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LEGISLATION REVIEW – THE MUSLIM WOMEN [PROTECTION OF RIGHTS ON MARRIAGE] ACT, 2019

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ABSTRACT

The Muslim Women [Protection of rights on marriage] act 2019 declared the practice of Instant Triple Talaq as unconstitutional, illegal and void. Muslim Husband indulging in this practice after the enforcement of this act will be subject to punishment of 3 year imprisonment with the imposition of fine. The issue of custody and maintenance is also resolved in this act. The backbone of the act is the criminalisation of the divorce. This research paper is indulge in explaining the types of Talaq in Islam, what is the act about. It will critically examine the grey areas of the act and history of the act. The paper will further explore the case of [Shayara Bano v. Union of India] that lead to the formation of this act and will compare the Muslim Personal law of our country with the other countries and will also compare it with the other religion.

INTRODUCTION

The atrocities faced by the women across the world has turn into a global issue. In the case of our countries, the situation of women was worse. In the ancient time women does not have their own identity and were merely considered as chattel. The condition of women transformed in the medieval era, when the women started fighting for their own rights and bring out reform in our country. The journey of women towards the gender equality in our country is commendable. Men always tries to supress women by inflicting manifestation in the form of sexual harassment, psychological abuse, disrespecting her, treating her with utter disgrace and by controlling her speech and expression. Though there are peculiarity in all culture and religion regarding the gender equality and marital rights of the women, the atrocity faced by the Muslim women because of

Triple Talaq needed cognizance. The social movement of abolishing the Triple Talaq or Talaq-e-Biddat is a long standing movement in the judicial history of India. On 22nd august 2017 five judge bench of Supreme Court declared practise of Triple Talaq as unconstitutional with 3:2 majority in the case of **Shayara Bano v. Union of India and others**. Subsequent to this government of India passed The Muslim Women {protection of right on marriage} Act 2019 to protect the rights of the Muslim women and prohibits divorce by pronouncing Talaq three times.

Contemporary position of the Muslim Women

Activism by some groups like Bhartiya Muslim Mahila Aandolan, Bebaak Collective and National Women's Commission, who plays a major role in the banning of the practice of Triple Talaq. The Muslim Women are able to fight for their rights because of the movements

but still the issue of women's rights in Islamic law requires special attention. Art 25 of the Indian Constitution guarantees equality and freedom from the discrimination on the ground of religion and gender but still there are certain customs that are based on the brutal orthodox thinking which is against the principles of the constitution. While delivering the verdict on the Triple Talaq case SC of India refer to the Quran and Hadith because there is no proper codified Muslim Personal law. Muslim women are in the inferior position due to the uncodification of the Muslim personal laws that lead to the ambiguous and obscure interpretation of the Quran. In our patriarchal society Men have interpreted the Quran and Hadith in their own convenience without thinking about the Women's perception. The futile Fatwas became a roadblock in implementing the rights of Muslim Women. The Muslim law that we follow today is of the Britisher's era. There is an urgent need of the codification and consolidation of the Muslim Law and bring in the uniformity with the constitution of India.

EVOLUTION AND DEVELOPMENT OF PERSONAL LAW

Types of Talaq under Muslim law

Marriages [Nikah] under Muslim law is considered as social contract and divorce is considered as a natural corollary of marital rights. But in our country marital rights are considered as piety of highest order and divorce is considered as evil, which can be used as a last resort. Under Muslim law there are several types of divorce and Triple Talaq is one of its kind.

Mulla has divided the divorce under Muslim law in 3 parts⁶³²

1. By the husband at his will without the intervention of court- *Talaq*
2. By the mutual consent of both husband and wife- *Munara'at*

3. By the judicial order at the suit by the husband or wife- *Faskh*

The wife cannot divorce herself from the husband without his consent but in some cases she can divorce through judicial order this type of divorce is called as *Khula*. Dr Furqan Ahmad further explained these categories of divorce under Muslim Law in his article⁶³³

1. By the husband

a. *Talaq*: In this, Talaq operates with the pronouncement of Talaq with unambiguous intention. This is divided into *Talaq-al-Sunna* and *Talaq-al-Bida*.

Talaq-al-Sunna is known as the approved Talaq {in the conformity with the dictates of prophets}. This is further divided into *Ahsan* {most approved}, it consist of the one single pronouncement made during the wife's *tuhr* {period of purity} and abstinence from the sexual intercourse for three *tuhr*. *Hasan* {approved} it consist of three pronouncement made during three successive *tuhr*, at the time when no intercourse takes place in *tuhr* period.

Talaq-al-Bida: This is unapproved form of Talaq, where three pronouncement are made in the single *tuhr*. There are 2 other type of Talaq [Ila and Zihar] but they do not have the practice importance.

2. By the wife

a. *Talaq-i-Tafwid*: This divorce is also known as delegated divorce. The Muslim women can, at the time of marriage, reserve her right to dissolve the marriage in some special circumstances.

b. *Khula*: This is the form of *mutatis mutandis*. Every women has a right of *Khula* irrespective of the inclusion of clause at the time of marriage.

3. By the common consent

a. *Khula*: If the husband want to continue the marital bond even after the wife decided to go for *Khula*, then the wife can move to the court without giving any reason for that.

⁶³² Mulla, Principles of Mahomedan Law, Chapter XVI (LexisNexis India, 20th edn., 2013)

⁶³³ Furqan Ahmad, "Understanding the Islamic Law of Divorce", 45 Journal of Indian Law Institute 484-508 (2003).

b. *Mubara'at*: when the couple mutually decided to dissolve the marriage extra-judicially.

4. By the judicial process

a. *Lian*: If the husband falsely accused wife for adultery then wife can file suit for the divorce.

b. *Faskh*: *Qadi* has the power to annul the marriage on the application filed by the wife in some miserable circumstances

Interpretation about the practice of instant Triple Talaq

Indian judiciary always had an antagonistic view towards Triple Talaq. Various HC have given different interpretation about the instant triple Talaq, prior to the landmark judgement of *Shayara Bano v. Union of India*. Some HC held Instant Triple Talaq to be bad in theology but good in eyes of law, some held that Muslim law does not allow instantaneous and irrevocable Talaq without any reconciliation in between the pronouncement⁶³⁴. According to Quran, Triple Talaq must be based on the reasonable ground and there must be intermittent mediation done by the two arbitrators, one from each side. The practice was unaccepted by the SC in some cases but in the *Shayara Bano* case, Apex court struck down the law and held it unconstitutional. Minority Muslim community demand for the proper legislature to secure their rights and subsequent to this government launch the bill.

About the bill

In 2017 the bill was presented by the law and justice minister Shri Ravi Shankar Prasad in Lok Sabha by the name of the Muslim women [protection of right on marriage] bill 2017 and it was passed by the LS on 28th December 2017 and later moved to RS for the further discussion. But LS and RS were not in session due to which there was delay in passing of bill and condition of the Muslim Women was not getting better because Triple Talaq was still prevalent in the country even after the Judgement of Apex court. The situation rendered mandatory for the

president to take a prompt measure for the issue to which, later in 2018 president released an ordinance on the Muslim Women [protection of rights on marriage]. Subsequently the bill was again introduced to LS on 17th December 2018 and was passed on 27th December 2018. On 30th July 2019 the bill was passed from RS, accordingly president Ram Nath Kovind gave his assent to the bill which turn into act on 31st July 2019.

ANALYSIS ON INDIAN LEGAL PROVISION WITH JUDICIAL

PRONOUNCEMENT

About the act⁶³⁵

The act is divided into 3 chap. with 8 section inscribed in it. Chap. 1 deals with the extent of the act and sec 1 under this chapter states that the act shall extent to whole India and will be enforced from 19th September 2018. Sec 2 elucidates the definitions of "Electronic form" under clause (a) of the act which shall be understood as per sec 2(1)(r) of Information Technology Act, 2000 and Clause b defines that triple Talaq is triable by the judicial magistrate first class exercising Jurisdiction under the code of criminal procedure 1973.

Chap 2 talks about the illegality of triple Talaq. Under sec 3, pronouncement of triple Talaq by the Muslim Husband either orally or in written, through an electronic device or by other means will be considered as illegal and void. Sec 4 says that volition of sec 3 by the Muslim Husband will subject him to the punishment of 3 year imprisonment along with imposition of fine.

Chap 3 provide protection to the rights of Muslim Women and sec 5 under this chapter defines that Muslim Women can ask for the maintenance for herself and for her children after the commission of Talaq, the maintenance will be decided by the Judicial Magistrate. Sec 6 authorise Muslim Women to claim the custody

⁶³⁴ *Jiauddin Ahmed v. Anwara Begum*, (1981) 1 GLR 358, *Rukia Khatoun v. Abdul Khalique Laskar*, (1981) 1 GLR 375, *Nazeer v. Shemeema*, 2017 (1) KLT 300.

⁶³⁵ [Nikil Verma], [The Muslim Women (Protection of Rights on Marriage) Act, 2019], [Law time journal], [7-sept-2021], [<https://lawtimesjournal.in/the-muslim-women-protection-of-rights-on-marriage-act-2019/>]

of the minor child in the event of Talaq in accordance with the procedure regulated by the Judicial Magistrate.

Sec 7 of the chap 3 defines that the offence under this act is cognizable, non-bailable and compoundable at the instance of the Muslim Women, who is the victim of Triple Talaq. No bail will be given to the Muslim Husband until the Muslim Wife is heard on the Talaq has been pronounced.

Grey areas of the Act⁶³⁶

- Accord to the Critics the act clearly fails to pass the test of the Art 14 of the Indian constitution on the reasonable classification. The case of **State of West Bengal v. Anwar Ali Shankar**⁶³⁷ limpidly explains the reasonable nexus test that direct legislative action to be in consonance with the objective that the legislature want to achieve from the act. The main objective of the act is to protect the Muslim Women from the atrocities faced by them due to the triple Talaq, but does the act secure the rights of the women? The subsistence allowances provided to the Women as mention in the act will be rendered useless because the husband {who is providing allowances} will be imprisoned for 3 years. The act completely defeat the whole purpose of financial protection of the Women. The act rendered Women financially distraught without any support for her and her child if any. Muslim wives will be abstain from using the act due to the fear of the husband landing in the prison.
- The act of criminalising divorce is only limited to the Muslim Community, no other religion has ever used criminal punishment for the divorce. This is against the art 14 because there is unequal treatment of a specific religious group as against the others.
- The matters related to family law were first subject to mediation or reconciliation, it is the basis of any court of law. But the act is silent on

⁶³⁶ [Gaurav Puri], [The Muslim Women (Protection of Rights on Marriage) Act, 2019: An Evaluation through Article 14], [9-9-2021], [<https://rmlnlulawreview.com/2019/09/12/the-muslim-women-protection-of-rights-on-marriage-act-2019-an-evaluation-through-article-14/>]

⁶³⁷ 1952 AIR 75, 1952 SCR 284

this topic. There is no scope and provision of mediation in the present act.

- The act is arbitrary in nature because it seek to punish Muslim Men rather than providing protection to the Muslim Women. It is a huge disadvantage for the husband as the act is non – bailable and cognizable. It is compoundable but only at the part of Muslim Wife. The act has made the husband feeble against the false allegation. It also provide no defence to the husband, which is discriminatory and against the nature of justice.
- The Divorce is the matter between the two private parties not against the public at large therefor this does not come under the ambit of criminal law because crime is committed against the public at large. Hence the subject matter of the legislature cannot be term as criminal in nature.

Case law⁶³⁸

SHAYARA BANO V. UNION OF INDIA

Facts

Shayara Bano was married to Riswan Ahmad for 15 year but in 2016 he divorced her through instant triple Talaq {Talaq-e-Biddat}. She filed a write petition under SC to hold the 3 practice [polygamy, Talaq-e-Biddat, Nikah Halala] as unconstitutional under art 14, 15, 21, 25.

Talaq-e-Biddat is banned in Shia community. Hanafi School of law considered this Talaq as immoral but still the Muslim men who follow Hanafi School, practice Triple Talaq. In this the husband renounce from his marital rights by pronouncing Talaq 3 times in one sentence without waiting for the Iddat period. Nikah Halal is the practice in which the divorced Muslim Women first have to marry the other men, establish the marriage and get divorce from the second husband before marrying the first husband. Polygamy is the practice that allow Muslim Men to have more than one marriage. The union of India and many women's organisation like Bhartiya Muslim Mahila Aandolan, Bebaak Collective and National

⁶³⁸ 9 SCC 1 Writ Petition (C) No. 118 of 2016

Women's Commission, back the Bano's plea of declaring practices unconstitutional. On 16th February 2017 the SC asked Shayara Bano, other women bodies and All India Muslim personal law board to give a written submission on the issue of Talaq-e-Biddat. The AIMPLB argue that uncodified Muslim personal law cannot be subjected to constitutional judicial review and triple Talaq is the essential practice in Islam, which is protected under the art 25 of the constitution of India.

After accepting the Shayara Bano petition, apex court form a 5 judge bench

Issue raised

1. Whether triple Talaq is the essential practice in Islam
2. Whether the practice of Triple Talaq violates the fundamental right inscribed under the Constitution of India.

Judgment

After 6 days of hearing, SC on 22nd august 2017 gave the judgment with 3:2 majority, declaring triple Talaq as unconstitutional and directed the government to form a legislature to curb the practice of triple Talaq and protect the rights of the Muslim Women.

Justice Rohinton Nariman and Justice Uday Lalit held that triple Talaq is regulated by the Muslim Personal Law [shariat] application 8 1937. They held the practice to be against the constitution as it is arbitrary in nature. Opposite to this, Justice Kurian Joseph noted that triple Talaq is against the notion of Quran and therefor lack legal sanction. He wrote that "what is held to be bad in the holy Quran cannot be good in Shariat and, what is bad in theology is bad in law as well".

The two dissenting Minority opinion by the Justice Kehar and Abdul Nazim held that triple Talaq is not regulated by the Shariat act of 1937, but is an important and essential part of personal laws therefor it is protected under art 25 of the constitution. Talaq-e-Biddat is a

legislative and does not go against the constitution of India.

COMPARITIVE ANALYSIS OF PERSONAL LAW

From the beginning of time, women have faced discrimination in all aspects of life. They were considered nothing but objects to be subjected to man. That she was a piece of man not an individual human being with the sole purpose to fulfill only Mans need alone. Even though this situation is not completely rectified but the condition of women is comparatively better. Given the centuries of this thought process that women are to be submissive, they do not demand any rights in ancestral property because of the custom called 'haqtyag' or sacrificing their rights voluntarily. There is no uniformity in inheritance laws because some regions are governed by different set of laws whereas some tribal groups are governed by their customary laws.⁶³⁹

Personal laws are meant by those rights that are given to them by religion in addition the legislation and constitutional rights. In some way these rights could be seen as interchangeable. The policies that took care of the preservation was so stern that Cornwallis repeated it in the Regulation III of 1773 which indicated that the government must ensure to preserve the Bharata's Shashtra and The Quran and other religious scriptures. In turn these religious scriptures ensured to keep woman always at the second position whether it be inside family or in the social domain. With this I would like to throw some light on the personal laws and how they managed to create a world for women to thrive in.

ANALYSIS OF PERSONAL LAWS

For this segment I have chosen to compare the Hindu Law and Islamic Shariya.

"From her father-son, or consort women never should be free for her Wilful separation stains her husband's family"⁶⁴⁰. There is no such

⁶³⁹ 1 Thomson Reuters Foundation- Report 2019

⁶⁴⁰ Manu, V148 to 158

concept of divorcing in Hinduism as marriage is a divine concept and even after the death of husband the woman is not freed from marriage bond.⁶⁴¹

On the contrary Islam is said to be the first religion that have women recognized a legal entity and given the equal status as men and has improved their status by promoting their education and other factors leading to their social developments and it has also mentioned the provision of divorce.

Marriage and Divorce under Personal Laws

Marriage under Hindu Law

Hindus have always believed marriage to be a divine concept. Hindu weddings are indissoluble eternal and valid for not one life but 7 life after. Though the purpose of wedding is not to beget children and legitimize them but also maintain the practices of rituals. The Essentials according to Hindu Marriage are:

- Neither partner has to have a living spouse at the time of marriage ceremony.
- At the time of wedding neither party must give the consent if mentally unstable or under hostile environment
- Until now the age to be wed is 21 year old for bridegroom and 18 years for the bride. If wed below this age would be considered a child marriage and thus be declared void.
- Both the parties must not be 'sapindas' of each other.
- Sapindas are two persons if one is a lineal ascendant of the other. The Hindu Marriage Act 1955 provides the extent of sapindas relationship in 5 degrees in line of ascent through the father and three degrees in the line of Ascent to the mother.⁶⁴²

Divorce

Primarily Hindu law does not identify divorce as marriage is an indissoluble Bond and husband and wife has to be wed to each other for 7 lives. But gradually it was realized that if it is not possible to live together as husband and wife then divorce can be a peaceful option. According to Hindu Marriage Act divorces are neither favored nor encouraged. Divorce can only be permitted under specific guidelines. These are: adultery, cruelty, desertion, conversion, insanity, leprosy, venereal disease, renunciation, presumption of death, divorce by mutual consent, irretrievable breakdown of marriage.⁶⁴³

Marriage under Muslim Law

When it comes to Muslim law marriage, it tends to be more of a Civic contract rather than being sacrosanct like in Hindu marriage. The main object of Muslim wedding is procreation and legitimization of off springs. The system of polygamy still prevails.

Muslim personal law makes it very easy for men to divorce women as they can unilaterally make this decision. Muslim women can divorce men only if this right is delicately to them by men during marriage. Although by interpretation Quran mentions that husband must take care of the wife during marriage, it does not mention anything after the divorce therefore women after divorce usually ends up in pretty bad economic situations.

All this change for good when in 2017 Shayra Bano, who was married for 15 years, received a letter from her husband, Rizwan Ahmed, who wrote Talaq Talaq talaq in the letter, divorcing her right on the spot. When the case was heard in Supreme Court "Talaq-e-Biddat" triple Talaq was declared unconstitutional. Although it is a small change but surely contributes massively towards gender equality progress.

⁶⁴¹ Rig Ved

⁶⁴² Hindu Marriage act 1955

⁶⁴³ Hindu Marriage act

Inheritance Laws

Inheritance laws for Hindu

One Hindu family unit consists of both females and males. The married and unmarried daughters remain to be the members of other family. Speaking of survivorship, men are the only coparceners with survivorship right. All property shall be divided among men except 'Stridhan'. Therefore widows are not part of this survivorship system. However this old rule has been repealed by women's rights to Property Act 1937. This act enables Women to get the entitled share in the husband's self-acquired property. But still there is no uniformity in Hindu Succession laws. The reasons of this absence of uniformity are based on the conversation and protection of family protection and property of a male Hindu. This Hindu women's right to Property Act 1937 is celebrated as the opening of a brand new chapter in the history of Hindu women.

Inheritance laws under Muslim personal law

Where as in Muslim law, all property is considered to be one and there is no distinction between separate property and self-acquired property unlike in Hindu law. Moreover there is no such thing as a joint family concept in Muslim family which is still prevalent in Hindus. The concept of heir comes into existence for the first time on the death of the ancestor. The right by birth it is still not known in Muslim law. There is no representation doctrine recognized by Muslim law.

Comparative study of India and other countries

It is truly unfortunate when we hear news of Muslim women's rights violation almost every day. Zeid Raad Al Hussain spoke about the murder of Iraqi lawyer who was merely promoting women's right in Iraq⁶⁴⁴. Another case of young Muslim British women found them to be silent sufferers and denounced Islamic state for not considering their right

place in the society.⁶⁴⁵ Up until 2017 triple Talaq cases were heard every now and then. All of these incidents around the globe make us realize how the condition of Muslim women was.

The main teachings of Islam are multiculturalism and rights of groups which are actually in contrast To democratic modern regimes with prevalent constitutions that advocates principles of individual freedom and equality along with other rights.⁶⁴⁶ From denial of equal citizenship to misconception of Indian Muslims as anti-Indians are terrorists to banning Indian triple Talaq India has come a long way and is still going forward to make things right.

Considering the survey conducted in 2013 by Thomas Reuther's Foundation Egypt found itself to top the list of worst countries in terms of women's right. A few other countries like Oman, Jordan, Turkey, Qatar, Kuwait etc., and Muslim women are made to live in deplorable conditions.⁶⁴⁷ Keeping Egypt aside, it perfectly showcases the status of Muslim women in Lebanon and Afghanistan in comparison with that of India. The current Taliban situation of Afghanistan has deteriorated women condition multifold. Women in Taliban are asked to sit inside their homes, to quit jobs, girls are forced to drop out from schools. In the current scenario the picture of women in Taliban is worse off than anywhere.

SUGGESTION

1. Rather than criminalising the practice, government can impose huge fine on the husband practicing Triple Talaq
2. The scope of Mediation and conciliation should be there.
3. The government should make law on the Nikah Halala
4. Codification of Muslim personal laws

⁶⁴⁵ Radhika Sanghani, Why young Muslim women are speaking out against the Islamic State on the streets of London, The Telegraph, September 24, 2014

⁶⁴⁶ Ayaan Hirsi Ali, The Caged Virgin: An Emancipation Proclamation for Women and Islam (Reprint Edition ed. 2008).

⁶⁴⁷ Egypt 'worst for women' out of 22 countries in Arab world, BBC, November 12, 2013,

⁶⁴⁴ World Report, 2018(28th annual review of human rights) (2018).

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5. The offence should also be compoundable on the instance of Husband

CONCLUSION

With the enactment of this act, India joined many Islamic countries like Bangladesh, Pakistan, Egypt, Tunisia, Sri Lanka and many more who have imposed ban on the practice of triple Talaq. It was the need of the hour for the Muslim Women who have faced atrocities from many years. The enforcement of this act bring out the uniformity, secularity and equality across the nation. The personal laws of different religion have gone through radical changes to tackle the issues of gender equality on the subject matter of polygamy and inheritance. There are still certain practices in some religion that are impractical and discriminatory in nature that are to be addressed. This legislature is the golden opportunity in proving gender equality in Muslim Law. The act is form with the virtuous intention but there are some anomalies that are to be addressed and rectified over time. In the country like India, marriages are considered as sacred and divorce as immoral and evil in nature. We need a society where women should not be seen as vulnerable after the commencement of divorce.

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