

A CRITICAL ANALYSIS OF TRIPLE TALAQ CRIMINALIZATION: EXAMINING THE CONSTITUTIONAL AND SOCIO- LEGAL ASPECTS

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ABSTRACT:

Muslim women have experienced extreme oppression and injustice as a result of talaq-e-biddat. This method makes it possible for a marriage to dissolve suddenly at the discretion of the spouse. The judicial tendency has changed against the practice since courts have frequently declared it to be inappropriate, with certain restrictions. In *Shayara Bano v. Union of India*, the Supreme Court decided against this practice. In the Muslim Women (Protection of Rights on Marriage) Bill, 2017, the Parliament later declared the practice to be illegal. The Bill also criminalizes the practice, making it a crime with a three-year prison sentence and no bail. The authors' thorough analysis of the measure leads them to the conclusion that criminalizing a private conduct will have a detrimental effect on the institution of marriage. It seems quite improbable that the Bill will succeed in both prohibiting triple talaq and protecting the rights of married Muslim women. The authors present an alternative strategy that might overcome some of the Bill's shortcomings while achieving its objective.

INTRODUCTION:

Muslim law views marriage as a sacred commitment in addition to a contract. ¹Because it is an act of piety or ibadat (worship), the institution has preserved its holiness since the beginning of time. ²The right to divorce is a logical extension of the right to marriage. ³The dissolution of a marriage is viewed as socially inappropriate since marriage is regarded as sacred. Of all things that God permits, ⁴Prophet Muhammad declared talaq-divorce by the husband at his will and without the court's intervention-to be the most abhorrent⁵.

One method dissolving a marriage in Muslim law is talaq-e-biddat, often known as immediate and irrevocable divorce (or "triple talaq"). A declaration is used to pronounce it. of talaq three times, either in quick succession or at brief intervals⁶. Special phrases are not necessary for a talaq to be deemed legal; however, the words must expressly state the husband's intention to end the marriage. The repudiation

¹ Ameer Ali, *Commentaries on Mahomedan Law* 1288 (5th ed. 2005)

² *Id.* at 1287.

³ *Id.* at 1551.

⁴ M. HIDAYATULLAH ET. AL, *MULLA PRINCIPLES OF MAHOMEDAN LAW* 258 (19 ed. 1990).

⁵ Ali, *supra* note 1 at 1552; 2 IBN ABIDIN, *RADD AL-MUHTAR ALA AL-DUR AL-MUKHTAR* 682 (1 ed. 2012).

⁶ Mulla, *supra* note 4, at 261.

becomes final and irrevocable right away if it was made during the wife's tuhr, or the time between periods, and the husband did not have any sexual relations with her during that time.

Because triple talaq is quick and irrevocable, it has long been a source of severe injustice for Muslim women. After the Lok Sabha approved the Muslim Women (Protection of Rights on Marriage) Bill, 2017 (often referred to as "the Bill"), which outlawed the practice and made it a crime, the dispute grew more intense. Strong resistance was raised to the Bill's suggestion that the simple act of declaring triple talaq would be punishable by law and not subject to bail since it could be exploited. There are important criminal and constitutional law concerns when someone's freedom is restricted by incarceration for making such a declaration, thus these considerations must be taken into account.

This article examines the provisions of the amended Bill that are the same as those of the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 (often referred to as "the Ordinance"). However, it doesn't go into specifics of how the Ordinance was made. Furthermore, no attempts have been made to look into the validity of the triple talaq practice. Brief legislative and judicial background is provided in Part II. Part III examines whether making triple talaq a crime amounts to a legitimate invasion of privacy. Before drawing a conclusion in Part V, the authors offer a different plan in Part IV.

BACKGROUND:

For the first time, the sc held that , an obviously arbitrary practice in ⁷Shayara Bano v. Union of India (Shayara Bano) in August 2017.⁸ According to article 25 (also known as "the Constitution"), the Court determined that it was not a "essential religious practice." However, a number of High Courts had already taken a critical stance against the practice before this ruling. The case of Jiauddin Ahmed v. Anwara Begum was reviewed by the Gauhati High Court.

idea of talaq under Muslim law and came to the conclusion that it forbids immediate and irreversible triple talaq⁹. The Court further declared that attempts at reconciliation must come *before a talaq*. The Kerala High Court determined that triple talaq in a single statement is invalid in accordance with the Quranic injunction in the case of Nazeer v. Shemeema.

In Shayara Bano, the minority decision maintained that triple talaq is a valid divorce procedure and that the ability to exercise personal law is a necessary part of religious freedom. under Muslim law. However, Parliament may pass legislation on it if it so chooses. It was believed that sc held thst it not had the desired effect of decreasing the number of these divorces¹⁰. State action in the shape of appropriate legislation was desperately needed to implement the Supreme Court's ruling¹¹.

The Bill, which said that the custom be unlawful and made it a crime, was later approved by the Lok Sabha. There was strong opposition to the Bill. Three safeguard-related amendments to the Bill were adopted by the

⁷ (2017) 9 SCC 1.

⁸ Mohammed Wajihuddin, *Criminalisation of triple talaq may be misused: Women's body*, THE TIMES OF INDIA (Nov. 24, 2017), <https://timesofindia.indiatimes.com/city/mumbai/criminalisation-of-triple-talaq-may-be-misused-womens-body/articleshow/61775066.cms>.

⁹ (1981) 1 GLR 358.

¹⁰ The Muslim Women (Protection of Rights on Marriage) Bill 2017, *Statement of Objects and Reasons*.

¹¹ *id*

Union Cabinet in order to remedy this.¹²The President authorized the Ordinance to halt the practice due to "overpowering urgency" and "compelling necessity" while it was still pending in the Rajya Sabha¹³.

LITURATURE REVIEW:

Legislative actions, court rulings, and socioreligious discussions have all influenced the conversation around the banning of triple talaq. A pillar of the legal discourse is the Shayara Bano v. Union of India (2017) ruling, which ruled that Talaq-e-Bid'ah was unconstitutional. Concerns regarding proportionality and the excessive state involvement in personal laws are raised by scholars who contend that Criminal penalties have replaced civil remedies under the Muslim Women (Protection of Rights on Marriage) Act, 2019 (Agnes, 2019; Noorani, 2020). Critics contend that criminalization violates Article 25's concept of fundamental religious practices, while proponents view it as an essential step toward gender justice and equality under Article 14 of the Constitution (Kumar, 2021; Ali, 2022). There are concerns over India's approach because comparative law studies show that many Muslim-majority nations, such as Egypt, Pakistan, and Tunisia, have changed triple talaq by civil methods rather than harsh prosecution (Hussain, 2021).

The law's discriminatory criminalization of Muslim men is also criticized by academics, who contend that it unfairly singles out one group while other personal laws preserve civil remedies for marital conflicts (Choudhury, 2021). The practical challenges of law enforcement, such as low conviction rates, abuse of legislation, and the police's discretion in filing complaints, are also highlighted by legal evaluations (Sharma, 2023). These discussions highlight the necessity of a well-rounded strategy that guarantees gender justice without violating fundamental rights.

Existing research looks at how the law affects Muslim women's access to justice, marital stability, and financial security from a socio-legal standpoint. According to empirical research, criminalization has not substantially reduced the number of unilateral divorces; rather, it has led to a rise in informal separations, a rise in abandonment, and a hesitancy on the part of Muslim men to enter into legally recognized marriages (Ansari, 2022; Patel, 2023).

RESEARCH GAP:

Even with the wealth of discussion around Triple Talaq, there are still important research gaps:

Empirical Evidence of the Law's Effectiveness: There is little evidence to support the claims that criminalization has improved the lot of Muslim women or decreased the number of arbitrary divorces.

Socio-Economic Impact on Affected Families: More research is necessary to fully understand the wider effects on families, especially those involving the dependents and children of males who are incarcerated.

Legal Consistency and Due Process: It is still unclear how the law relates to more general legal precepts, such as proportionality in criminal law.

Alternative Legal Remedies: Not enough research has been done on alternate legal options including monetary damages, reconciliation procedures, or civil fines.

The Criminalization of Triple Talaq: Constitutional and Socio-Legal Considerations

Since triple talaq is illegal while other personal laws resolve marital conflicts amicably, Proportionality (Article 14) and religious freedom (Article 25) are constitutional issues brought up by the Muslim Women (Protection of Rights on Marriage) Act, 2019. According to socio-legal research, it has not brought about

¹² Instant triple talaq Bill: Cabinet approves inclusion of provision of bail, THE HINDU (Aug. 9, 2018),

<https://www.thehindu.com/news/national/instant-triple-talaq-bill-cabinet-approves-provision-of-bail/article24643897.ece>.

¹³ Triple talaq is a criminal offence, THE HINDU (Sept. 20, 2018), <https://www.thehindu.com/news/national/triple-talaq-is-criminal-offence/article24989451.ece>.

justice but rather financial instability and desertion. Low conviction rates and societal opposition to religious dispute settlement provide difficulties for enforcement. For a well-rounded strategy, Alternative Dispute Resolution (ADR) is still untapped.

IS CRIMINALIZING TRIPLE TALAQ A VIOLATION OF PRIVACY OR A MATTER OF GENDER JUSTICE?

The Bill seeks to criminalize the pronouncing of triple talaq to achieve gender justice. However, criminalization makes privacy violations more likely. The Supreme Court held in Justice K. S. Puttaswamy (Retd.) v. Union of India that under Article 21 of the Constitution, privacy is a fundamental right. Three conditions must be met for the State's invasion of privacy to be justified. It needs a supporting piece of legislation to violate someone's privacy. People cannot have their lives or personal freedom taken away from them without adhering to

legal procedures. Second, a legitimate state must ensure its laws are rational and not arbitrary. The third condition is proportionality, which states that the means used should be proportionate to the desired outcome. The proposed legislation to criminalize triple talaq meets legal requirements. The last two prerequisites are mentioned below.

A. The requirement of a valid state goal

Pursuing a legitimate state objective prevents arbitrariness in the law. The law imposing the restriction must be reasonable, as specified by Article 14. The guarantee protects against arbitrary state action, defined as being done arbitrarily, capriciously, without a determining principle, not based on nature, non-rational, and relying solely on will (21, 22). According to the Bill, a Muslim husband cannot announce triple talaq against his wife in any form—verbally, in writing, online, or otherwise. This clause fails to meet the legitimate state objective of reasonableness for the reasons outlined below:

1. The criminal consequences of a civil wrong

In his book *An Introduction to the Principles of Morals and Legislation*, Jeremy Bentham, a renowned and trustworthy source for comprehending the principles of criminal jurisprudence, listed some instances in which a wrongdoing should not be considered a criminal offense.

First, when it is without justification, that is, when there is no mischief for it to stop because the act is not mischievous¹⁴. An illegal act must have some negative external effects in order to qualify as a crime; this is known as an actus reus (criminal act)¹⁵. There must be a direct link between the voluntary misconduct and the harm that results¹⁶. After Shayara Bano, declaration of triple talaq has lost its legal validity and ability to dissolve a Muslim marriage¹⁷. Mere pronouncement of triple talaq, unaccompanied by any other act is irrelevant as it does not dissolve the marriage and in no way adversely affects either the wife or the society.¹⁸ Since her status hasn't changed, she is still a lawfully married wife. Therefore, on the surface, nothing is wrong. But in the case of bigamy as well, Criminalization of the pronouncement of triple talaq cannot be considered to be without merit because someone is penalized for solemnizing a legitimate second marriage even though it is void and inconsequential. Therefore, an inconsequential act can be considered a criminal offense.

¹⁴ JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 134 (1 ed. 1789).

¹⁵ N.V. PARANJAPPE, *CRIMINOLOGY & PENOLOGY WITH VICTIMOLOGY* 12 (16 ed. 2014).

¹⁶ *Id.* at 13.

¹⁷ Flavia Agnes, *The Politics behind Criminalising Triple Talaq*, 53(1) EPW 12 (2018).

¹⁸ Faizan Mustafa, *Why Criminalising Triple Talaq is Unnecessary Overkill*, *THE WIRE* (Dec. 15, 2017),

<https://thewire.in/gender/why-criminalising-triple-talaq-is-unnecessary-overkill>.

Secondly, when it fails to prevent the wrongdoing, it is ineffectual. The punishment is not justified if it does not deter him from committing a crime. The possibility of reconciliation would be diminished if the husband were imprisoned for uttering the triple talaq. By preventing the wife from reporting such incidents, this would decrease the deterrent effect.

Thirdly, if it is too costly or unprofitable, meaning that the harm it would cause would be greater than what it would prevent, only a minor act could be prevented by making the declaration of triple talaq illegal; additionally, due to the diminished deterrent effect, there is little chance of such prevention, but it would result in the danger of irreversible marital conflict, as it has been observed that when one spouse accuses the other, the spousal conflict escalates and eventually leads to the dissolution of the marriage. Flavia Agnes, in her criticism of the Bill, said that after the husband

undergoes incarceration, it would be unrealistic to anticipate a reunion between the couples since the furious husband might employ the authorized Quranic form to declare triple talaq over the course of three months¹⁹. Since incarcerating the husband will lessen the likelihood of reconciliation, the goal of defending the rights of the resentful wife cannot be accomplished. Therefore, criminalization would cause the exact institution it is meant to safeguard to collapse. It would also result in the danger of abusing the provision that stipulates penalties for such a declaration²⁰. Similar laws have been abused, such as Section 498A of the Indian Penal Code (commonly known as "the IPC") and the restrictions under the Dowry Prohibition Act, 1961 (also known as "the DP Act").

Finally, in cases where it is unnecessary, such as when the mischief may be resolved more affordably²¹. If a civil remedy is adequate for a wrongdoing, the state may not need to impose criminal penalties. Muslim weddings are contractual in nature, therefore any disagreement resulting from them can be resolved through civil procedures²². When there are less expensive alternatives to address the problem, it is not appropriate to employ the state apparatus to imprison someone for three years. These strategies could include specially designed tools like alternative conflict resolution procedures and civil remedies like fair compensation.

Several acts in pari materia, such as the Protection of Women from Domestic Violence Act, 2005 (often known as "the DV Act") and Section 125 of the Code of Criminal Procedure, have adopted this plan of offering civil remedies rather than criminal penalties. Muslim-majority nations such as Turkey, Cyprus, Tunisia, Algeria, Malaysia, Jordan, Egypt, Iran, Iraq, Brunei, the United Arab Emirates, Indonesia, Libya, Sudan, Lebanon, Saudi Arabia, Morocco, and Kuwait have also outlawed the practice. The majority of these nations have civil courts that offer civil remedies where proceedings pertaining to the declaration of triple talaq are heard.

To promote reconciliation, a number of procedures are suggested, including speaking with religious leaders or an arbitrator.

Therefore, even the Hanafi school of Shariat law, which acknowledges triple talaq, views it as a sin and bad theology. No court, including the Supreme Court, has ever regarded it as a crime²³. Even when the court invalidated the practice in *Shayara Bano*, it did not recommend making it a crime²⁴.

¹⁹ Agnes, *supra* note 27 at 13.

²⁰ Ministry of Law and Justice, Govt. of India, 243rd Law Commission Report – Section 498A IPC, <http://lawcommissionofindia.nic.in/reports/report243.pdf>.

²¹ Bentham, *supra* note 24 at 134.

²² Mustafa, *supra* note 29.

²³ *Nazeer v. Shemeema*, 2017 (1) KLT 300; *Masroor Ahmed v. State (NCT of Delhi)*, 2008 (103) DRJ 137 at 153; *Jiauddin Ahmed v. Anwara Begum*, (1981) 1 GLR 358; *Rukia Khatun v. Abdul Khalique Laskar*, (1981) 1 GLR 375.

²⁴ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

The lack of any deterrent effect of the Shayara Bano ruling was one of the justifications offered for the declaration's criminalization. It has been decided that the State must criminalize offenses in a minimalist manner since a more compelling argument is needed when an offense is made punishable by incarceration. The aforementioned argument is insufficient to support locking someone up since it is inappropriate to draw the conclusion that there is no deterrent effect in as little as four months.

2. Mens rea is absent.

Any declaration of triple talaq made by a Muslim spouse to his wife is punishable under the bill. Since no specific or implied mental element has been mandated, it could be construed to cover even statements made with no intention of divorcing the wife. The fundamental tenet of criminal jurisprudence is that the accused's culpable act must be accompanied by an element of mens rea. Only when an act that is prohibited by law is performed willingly—not when the performer has an innocent intent—is it considered a criminal offense. Jeremy Bentham believed that a wrongdoing committed without mens rea shouldn't be considered a crime²⁵. Nonetheless, there is a category of offenses sometimes referred to as strict liability offenses that do not rely on any mental component but include prohibited behaviors or omissions. Any defense of ignorance, error, or reasonable care is not admissible; it is required to demonstrate that the forbidden act was committed²⁶.

Three categories²⁷ can be used to group these strict liability offenses: First, actions that are forbidden in the public interest under punishment but are not actually crimes but have a quasi-criminal character. For instance, crimes involving food and narcotics, unique social and economic offenses, environmental degradation, etc. As was previously mentioned, the declaration of triple talaq does not meet the actus reus criteria, which is necessary for it to be considered a criminal offense. As a result, it would not fit into the first group.

Second, instances of contempt of court, libel, and public annoyance, among others. Third, there are situations where a criminal action is really used to enforce a civil right. For instance, instances where local rules and regulations have been broken, etc. Usually, such offenses carry very minor punishments²⁸. In penal law, strict liability cannot be justified if a conviction carries the risk of condemnation and imprisonment²⁹. Without some sort of mens rea, strict criminal culpability denies the accused their freedom without following the constitutionally guaranteed due process³⁰.

It would be unreasonable to issue the triple talaq declaration a strict liability offense carrying a maximum sentence of three years in jail because it does not fit into any of the aforementioned categories. Therefore, under Article 14 of the Constitution, it is arbitrary and illogical to make the mere declaration of triple talaq a crime without a sufficient determining principle.

B. The requirement for proportionality

The proportionality requirement ensures that the objectives and the strategies employed to achieve them make sense. Because it guarantees that the type and extent of the infringement on a right is not out of proportion to the goals of the law, proportionality is a crucial component of the protection against capricious official action. A penalty must always be appropriate for the offense. Each and

Bentham, supra note 25 at 136.

²⁶ *Id. at 213-14; RATANLAL & DHIRAJLAL, THE INDIAN PENAL CODE 23 (32 ed. 2013).*

²⁷ *11(1) HALSBURY'S LAWS OF ENGLAND 273-274 (4 ed. 1987); DAVID ORMEROD, SMITH AND HOGAN ON CRIMINAL LAW 59-72 (2 ed. 1969).*

²⁸ *Halsbury's Laws of India, supra note 52 at 28; American Jurisprudence, supra note 52 at 227.*

²⁹ *American Jurisprudence, supra note 52 at 227.*

³⁰ *Id.*

every criminal sentence that is justified is based on the just deserts principle of proportionality between offense and punishment³¹.

Triple talaq has been recognized as a crime that carries a maximum sentence of three years in prison and a fine³². According to the DV Act, even declaring triple talaq is equivalent to "domestic violence." It involves "verbal and emotional abuse" as well as damage or impairment to mental health. The concept of "abuse" is quite broad. Abuse is defined as anything that goes against the good order established by usage. She may be insulted, made fun of, degraded, threatened, or denied the advantages of living in a shared home, among other forms of verbal and emotional abuse.

It is important to remember that there are a number of civil remedies available. The Act only specifies a maximum punishment of one year in jail for verbal and emotional abuse as well as other types of domestic violence, not criminal consequences. When the magistrate's order granting such civil remedies is broken³³. It would not be compatible with the Act's plan to put the husband in jail for up to three years. Therefore, the punishment mentioned above is unreasonable and excessive.

It has been decided that the punishment must be appropriate for the seriousness of the offense, and that any harsh punishment would be blatantly arbitrary and in violation of Article 14³⁴. As a result, such a disproportionate and irrational punishment is capricious and violates Article 14. Furthermore, the crime of triple talaq has been rendered punishable by law if the wife or any other person connected to her by blood or marriage provides information about the occurrence of the crime to the officer in charge of a police station³⁵. That would imply that after the husband would be arrested without a warrant and without doing any preliminary investigation after receiving a complaint. Numerous offenses pertaining to related topics, including as cruelty and accepting or providing dowries, are punishable by law, which encourages their abuse³⁶. The Supreme Court in Shayara Bano and the Parliament through this Bill ruled that the proclamation of triple talaq was illegal and void, and that the Bill must contain certain protections to prevent such misuse; otherwise, the procedure under the Bill would be irrational and unjust. The goal was to preserve marriage without compromising Muslim women's rights. However, the marriage would be irreparably harmed if the declaration of triple talaq were made a crime that may result in up to three years in prison. The Bill's chosen methods would negate the precise goal it aims to accomplish, proving that there is no logical connection between the two. Therefore, the criteria of proportionality is not met by criminalizing the mere declaration of triple talaq in the absence of any further action.

The State's invasion of privacy Since the criminalization of the proclamation of triple talaq does not satisfy the standards, it is not acceptable to use criminal sanctions. The State's interference would be lawful since it would satisfy all requirements if it employed civil measures to achieve the objective of banning triple talaq.

³¹ Halsbury's Laws of India, *supra* note 57 at 312.

³² The Muslim Women (Protection of Rights on Marriage) Bill, 2017, s. 4.

³³ The Protection of Women from Domestic Violence Act, 2005, s. 31 (a).

³⁴ Bhagat Ram v. State of Himachal Pradesh, (1983) 2 SCC 442.

³⁵ The Muslim Women (Protection of Rights on Marriage) Bill, 2017, Notice of Amendments,

https://www.prsindia.org/sites/default/files/bill_files/Triple%20Talaq%20Notice%20of%20Amendments.pdf.

³⁶ Law Commission Report – Section 498A IPC, *supra* note 37.

RECOMMENDED SCHEME

There are serious contradictions in the proposed bill that can be fixed with the following alternative plan:

Triple talaq declarations ought to be deemed "void and illegal." It wouldn't affect the husband and wife's legal standing in any way. On the woman's plea, the magistrate may request that the husband pay the wife for the psychological suffering she endured. The amount of the compensation and the deadline for payment may be determined by the magistrate. There would be no legal repercussions for merely declaring triple talaq.

In addition to a fine, the spouse faces up to a year in jail if he disobeys the magistrate's order and fails to pay the required amount. This is in line with the strategy put in place under the DV Act.

The spouse or any other individual who seeks to impose the triple talaq declaration should be punished with a fine and a term of jail that can last up to a year, even if the declaration alone would not have any legal significance.

The spouse should not be subject to any of the aforementioned penalties if he makes the required payment and neither enforces nor attempts to enforce the declaration. It is important to remember that the husband will always have the choice to remarry even if his declaration is legally meaningless as long as polygamy is practiced. The goal of defending Muslim women's rights would become useless as a result. To prevent this circumstance, it is advised that civil provisions against polygamy be included in the legislation.

The declaration of triple talaq should be expressly mentioned in the definition of "domestic violence" in the DV Act. It would ensure that the wife could ask the court for full remedies under the aforementioned Act in addition to the remedies offered under the aforementioned plan.

CONCLUSION:

The Muslim Women (Protection of Rights on Marriage) Bill, 2017 is one step in this direction. The bill aims to provide justice for Muslim women and put an end to the continuous harassment caused by this practice. The Indian judiciary has always taken a strong position against triple talaq, but it was essential that this tactic be incorporated into the actual text of the statute.

The current form of the Bill criminalizes the announcement of triple talaq and renders the practice void. It seems quite unlikely that it would be successful in achieving its dual objectives of prohibiting triple talaq and defending the rights of Muslim women. The Supreme Court's Shayara Bano ruling is in line with the bill's first section, which declares triple talaq to be illegal and null and void.

However, because they would discourage others from reporting similar incidents and lessen the possibility of reconciliation, the provisions that harshly punish the act are likely to have the opposite effect of what is intended. Moreover, the Shayara Bano Court never suggested that triple talaq be made a criminal offense. The state is likely to invade the privacy of its citizens by making such behavior illegal.

Therefore, in order to achieve the dual objectives of the Bill, the proposed plan should be considered. Before the Bill is passed, it should be discussed with the Muslim community and legal professionals to improve its efficacy. In order for the bill to achieve its objective, awareness of its consequences must be increased after it is approved.

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