Muslim husband has the legal right to take a second wife even while the first marriage subsists, but if he does so, and then seeks the assistance of the Civil Court to compel the first wife to live with him against her wishes on

¹⁵ Until the enactment of Hindu Marriage Act 1955, Hindu Male was entitle to have unlimited number of wives and polygamy was lawful.

¹⁶ Neera Bharihoke (ed.) *Position of Women Under Muslim Personal Law: Some Observations* 238-239 (Severals Publications, New Delhi, 2008)

¹⁷ AIR 1960 All 684

pain of severe penalties including attachment of property, she is entitled to raise the question whether the court, as a court of equity, ought to compel her to submit to co-habitation with such a husband. In that case the circumstances in which his second, marriage took place are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first”.

So far the Supreme Court of India played a proactive role in striking a balance between the customary practices and the rights of the individual in a welfare State. However, while quashing the Triple talaq in 2017 Supreme Court decided to examine the constitutional validity of prevalent practices of ‘polygamy’ & ‘nikah halala’ among the Muslims and issued a further notice to the Centre and State Law Commission.

3.2. Right to Mehr

In Islam every married woman has a right to receive from her husband, as a token of respect and social security, some money or property or another valuable thing. This is called *Mehr*¹⁸. The concept of *Mehr* occupied a unique position in the Muslim law of marriage. Therefore, dower is inherent in the concept of marriage under Muslim law and it is an integral part of it. It is a sort of deterrent to the husband’s absolute power of pronouncing divorce on his wife, so the main object of dower is to offer protection to the wife against such arbitrary power.¹⁹ *Mehr* is not only the consideration for marriage, *Mehr* is intended to be a mark of respect in which the wife is held by the husband.²⁰ The Supreme Court also in the *Shah Bano case*²¹ observed that “Mehr was not a consideration for marriage but an obligation imposed upon the husband as a mark of respect to his wife, and was therefore not a sum payable on divorce.” C.J Chandrachud further observed :

“Our submission, the Magistrate will have to take this sum into consideration while fixing the amount of maintenance and if he comes to the conclusion that this amount is sufficient to

¹⁸ According to Mulla, “a sum of money or other property which the wife is entitled to receive from the husband in “consideration of marriage.” The word “consideration” is not used in the sense of the Contract Act. According to Muslim law, dower is an obligation imposed upon a husband as a mark of respect to his wife. If dower were a bride price, a postnuptial agreement to pay dower would be void for want of consideration, but such an agreement is valid and enforceable.

¹⁹ *Abdur Kadir v Salima* (1886) 8 All 149.

²⁰ Rakesh Kumar Singh Law of dower (Mahr) in India, “*Journal of Islamic Law and Culture*”58– 78 (2010), <https://doi.org/10.1080/1528817X.2010.528594>

²¹ *Mohd. Ahmed Khan v Shah Bano Begum*, AIR 1985 SC 945. Mehr amount became a part of the maintenance amount under Section 125 of Cr.P.C. through Section 127 (3)(b) of Cr.P.C., 1973.

maintain her, he will have to give a finding that she is not unable to maintain herself and therefore no maintenance amount need be given to her”.

In India the practice is that the nature of dower is determined on the authority of *Hedaya*, *Darul Mukhtar* and *Fatawa Alamjin*.²²

3.3. Right to Maintenance

Nafaqa (maintenance) means all these things which are necessary for the support of life such as food, cloth and lodging. When a woman surrenders herself to her husband, it is incumbent upon him to support her and provide both, food and shelter whether she be a Muslim or an infidel, because such is approved by the holy *Quran* and tradition. The rules relating to maintenance of divorced wives are unfortunately gravely misunderstood, and there is a pressing need for their reappraisal.

The Shah Bano Case

The story begins in 1975 with a Muslim woman, *Shah Bano*, who after forty-three years of marriage separated from her husband Mohammad Ahmed Khan well known advocate in Indore in accordance with Islamic law. The divorce was performed by the procedure of talaq that is the husband declaring (three times) that he ends the marriage. Throughout the duration of the marriage *Shah Bano* had been a housewife who was financially dependent on her husband. After divorce, *Shah Bano* was left with no means to support herself. She sued her former husband under Section 125 of the Indian Criminal Procedure Code for failing to provide her with adequate maintenance after the divorce. Section 125 states that maintenance, up to a maximum of five hundred rupees a month, must be provided by the husband for a former spouse who would otherwise be destitute. *Shah Bano* filed her case in a lower court in the State of Madhya Pradesh, where a Magistrate pass the order that her ex-husband was required to pay a monthly maintenance payment of twenty-five rupees a month. Disheartened at the paltry amount awarded to her, *Shah Bano* appealed to the Madhya Pradesh High Court, which in 1980 ruled that the payment should be increased to approximately one-hundred eighty rupees. Following this judgment, Mohammad Khan (a lawyer by profession) appealed to the Supreme Court of India, reiterating the argument he made in the lower courts: that because he satisfied Section 127 of the Indian Criminal Procedure Code, Section 125 did not apply to him. Section 127 states that Section 125 shall not apply where a divorced woman has received, whether before or after the date of the said order, the whole of the sum which, under

²² Khan Noor Ephroz *Women and Law Muslim Personal Law Perspective* 155 (Rawat Publication, New Delhi, 2003)

any customary or personal law, applicable to the parties, was payable on such divorce.

Mohammad Khan contended that under Muslim personal law he had already paid the "whole" sum to *Shah Bano*, and as a result, he owed her no further payment and, further contested that the Muslim Personal Law in India required the husband to only provide maintenance for the *iddat* period after divorce. Mohammad Khan claimed that he was no longer obliged to maintain his former wife. Furthermore, Mohammad Khan rejected *Shah Bano's* additional argument that the *Quran* required, at the very least, she receive marta or lump-sum payment made by the divorcing husband signifying the end of the marriage. According to Mohammad Khan, marta payments had to be made only by those who were considered pious in the eyes of Allah (muttaqeen). This was a personal description he claimed did not apply to him. Khan's argument was supported by the All India Muslim Personal Law Board which contended that courts cannot take the liberty of interfering in those matters that are laid out under Muslim Personal Law, adding it would violate The Muslim Personal Law (Shariat) Application Act, 1937. The board said that according to the Act, the courts were to give decisions on matters of divorce, maintenance and other family issues based on Shariat. The Supreme Court, in a bench comprised of Justices Chandrachud, Desai, Venkataramiah, Chinnappa Reddy, & Misra affirmed the Madhya Pradesh High Court ruling and held that Mohammad Khan was still responsible to his former wife for maintenance payments. Justice Chandrachud, writing for the Court, rejected Mohammad Khan's interpretation of Muslim personal law. Relying on its own research and understanding of the *shari'a*, the Court opined that the principles of Islam, in fact, require that a husband not "discard his wife whenever he chooses to do so" without first ensuring that she is financially secure. The Supreme Court's arrogating to itself the power to ascertain authentic Islamic law understandably elicited great anger within the Muslim community. Among many Muslims, there was a perception that the *Shah Bano* judgment marked the beginning of the end to Muslim personal law in India. Rather than judicially balancing the general law against the personal law and then selecting the former as the basis for its decision, the Supreme Court's attempt to interpret the *Shari'a*, according to some observers, seemed to be an alarming move to subvert Muslim personal law. Two earlier Supreme Court cases, involving facts similar to *Shah Bano*, had not aroused the kind of hostile reaction among Muslims that was seen in 1985. In *Bai Tahira v. Ali Husain Fissalli*²³ & *Fazlunbi v. K Khader Vali*²⁴, the Court twice upheld the rights of divorced Muslim women to receive maintenance for a period beyond *iddat*. Why was there no uproar by the Muslim community about

²³ AIR 1979 SC362

²⁴ AIR1980 SC 1730

either of these decisions? Perhaps the reason lies in the fact that the author of these two judgments, Justice Krishna Iyer, judiciously weighed the personal law against Section 127 of the Criminal Procedure Code to arrive at decisions that appear to have been accepted and respected by the opposing parties.

In 1986, the government of India passed the Muslim Women (Protection of Right on Divorce) Act, 1986 . This act overturned the Supreme Court decision in *Shah Bano* case. It allowed maintenance to a divorced Muslim Women only during the *iddat* period. But this provision of the new law was seen as a contrast to Section 125 of the Criminal Procedure Code.

The Muslim Women's (Protection of Rights on Divorce) Act 1986 provides that a divorced Muslim is entitled to

1. a reasonable and fair provision within the period of *iddat* (a period roughly three months imposed upon a woman who has been divorced or whose husband has died, after which a new marriage is permissible).
2. two years maintenance for her children.
3. *Mehr* (dower) and all other properties given to her by her relatives, husband and husband relatives.

In case where a woman is unable to maintain herself after the *iddat* period the magistrate can order these relatives who are entitled to inherit her property, to maintain her in proportion to what they would inherit in accordance with Islamic law. If a woman has no such relatives the magistrate would ask the state *Wakf* Board to pay maintenance.

Danial Latifi, Shah's Bano advocate, challenged the validity of the enactment on this ground it violates the fundamental rights and its discriminatory character. in *Danial Latifi v Union of India* in 2001²⁵, the Apex Court not just upheld the act constitutional valid, but further clarified that liability of a Muslim husband cannot be restricted to the period of *iddat* only entire alimony is to be paid during *iddat* period only. Divorced woman is entitled to a reasonable and fair provision of maintenance to be made and paid to her with in the *iddat* period by her husband, but this includes future needs.

This verdict was, thus a step forward on the road to sex equality in as much as it provides a predominantly social, rather than religious grounding for maintenance provisions. Notwithstanding this liberal interpretation, the issue of discrimination on the basis of religion has not

²⁵ (2000) 7 SCC 740

gone away. It remains significant only Muslim women are denied maintenance under the Cr. P.C.

3.4. Right of Muslim Wife of Dissolution of Marriage

Under matrimonial jurisprudence, Muslim wife is certainly entitled to divorce her husband without taking recourse to 1939 Act. Islamic law believes in the 'breakdown theory' and not in the 'fault theory' of divorce and thus causes of breakdown of marital tie are not subject to any scrutiny. If there is 'irretrievable breakdown' of marriage due to 'incompatibility of spouses', law provides for out of court divorce so that spouses part with grace and dignity. Even Shariat Act of 1937 explicitly recognizes these types of divorces by using different terms such as *Khula*, *Mubarat* & *Lian* for the divorce by wife. The *Sharia* has laid down the rule that where a woman has been married before attaining the age of puberty, or with an unequal or where the husband is impotent, an apostate, an insane or is suffering from some disease or is missing, the wife on proving the said facts may seek the divorce as a matter of right and it becomes obligatory on part of the Kazi (judge) to dissolve the marriage. When the wife seeks divorce under any of the said provisions she will not surrender her dower in favour of the husband, as in case of *khula* and *mubarat*. Muslim woman is entitled to *Talak-e-Tafwid* ie delegated divorce which gives her an identical right to divorce at par with men under which she can divorce her husband without going to any court by simply pronouncing divorce on herself.²⁶ There is also a scope for drawing up pre-nuptial agreement or *Kabin-nama*. The British courts also upheld a Muslim woman's right to impose conditions upon her husband through pre-nuptial agreements. Though such agreements were deemed to be against public policy under English law. Some instances of conditional restrains upon the husband are: restraint on polygamy, right to matrimonial home/residence right of *Mehr*, right to work and earn, etc.²⁷

a. *Talaq under Islamic Law*

Pre-Islamic Period:

Prior to Islam, divorce among the ancient Arabs was easy and of frequent occurrence and that this tendency has persisted to some extent in Islamic law. But to take a fair and balanced view it must be observed that a Prophet showed his dislike to it in no uncertain terms. He is reported to have said that 'with Allah the most detestable of all things permitted is divorce.'²⁸ According to Abdur Rahim, at least four various types of dissolution of

²⁶ available at :<http://www.faizanmustafa.in/2017/05/30/muslim-womens-right-to-divorce-2/>

²⁷ Flavia, Agnes, *Family laws and Constitutional Claims* 49 (Oxford University Press, New Delhi, 2011)

²⁸ Asaf A.A. Fyzee, *Outlines of Muhammadan law* Revised by Tahir Mahmood 117 (Oxford University Press 2008, New Delhi)

marriage who known in pre-Islamic Arabia. These were *Talak, Ila, Zehar and Khula*. A woman if absolutely separated through any of these four modes was probably free to remarry, but she should not do so until sometime, called the period of *iddat*, had passed it. It was to ascertain the legitimacy of the child. But it was not a strict rule. Sometimes, pregnant wife was divorced and was married to another person under an agreement. It is interesting to note that period of *iddat* in case of death of husband then was one year.²⁹

After the Advent of Islam

The Prophet of Islam looked on these customs of divorce with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. It was impossible, however, under the existing conditions of society to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi barbarous community to a higher development.³⁰ Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one and opens a way for the parties to seek agreeable companions and thus, to accommodate themselves more comfortably in their new homes.³¹ The reforms of Prophet Muhammad marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband and gave to woman the right of obtaining the separation on reasonable grounds. Ameer Ali asserts.

"The permission (of divorce), therefore, in the *Koran* though it gave a certain countenance to the old customs, has to be read in the light of the law givers' own enumerations. When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of his words on the institution of divorce."³²

In considering the institution of divorce glib generalizations are somewhat dangerous. Some years ago, in writing on the subject, Fyzee observed.

"It is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his without cause. Dower to some extent restricts the use of the power. But experience shows that greater suffering is engendered by the husbands withholding divorce than by his irresponsible exercise of this right. Under such conditions the

²⁹ Syed Khalid Rashid, *Muslim law* Rev. by V.P. Bhartiya 103-04 (Eastern Book Company, Lucknow, 2009).

³⁰ *Ibid*

³¹ *Yousuf, Rawther v. Sonoramma*. AIR 1971 Ker 261

³² *Supra* note 27 at 117

power to release herself is the surest safeguard for the wife. No system of law can produce marital happiness, but humane laws may at least alleviate suffering. And when marital life is wrecked, the home utterly broken up by mis understanding, jealousy and cruelty, or infidelity, what greater boon can a wife have than the power to secure her liberty? The unfortunate position of woman of India is due to the fact that women, being illiterate, are ignorant of their rights and men being callaous, choose to remain ignorant'.³³

Tahir Mahmood also points out that, "In India the courts, gradually realizing that the concept of *Talak* has been very much misunderstood in the past, have made appreciable efforts to remove the misconception in this respect.

Husbands Unilateral Power to Divorce:

Once it was said by V.R. Krishna Iyer in *Yousuf v. Sowranma*.³⁴

“The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. It is popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage.... However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the holy *Quran* laid down and the same misconception vitiates the law dealing with the wife's right to divorce...”

In Muslim community, one major factor which affects the status of women is the practice of divorce under Muslim Personal law, divorce is an easy matter for the husband as he enjoys an unlimited freedom to divorce his wife at his own will. Several schools like the *Jafari*, the *Hanafi*, the *Maliki*, the *Safai'i*, the *Hanbali* support men's right to triple talaq (talaq in one sitting). The *Quran* emphasizes that divorce should not be a hasty impulsive act but should also be finalized only after a period of waiting during which the couple is counselled and, given a chance to rethink on the decision. *Talaq* is a procedure that can be initiated by the husband alone without the consent of his wife. Besides, the exercise of talaq is extra-judicial and in no way subject to external check therefore, the power of the husband to divorce is absolute. Talaq may be pronounced in a number of ways, e.g., (1) Ahsan (2) Hasan (3) Bid' ah. The Ahsan form of talaq is *Talaq-I-Sunna*. The repudiation does not take place at a single sitting nor can it take place during menstruation. *Iddat* is observed during the period following menstruation that is *tuhr* or the

³³ Asaf A.A Fayzee, *Outlines of Mohammadan Law* 118 (Oxford University Press, 2009)

³⁴ AIR 1971 Ker 261

purity period. Two arbitrators from both sides are appointed to bring about reconciliation. During the period of *iddat* marriage is not dissolved. If reconciliation takes place, the marriage is saved and no *nikah* is needed. In *Ahsan talaq* even after the third pronouncement of *talaq*, after the *iddat* period, the marriage is revocable. The man can remarry his divorced wife. This practice is in accordance with the teaching of the *Quran* and according to Sunna rules. Both Sunni and Shia schools approve of *talaq-a-ahsan*. The Hasan form is *talaq-a-sunna* but is not as commonly accepted as *talaq-a-ahsan*. The man is supposed to pronounce *talaq* during the successive periods of purity or *tuhr*. A couple can live together as husband and wife if the husband so desires before he pronounces the third *talaq*. On the third *talaq*, the marriage is dissolved and the *talaq* is irrevocable. Therefore, he cannot remarry her. If she wants to remarry, she has to perform *Halala*, i.e., marry another man, consummate the marriage, consequently dissolve it, and only then remarry her divorced husband. Prophets and Caliph Ali condemn this process of *Halala*. All Shia and Sunni schools of thought have approved of *Talaq-a-Hasan*. Since it is not irrevocable, it is not very popular; yet, the Hanbali Sunni School gives it more importance than to other types of *talaq*. *Talaq-a-Bidah* is a form of divorce, which is severely criticized since it goes against the rules laid down by the *Quran*. However, the Sunna approves it. In this form of *talaq* the husband unilaterally, without the consent or knowledge of the wife, pronounces *talaq*. Husband can pronounce *Talaq* once or three times simultaneously, without paying attention to the fact whether wife is in a state of *tuhr*. The Prophet did clearly not approve of this form of divorce. Mohammedan law permits the husband to divorce his wife without any misbehavior on her part and without assigning any cause. This result in conferring on women an inferior status compared to their counter parts in other communities. According to Kapadia a system where the wife has continually hanging over her head the apprehension of divorce cannot but prove an abiding source of uneasiness to her."³⁵

On the other hand the woman is not given such freedom she is not free to remarry immediately even after pronouncing *talaq* (divorce). She has to wait for three mensural periods in order to confirm whether she is pregnant or not. The period of waiting is called *iddat*. Though the Prophet had given unlimited freedom to the man, he was not in favour of free divorce, as his aim was the stability of family and is permitted only in exceptional circumstances. Al Ghazali remarks that divorce in Islam is permissible when the object is not to trouble the wife but only in case of

³⁵ M. Indu Menon, *Status of Muslim Women in India' A Case Study of Kerala* 75 (Uppal Publishing house, New Delhi, 1981),

extreme necessity and on just grounds.³⁶ The behest of *Quran* regarding separation is:

Virtuous women are obedient and careful during husband's absence, because God hath of them been careful. But (as to) those for whose refractoriness you fear desertion, admonish them, but if they are obedient, seek not a way against them. Verily God is high exalted. And if you fear a breach between husband and wife, refer the matter to two arbitrators one chosen from the family of each party, if they desire. Allah will effect harmony between them.

In spite of all these restrictions, Muslim men still enjoy much freedom compared to women as far as divorce is concerned. In modern times many women in the Muslim community think that women also should be given freedom like men in seeking divorce.

No More "Talaq-Talaq-Talaq" Legal Precedent in Shamim Ara

In 2002, in a landmark ruling in *Shamim Ara v. State of U.P.*³⁷ The Supreme Court derecognized the husbands dictate to divorce in any manner, from any date past or future and without any proof. In order to a valid, talaq has to be pronounced as per the *Qur'anic* injunction. The term 'pronounce' was explained as 'to proclaim, to utter formally, to declare, to articulate'. While sitting aside the judgements of the two lower courts, the family court and the Allahabad High Court, the Supreme Court commented.

“None of the ancient holy books or scriptures mention such form of divorce. No such text has been brought to our notice which provides that a recital in any document, incorporating a statement by the husband that he has divorced his wife could be an effective divorce on the date on which the wife learn of such a statement contained in an affidavit or pleading served on her”.

Approving the decisions of Guhati High Court in *Jiauddin Ahmed v. Anwara Begum*³⁸, & *Rukia Khatun v. Abdul Khalik Laskar*³⁹ the highest court held:

“The correct law of *talaq* as ordained by the holy *Quran* is that *talaq* must be for a reasonable cause and be preceded by attempt at reconciliation between the husband and the wife by two arbitrators-one from the wife's family and other from the

³⁶ Furquan Ahmad, “Understanding the Islamic law of divorce” 45 *Journal of Indian Law Institute* (2003)

³⁷ (2002) 7SCC 518[

³⁸ (1981), Gau LR 358

³⁹ (1981) 1 Gau LR 375

husbands, if the attempts fail, *talaq* may be effected... We are also of the opinion that the *talaq* to be effective has to be pronounced. We are very clear that mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating *talaq* on the date of delivery of the copy of the written statement to the wife. The husband ought to adduce evidence and prove the pronouncement of *talaq*...⁴⁰

Unfortunately, despite the plethora of judgements cited here, the media continued to project that Muslim women are devoid of rights rather than dwell upon the entire judicial discourse. Which had held instant and arbitrary triple *talaq* invalid and safeguarded the rights of women approaching the courts for maintenance. Courts play an important role in striking a balance between the changing needs of the society and protection of the freedom of the individual. The Supreme Court and High Courts are the protector and guarantor of the fundamental rights, courts by way of several judgements have elaborated the exact extent and the nature of the guarantee given by the Constitution. These judgements in fact have clarified the law to a large extent.

The real law is what they do in actual judicial behaviors. The life of law is not logic but experience and what the court decide and this stresses the empirical and pragmatic aspects of law. Making new rules in legislation and it also includes judicial legislation. According to Dias & Hughes. "Legislation is law made deliberately in a set form by an authority which the courts have accepted as competent to exercise that function".⁴¹

In India judges fully realize that the legalistic approach cannot exclusively further or cater the social goals of the community. The process of social change was very slow in pre-independence period because of British domination and Parliamentary law had no real relationship with social justice in keeping with the life of the people. After independence the judiciary under new framework of Indian polity adopted the attitude of promoting social economic justice for the masses in order to promote welfare of people.⁴²

One of the earliest instances raising in a case of *Moonshee Buzulur Raheem v. Luteefut-oon-Nissa*.⁴³ where the privy council held that if under the Muslim law, no wife can separate herself from her husband under any

⁴⁰ The view referred in reaffirmed subsequently by Bombay high court in *Dagdu Pathan v. Rahimbi Pathan* (Najmunbee v. S.K. Sikander SK Rehman and Delhi High court in *Riaz Fatima v. Mohd Sharif*)

⁴¹ www.shodhgangan.in/flibnet.ac.in/bitstream/10603/54472/10/10-chapter/203pdf-p-181

⁴² *Ibid*

⁴³ (1867) 11 M.I.A. 551

circumstances whatsoever, the law is clearly repugnant to the natural justice and the privy Council was not bound to follow it. The court decided the case in favour of the wife, keeping in view the English doctrine of Justice, Equity and Good Conscience.

The Pre-Independence judicial trend was in favour of recognizing the triple talaq as an irrevocable divorce. The unilateral male repudiation of marriage sometimes favoured men, as it did in *Furzund Hossein v. Janu Bibee*⁴⁴ in which the man gained the right to his wife's conjugal company. The judiciary initially recognized unilateral male repudiation unconditionally and later introduced some conditions for its validity, Adjudication on this issue was based on unmodified Muslim legal traditions, the *Quran* and colonial precedent, not on legislation or the Constitution. As such, even though they had but little respect for the existence of triple talaq they nevertheless upheld its validity provided it followed the correct pronouncement.

After independence the judicial trend towards *triple talaq* till the decision of *Khadisa v. Mohammad*⁴⁵ was recognized as an irrevocable divorced if pronounced in single breath.

b. Journey of Shayra Bano from Supreme Court to Parliament

In February, 2016 Shayara Bano, from Uttrakhand filed a writ petition under Article 32 of the Supreme Court to challenge the validity of *Triple Talaq, Polygamy & Nikah Halala*. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 to the extent permit these practices; and the Dissolution of Muslim Marriages Act, 1939 does not provide remedy to Muslim women against their husbands' bigamy, that was available to women from other religions⁴⁶. in August 2017 by 3:2 majority Supreme Court in *Shayara Bano v. Union of India*⁴⁷ the practice of invalidate the practice of instant *triple talaq* in the eyes of the secular state. The majority of the bench held that *talaq* is not part of essential feature of Islam. Justice Kurian Joseph even stated that *triple talaq* is condemned by *Quran* and therefore cannot be even considered as aspect of Muslim personal law, the minority view of chief justice J.S. Khehar gave the dissenting opinion on the ground *Triple Talaq*, being uncodified personal law, is outside the scope of Article 13 of the Constitution of India. Justice Abdul Nazeer was of the opinion that *triple talaq* is valid form of divorce

⁴⁴ (1878) ILR4 Calcutta 588.

⁴⁵ (1979) KLT 878

⁴⁶ Hindu Marriage Act, 1955 s.17 Punishment of bigamy.—"Any marriage between two Hindus (including Buddhist, Jaina or Sikh) solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly".

⁴⁷ (2017) 9 SCC1

under Muslim law and right to follow personal law is an integral part of freedom of religion. But if parliament so wants it may enact a law on it. No one should question Parliament's power to legislate in respect of personal law in exercise of its legislative powers under Entry 5 of list III and thus it is certainly bring a law outlawing *triple talaq*. Nariman, Lalit & Joseph J.J constituted the majority in holding that triple talaq was un-Islamic, arbitrary and hence, illegal. Every punishment which does not assure from absolute necessity, says Montesquieu, is tyrannical. In fact, criminal law should be used only as a "least resort" (*ultima ratio*) and only for the "most reprehensible wrongs" Excessive use of criminal law for purpose it is ill suited to tackle is the harsh reality of modern state. Every year we are enacting new criminal statutes both at the central and well as in the states. The triple talaq another example.⁴⁸

4. The Muslim Women (Protection of Rights on Marriage) Act, 2019

The statement of objects and reasons note that the Supreme Court judgement has not worked as a deterrent in bringing down the member of instances of triple talaq⁴⁹. In order to prevent the continued harassment being meted out to the hapless married Muslim women due to *talaq-e-biddat*, urgent suitable legislation is necessary to give some relief to them. The legislation would help in ensuring the larger constitutional goal of gender justice and gender equality of married Muslim women and help subscribe their fundamental rights of non-discrimination of empowerment". The Muslim Women (Protection of Rights on Marriage) Act 2019" protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands.

The triple talaq law faced resistance inside and outside the Parliament both on technical and constitutional grounds. No doubt it is a progressive social legislation. The practice of *triple-a-biddat* is prevalent in India and had to be abolished at the earliest. However, the manner in which the Bill has been passed in the Lok Sabha. It has been felt that some provisions bear the character of being a hasty and ill-considered price of legislation.

⁴⁸ Indian express.com/article/opinion/columns/triple talaq-talaq-bill passed-parliament-lok sabha-legal-excess-5002913/

⁴⁹ Union Law Minister Ravi Shankar Prasad said the legislation was a must for gender equality and justice as despite an August 2017 Supreme Court verdict striking down the practice of instant triple talaq, women are being divorced by 'talaq-e-biddat'. He said that since January 2017, 574 such cases have been reported by the media. available at: <https://www.news18.com/news/politics/triple-talaq-bill-must-for-gender-justice-and-equality-says-centre-in-lok-sabha-oppn-terms-it-discriminatory-2245449.html>

5. Conclusion

Section 3 of Muslim Women (Protection of Rights on Marriage) Act 2019 makes the process of pronouncement of *talaq-e-biddat* by a Muslim husband upon his wife either by words, spoken or written or in electronic form "void and illegal"⁵⁰ meaning it would have no legal effect. Under Section 4, it further makes the utterance of *talaq*, *talaq*, *talaq* a criminal offence, punishable up to three years and fine.

The area of the concern is that the pronouncement of *talaq* in a single setting has already been declared void by the Supreme Court in 2017 and, it is an absurdity to make a person uttering it criminally liable, facing 3 years of imprisonment. Will the wife not be allowed to marry for three years. Further, Section 7 states that the offence of pronouncing triple *talaq* is a cognizable and non bailable offence⁵¹. However, by making the offence of triple *talaq* a cognizable offence, the police can arrest Muslim men without any from judicial oversight to determine other a warrant should be issued, and the police can take a Muslim man with custody even if the wife does not file a complaint. In these cases additional burden of proof lies upon the wife when case goes to the court and man denies having said this how will she prove it? Also, making the offence criminal closes the window of opportunity for the man to reconcile or negotiate with his former wife and provide her maintenance

The Act is a classic example of mal-drafting which lawyers have termed as strict liability offence *viz* one where ostensibly, or at least in present language, no mental intent (or *mensrea*) is required. The Act fails to address the crucial aspect of maintenance. Although the Bill provides for the maintenance allowance and custody of her minor children under Section 5⁵² and 6⁵³ but there is no clarity whether an interim relief with the

⁵⁰ The Muslim Women (Protection of Rights on Marriage) Act 2019 s 3 “Any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal”.

⁵¹ Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—“(a) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage; (b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine; (c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person”.

⁵² The Muslim Women (Protection of Rights on Marriage) Act 2019 s.5 “A married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her

allowance can be provided or if the allowance will be provided only after the conviction of the husband. shelter the subsistence allowance provided under the proposed framework, is in addition to the maintenance to be provided under claim 3 and 4 of the Muslim woman (Provision of Rights on Divorce) Act, 1986.

As suggested by Prof. Faizan Mustafa, triple in his article why criminalising triple talaq is unnecessary over kill⁵⁴ triple talaq may be treated as a civil wrong if we really want to send people to jail for giving triple talaq, this too is possible under civil law. There can be imprisonment for non payment of debt or maintenance or contempt of court. Thus triple talaq may be considered civil contempt of supreme court.

husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate”.

⁵³ The Muslim Women (Protection of Rights on Marriage) Act 2019 s.6 “A married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate”

⁵⁴ <http://the.will.in/205140/why-criminalising-triple-talaq-is-unnecessary-over-kill/>