# Muslim Women (Protection Of Rights On Marriage) Bill, 2018: An Analysis Of The Criminalisation Of Triple Talaq In India

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## *Abstract*

*Indian marriage laws are based on religion and is dominated by customs. Muslim population being one of the major parts of the society there is a need to reform the objectionable customs. The recent Muslim women (protection of rights on marriage) bill, 2018 introduced in Lok Sabha of India was objected in Rajya Sabha. The ordinance in the form of law exists against the custom of triple talaq or instant divorce. This paper aims to analyze the bill if it is a political agenda or is it the need of the society to reform the existing traditions. The methodology is analytical where the Islamic law and the Indian laws and supporting cases are considered for critical analysis to reach the conclusion. Is there any other way to provide justice? The criminalization of the civil matter when civil laws exist is also a matter to be analyzed and interpreted.*

***Keywords:*** *Triple talaq, Muslim women (protection of rights on marriage) bill, 2018, Ordinance, criminalization of marriage law.*

## 1. Introduction

Prophet Mohammed says, about marriage, "*The one who does not marry is not amongst me"* and the concept of divorce should not be resorted to. It should be used only when there is no other alternative. For divorce he says, "*Of all the lawful things, divorce is the most hated by Allah."* This raises the question as to whether Quran supports this practice? Talaq means release and is a sinful word. There are different types of talaq under Islamic law. Triple talaq or talaq-e- biddat is the most disapproved form of talaq, because it is not approved in Quran and it is instant and irrevocable. Triple talaq has always been an issue under the Islamic law as it was the most disapproved form of talaq. It was a practice approved under the Shariat law. It is said to be disapproved form of talaq because quran never considered it as a good practice. Prophet condemned this practice. Triple talaq or talaq-i- biddat itself depicts the patriarchal influence on the Islamic laws. This practice was opposed by the Muslim women. More than two lakh women in India suffer due to the talaq issues in the religion and this led to initiatives being taken by women organizations like Bhartiya Muslim Mahila Andolan. There were opposition raised against, The Muslim Personal Law (Shariat) Application Act, 1937 stating that it is irrelevant in the modern period and not in accordance to Islam. This unapproved form of divorce is followed by the Sunni community and not by the Shia community. Shia schools of Islamic jurisprudence follow the law that comes from the house of prophet. Since this practice is not from the house of prophet, it is not followed by Shias.

## 2. Different forms of talaq:

Islamic law is the only law in India which has both judicial and extra judicial divorce. All other religion has judicial divorce. The law of divorce recognizes grounds for both husband and wife. For husband it is talaq which is again divided into talaq-i- sunnat and talaq-i-biddat, the other two types are Ila (the husband takes an oath of not having any sexual relations with his wife and if he succeeds beyond 4 months, divorce takes place) and Zihar where the wife is compared to mother or sister by the husband. In both Ila and Zihar the intention of the husband must be clear as to not continue the marital relations. The choice is there with the husband and he may reconcile by having sexual relations in case of Ila and in case of Zihar he has to perform penance as laid down in kuran.

Talaq-i- sunnat is again divided into ahsan (most proper) and hasan (proper) form of talaq. Where talaq-i- sunnat is an approved form of divorce as it gives time to the couple to reconsider the decision. Ahsan is the most proper form of talaq as the evil word of talaq is pronounced only once. Within the period of iddat the couple can reconsider the decision. In hasan after every pronouncement of talaq there is a gap of one month to think. With the third pronouncement, talaq becomes final. Talaq should be pronounced when the woman is in her tuhr (period of purity). Talaq-i- biddat is the matter of discussion in this paper where it is not approved by prophet but still practiced.

For, females it is Talaq-i-tawfeez and Lian. Talaq-i-tawfeez is the delegated form of talaq where the husband delegates the right to wife or any other concerned person to pronounce talaq. In lian the wife when being accused by the husband of false charges of adultery, she can divorce. There is Khula and Mubarrat for mutual consent divorce. Islamic law is the first law that had recognized mutual consent for divorce. It has also introduced arbitration in talaq. Shia community and hanabali school does not believe in triple talaq. All types of talaq are valid though there are differences of opinion within the schools.

### 2.1 Origin of Triple talaq or talaq-i- biddah:

The pre-islamic Arabian state was said to be a period of ignorance, a period of chaos and confusion. This is the period where man never lived a proper life. It is only with the preaching's of prophet the situation changed. In this period man cold marry any number of wives. Woman could marry any number of husbands. Man, and women could divorce the way they wanted. Prophet laid down the system of marriage and divorce. He stopped the practice that existed in pre-islamic Arabian state. Hence prophet would never support this practice of triple talaq which is instant and irrevocable. Biddat means innovation and hence it is innovated form of divorce which was not laid by the prophet. Today with technology, modern gadgets being used for the communication of triple talaq, the situation has become worse.

This practice of triple talaq originated with the Arabs when they conquered Syria, Egypt and Persian regions. The men got attracted to female community of the Syrian and Egyptian region. The Syrian an Egyptian women were ready to accept them only if they pronounced talaq in three sittings to their wives at home. The Muslim Men were aware of the practice of talaq and knew that this kind of talaq was void. So, they expected that they could marry the women and keep their wives also. Expecting this they agreed to divorce their wives with pronouncement of triple talaq. This is the origin of the practice. This happened during second Caliph Umar's period. When he got the news of the misuse of talaq by the men, he declared such talaq to be binding, so that men do not enjoy both the women. This was just a temporary measure adopted

to punish the men who betrayed their family. But it became a permanent practice with time and leading to state of unreasonableness.

### 2.2 Islamic jurisprudence on Triple talaq:

Islamic law of jurisprudence is based on Quran being the most authenticate source and Sunnah being the primary and some secondary sources. According to Ibn Taymiyyah in his Fatwah (3:22), after divorcing his wife Muttalib felt sad over the decision. He had divorced his wife thrice in one sitting. Prophet said he still had time to take her back. Because it is only one sitting that is done. Therefore, he took her back[1].

According to surah Al- Baqarah 2:229: Divorce can be pronounced twice, then either retain her or kindly release her. It is not good to take back whatever is given to her with love at the time of marriage.

2:230: Then, if he divorces her for the third time, after having pronounced twice earlier, she shall not be lawful to him. There is no sin if she marries another man, and that man divorces her then she can reunite with the first husband[2].

So talaq was permitted only based on the above propositions and not by any other practice that was developed by men. Triple talaq was followed by most of the sunni schools except for Imam Ahmad bin Hanbal, the founder of Hanabali school who opposed the practice. All the other founders of the Sunni schools of Islamic law never opposed to such a practice. Imam Ahmad bin Hanbal believed in talaq where there is time to take the wife back that is the act of reconciliation. Basically, Quran believes in recourse or cooling period or the time to rethink. Therefore, every pronouncement of talaq is during the tuhr period and there is time provided with iddat period for rethinking. Nikah halala is the type of marriage which is performed after the talaq. It is like a punishment provided to husbands when they without thinking pronounce talaq and hence need to separate from their first wives. Then she has to marry someone else and there should be consummation in the later marriage. It is only after the second husband divorces her willingly, she can come back to the first husband. She won't remain the same as she was before and he loses her because of talaq.

### 2.3 Judicial history on triple talaq:

When the judicial history of triple talaq is taken into consideration, this is not the first time it has become an issue. Today this issue of triple talaq becomes historical because of the effort of the government to bring a law in force. Today triple talaq is being used as a political weapon. When the pre-independence period is analyzed, it is in Sara Bai v. Rabia Bai[3] the oldest case on triple talaq where the widow of a Cutchi Memon Muslim brings an action of maintenance against the estate of the husband which vests with the daughter. The other descendant is the daughter of the deceased who refuses the claim of maintenance of mother as mother was divorced by father before his death by triple talaq. So, the issues in the case revolved around if the woman was actually divorced because the widow said she was not aware about it. If the divorce is considered to be valid then, whether she is entitled to maintenance. As the triple talaq was done during her absence but the talaqnama was signed by kazi and two witnesses, talaq gets confirmed. They tried communicating it to

[1] https://contentislam101.files.wordpress.com/2015/04/gems-and-pearls-of-ibn-taymiyyah-by-dr-muhammad-ibn-abd-ar-rahman-al-arifi.pdf
[2] http://www.islamicstudies.info/tafheem.php?sura=2&verse=231&to=231
[3] (1905) 30 ILR 537 (Bom)

the widow but communication was not effective enough. The divorce was considered valid and she was not allowed to inherit. Neither was she allowed to claim the iddat money as there was a lapse from her in claiming the amount. Then in 1909 through Fulchand v. Nammal Ali[4] it was held that presence or absence of wife is immaterial at the time of triple talaq.

Further Asha Bibi v. Qadir Ibrahim[5] upholds Fulchand's judgement and it was held that presence of wife is not necessary if the formalities of talaq has been followed. The issue in this case was the validity of talaq as it was pronounced thrice addressing her father and in her absence. Presence of wife is not necessary at the time of talaq was held. Moving ahead in Kathiyumma v. Urathel Marakker[6] the Madras high court also confirmed that presence of wife is not required at the time of talaq. It should be communicated to her and the moment she is aware of the act, it becomes valid. If the father tears the talaqnama and does not inform the daughter, talaq will become valid only after it is communicated to her.

Before independence there is the next important case is of Saiyid Rashid Ahmed v. Mst Aneesa Khatoon[7] a case of 1932 where the issue was same like the case of Sarabai, where the property inheritance was the issue. The claimants in this case were the brother and sister of the deceased being the appellants and the widow and his children being the respondents. After pronouncing triple talaq, husband rejoined with Anisa Khatun and lived happily for fifteen years, had children. The marriage was considered illegal. The children born were considered as illegitimate. As there is a customary practice under Islamic law where Anisa Khatun should have married a third person and then after obtaining a divorce from him could rejoin the deceased husband. Hence the triple talaq was considered to be a valid talaq and so the reunion was illegal.

Post-independence in Ahmed Giri v. Mst Megh[8], the Jammu and Kashmir high court decided this case where the husband after having 10 kids from the relation, husband abandons his wife and when she claims maintenance, he claims to have divorced his wife long back. Since triple talaq is valid in India this leads to injustice to the women. In Yusuf v. Sowramma[9] Justice Krishna Iyer not only criticized the practice of triple talaq under Islamic law but also the power which the male community has against the women. However, the case was unique in itself where both the spouses got married to different people during the pendency of the litigation. Some of the similar judgements like above is Rahmatulla V. State of UP and others[10] where the practice of triple talaq was severely criticized by the judge.

Further there are cases like Shamim Ara v. State of UP[11] where maintenance was not provided to the wife because she was divorced according to the husband. The divorce was not informed to the wife. The issue was a written statement of the husband be considered as talaq. Justice Lahoti held that there is no proof of talaq being pronounced and the marriage subsist and the women is entitled to maintenance. Similar judgements are Mohd Ibrahim v. Mehrunissa Begum[12] and Iqbal Bano v. State of UP[13] written statements of divorce can be considered as divorce only if the required procedures are followed properly.

[4] (1909) 36 Cal.184
[5] (1910) 3, Madras 22.
[6] (1931) 133 IC 375: AIR 1931 Mad 647
[7] (1932) 34 Bom LR 475
[8] AIR 1955 J & K 1.
[9] AIR 1971 Ker 261
[10] II (1994) DMC 64
[11] JT 2002 (7) SC 520.
[12] AIR 2004 Kant 261
[13] (2007) 6 SCC 785.

The modern judgement that reversed all the above decisions was the historical judgement of Shayara Bano vs. Union of India,[14] where the woman was divorced by her husband through triple talaq. She was married at the age of 15. She filed a case against the triple talaq, polygamy and the practice of remarriage known as nikah halala under Islamic law to be unconstitutional and violative of art 14, 15, 21 and 25 of the constitution. Supreme Court with 3:2 majority held triple talaq to be unconstitutional.

## 3. Muslim Women (protection of rights on marriage) Bill, 2018:

After the judgement of Shayara Bano vs. Union of India on 22nd August 2017, the government passed an ordinance on 20th September 2018. The ordinance as well as the bill only focuses on triple talaq and does not address polygamy or the issue of remarriage that was raised as an issue in the case. The judgement also does not give much weightage t other issues as prophet has laid down remarriage rules and polygamy. After the ordinance the government raised The Muslim women (protection of rights on marriage) 2017 bill, which was passed in Loksabha on 28 December 2017. However, Rajya Sabha objected whereby the bill was reintroduced in December 2018. The situation remains the same. This Bill is the aftermath to the ordinance initiated by the law minister Mr. Ravi Shankar Prasad. The object with which the bill was initiated is to protect the women community. This bill would stop the arbitrary practice of pronouncing triple talaq by the male community. It addresses all issues related to the practice.

The bill has in total has 8 sections divided into three chapters. The first chapter of the bill deals with the applicability of the bill. It would be applicable to the whole of India except Jammu and Kashmir. Section 2 of the bill deals with definitions like, electronic form, Magistrate, and talaq.

Electronic form shall have the same meaning as assigned to it in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (Where it is defined as with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device). Thus the definition becomes complete and does not require any further explanation.

The next definition is of talaq where it signifies triple talaq or the Islamic term talaq-e-biddat. There should not be an introduction of any other type of instant or irrevocable divorce and therefore this definition incorporates every type of such arbitrary practice.

Chapter 2 of the bill is titled as declaration of talaq to be void and illegal which consists of two sections. Section 3 of the Bill clearly states that any kind of the triple talaq by the husband in any form is void and illegal. When the divorce is void, it plainly means that the marriage subsists.

Section 4 of the bill punishes the husband who pronounces such divorce with imprisonment which may extend up to three years. It may also be accompanied by fine. The action would be taken only if the aggrieved woman or her relatives by blood report the matter.

The last chapter of the bill is titled as protection of rights of married Muslim women. The very first section that is S.5 begins with maintenance. It begins with, “Without prejudice to the generality of the provisions contained in any other law for the time being in force..” Which means that this provision shall be given priority over any other law for the time

[14] 22nd August 2017

being in force. This provision shall not affect other laws. [15] Thus, though there are provisions for maintenance provided in other laws, they will be considered only after the provisions of this act is considered. The provision makes it clear that the divorced women and the children should be provided with subsistence which the magistrate would consider according to the case. It does not provide for a clear amount as minimum nor does it provide for the maximum amount of maintenance. The provision gives discretion to the magistrate to decide according to the facts and situation.

Section 6 of the bill deals with the custody of the minor children and begins with notwithstanding clause and clearly depicts that irrespective of any other law in force, the custody of minor children will be with mother, and it depends on the decision of the magistrate.

Section 7 further provides that the offence under this act is cognizable if the information is provided to the police officer by the married women or her relatives. The offence shall be compoundable if the concerned women wants it to be. It shall be decided by the magistrate and according to the conditions laid down by him. It is a non – bailable offence. However, bail may be granted after hearing from the women, the magistrate may decide the conditions for bail.

With the incorporation of S.8 it is expressly provided that the ordinance that existed before this law is repealed. Any action taken on behalf of the ordinance before this law coming into existence shall be considered to have been taken under this bill.

Hence this bill gives lot of importance to married Muslim women who are still considered to be the part of most vulnerable group of women in India. It is a women centric bill with a complete protection to women and her dependents. This bill puts an end to one of the patriarchal customs imposed on women in the form of instant divorce. The religion per-se does not support the practice and could have completely stopped it. Since the religion did not provide for the relief, state had to intervene and stop this arbitrary practice with the help of this bill. The question whether this bill would be useful to the women is to be answered in positive. However, since wide powers are given to the married Muslim women, this can also be misused by the women. The magistrate handling such issues should be careful enough to cross check the evidences submitted before deciding the matter for justice to prevail. The fate of this law should not be like the protection of women from the domestic violence act, 2005 being used by women against men as a weapon leading to violation of the objective with which the law was framed. Thus, injustice prevails in many cases.

## 4. Can civil laws be merged with criminal laws:

S.3 of the Bill creates a situation where criminalization of civil offence takes place. Marriage is subject of civil law. Intention or Mens rea is essential ingredient for a criminal act. In case of triple talaq it is not necessary that there is an intention at the time of pronouncement, since it may be pronounced without a second thought as in the case of Sher Mohammed v. Nazma Biwi[16] where talaq was pronounced by the husband under the influence of liquor and later he realized his mistake and lived with his wife and three children.

[15] this expression is used in a clause where there is to be no priority given over another clause. It tells the reader that the clause in which the expression appears does not affect the clause to which it refers. https://www.vantageinsurance.co.uk/assets/files/atrisk/November%202013.pdf

[16] https://www.indiatoday.in/magazine/religion/story/20060508-orissa-triple-talaq-case-supreme-court-overrules-clerics-spotlight-on-shariat-misuse-783347-2006-05-08

Since the law doesn't consider mens-rea and is difficult to ascertain mens-rea, this provision acts like strict liability. The only justification that can be provided is it may act as deterrence. That will reduce the number of triple talaqs in India. Criminalization of a civil act is justified when civil laws fail to stop certain unjust practices or when man refuses to abide by the laws laid down.

## 5. Conclusion:

Though the government may try to give a political touch to the entire episode of triple talaq, the matter was raised not by the government but by the people practicing the religion. From 1905, in various high courts and in supreme court, aggrieved women have raised the issue of injustice suffered by them through triple talaq. In 2013 a fatwa was issued against this practice by mufti of Ahl-e- hadith. Modern intellectuals like Ashgar Ali Engineer in his writings express the modernization adopted by countries like Jordan, a Hanafi Islamic country where arbitration is resorted to in case of triple talaq. He has tried his best to educate the society through his writings that Muslim Personal Board should initiate the bill against triple talaq.[17] There are evidences in hadith where prophet has condemned the practice of triple talaq. Hence government is facilitating to stop the arbitrary process though it may be for political gains. Around 20 Islamic countries have banned triple talaq, then why should it be continued in India. This practice has nothing positive in it.
It is rightly put in Shayara Bano's case by Justice Kurian Joseph, "Can something found to be sinful by God be validated by men through law?".

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