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THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019: AN INSUBSTANTIAL ADDITION TO THE REALM OF LAW

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Abstract

The Muslim personal law governing the family law matters of Muslims in India has always been under a scrutiny with allegations of being gender discriminatory. At the core of these allegations have been divorce provisions in general and Instant Triple Talaq or Talaq-ul-Biddat in particular. The practice was set aside by the apex court in the case of Shayra Bano v. Union of India and was declared void and illegal by the Muslim Women (Protection of Rights on Marriage) Act, 2019. The Act further provides the punishment of imprisonment up to three years in case a husband indulges in the said practice. The Act is hailed by many for empowering the Muslim women and rescuing them from the injustice faced for centuries. On the other hand the Act is criticized labeling it froth, made in haste and capable of doing more harm than good to the Muslim women. Through the instant academic work an effort has been made to critically analyze the provisions of the said Act on various grounds like criminalizing a private conduct, quantum of punishment, subsistence allowance, custody of the child to substantiate that it is an insubstantial addition to the realm of law. The Act leading to the multiplicity (Shayara Bano v. Union of India and others, 2017) of laws has been reflected by discussing that the existing laws would have been enough to take care of the wrong doings of the pronouncement of Instant Triple Talaq after the decision of the apex court..

Key words: Personal Laws, Women Empowerment, Gender Equality, Criminalization.

Introduction

1.1 Background:

In Islam, there has always been the practical approach to all the human affairs and that includes Divorce too, but as a necessary evil, which is quite evident from the fact that Prophet Muhammed declared it to be the most disliked of all the lawful things in the sight of Allah. (*Shayara Bano v. Union of India and Others*, (2017) 9 SCC 1) Divorce i.e. *Talaq*, etymologically, means the repudiation or rejection but under the Islamic law, it confers a meaning of release from the marriage tie (Ahmad & Khan, 2006). In the wider connotations, *Talaq* in the Muslim law, can be categorized into three heads, a) by husband, i.e. *Talaq*, *Ila* and *Zihar*; b) by wife, i.e. *Talaq-e-Tafwid* and *Khula*; c) by mutual consent of husband and wife, i.e. *Muabarat*; and d) by judicial intervention, i.e. *Lian* and *Faskh*. (Ahmad, 2003)

While most of the forms of divorce above are accepted legally, socially and religiously, it is the Instant Triple *Talaq*, or the *Talaq-ul-biddat* which has raised debates. The *Talaq-ul-biddat* is a form of divorce where the man delivers three pronouncements which are directed towards the wife in one go. The pronouncement translates to "I divorce thee", said three times (Ahmad & Khan, 2006). It is supposedly an innovation of the post Prophet era. The origin of triple *Talaq* canbe traced back to the period of Caliph Umar (Edappagath, 2014). It is believed that this form of divorce is not recognized by the *Shias* and the other sub-schools of *Sunni* School of Islamic Jurisprudence, except the *Hanifi* and *Shafi'i* Schools (Khurshid, 2018). Nevertheless, what is important is the fact that though Caliph Umar, innovated this form of divorce, he too discourage its pronouncement and believed that it is sinful and he insisted that a man who divorces his wife in this form must be flogged in public, however, though the pronouncement of *Talaq-ul-Biddat* continued, the flogging wasn't made a mandate, and therefore, the concept of checks and balances to some extent had failed (Salam, 2018).

1.2. Judicial trends with respect to instant triple *talaq*:

The Indian Courts, in the judicial history with respect to the matter related to the validity of the Instant Triple *Talaq*, have mostly had consensus with the fact that such a pronouncement is not in accordance with the procedure laid down by the Holy Quran. However, an exception would be the courts of colonial India, which believed that it wasn't the Court's duty to interfere in a matter that is supposedly to be governed only by the personal law and thus in this regard, in some cases like *Agha Mohammad Jafar v. Kulsoom Bi* **(**(1897) 24 1A) and *Sara Bai v Rabia Bai*, (ILR 30 Bom 537) upheld the validity of the pronouncement of the Instant Triple *Talaq*.

On recognizing the ambiguity that persisted with reference to the validity of the Instant Triple *Talaq*, many attempts were made to have the ideology judicially redefined and one such attempt was also made by Justice Bahrlul Islam, who asserted that the instant triple *Talaq* cannot be pronounced merely in the view of the husband's wish and that such a pronouncement must be preceded by efforts of conciliation, else it would be in contradiction with the directions given in the *Quran*. (*Rukia Khatun v. Abdul Khalique Laskar* (1981) 1 Gau. L.R. 375)

In the year of 2002, the Supreme Court took it a step ahead and in the case of *Shamim Ara v. State of Uttar Pradesh and another* (AIR 2002 SC 619) held that if there has been pronouncement of three successive *Talaq* it shall be deemed to be just one pronouncement. However, this shall be the case only if there has been measure taken by the parties to arbitrate or reconciliation in order to end the marital discord and thus overlook each other's flaws. The precedent set by the judgement was reiterated by the other courts as well.

Then came the landmark judgement *Shayara Bano v. Union of India and Ors.* (2017 9 SCC 1) with respect to the validity of the Triple *Talaq*, which was delivered by the Supreme Court on 22nd August 2017. The significant petitioning party involved was Shayara Bano who moved to the court against the pronouncement of instant triple *Talaq* or the '*Talaq-ul-Biddat*' by her husband Rizwan Ahmed on the 10th of November in the year 2015, in the presence of two witnesses. The petitioner Shayara Bano, contended that such a divorce is unconstitutional since it is violative of Article 14, 15 and 21 of the Constitution of India,& isn't protected by the virtue of Article 25(1), 26(b) and 29 of the Constitution of India and thus also be declared to be void ab initio. The five Judges bench was constituted by Chief Justice Khehar, Justice RohintonNariman, Justice U.U. Lalit, Justice Kurian Joseph and Justice Nazeer. Justice Khehar and Justice Nazir, asserted that the Instant triple *Talaq* was not unconstitutional in nature and is within the ambit of the Article 25 of the Constitution of India 1950. However, Justice Nariman and Justice Lalit held the Instant Triple *Talaq* to be violative of Article 14 of the Constitution of India 1950. However, it was Justice Joseph who observed that "what is bad in holy Quran cannot be good in *Shariat* and what is bad in theology is bad in law as well". Therefore, he only asserted that the practice of *Talaq-ul-biddat* was not in consonance with the Quranic law and no specification as to the constitutionality was made. On a conclusive note, the practice of instant triple *Talaq* was thus 'set aside' by the Supreme Court of India. The minority opinion in this case also directed the legislature to come up with a law pertaining to Instant Triple *Talaq*.

1.3. Timeline of the bill becoming an act:

In the aftermath of the judgment delivered by the Supreme Court in the Shayara Bano v Union of India and others, The Muslim Women (Protection of Rights on Marriage) Bill of 2017 was passed by the Lok Sabha on 28th December 2017, however the Rajya Sabha sought certain amendments on the 9th of August 2018, however the bill was declared to have not been passed in the Rajya Sabha by the Chairman, on the 10th of August 2018 (PRS, 2019). Then, an ordinance was passed by the then President of India, Ram Nath Kovind on 19th September 2018 in exercise of power vested to him by Article 123 of the Constitution of India, which was later re-promulgated on 21st February 2019 (Leaflet, 2019). The bill of 2018 was already passed by the Lok Sabha on 27th December 2018 to make the ordinance an Act and same was passed by Rajya Sabha on 30th July 2019. The Non-Democratic Alliance Government could therefore finally pass the Bill with 84 votes in favour, of the total 99 votes casted, to make it an Act (India Today, 2019).

Features of the muslim women (protection of rights on marriage) act, 2019:

This 20thAct of 2019 consists of 8 sections in total. The Act has the whole of India except the state of Jammu and Kashmir under its jurisdiction and carries a retrospective effect, for it is deemed to have been in forced since 19 September 2018 (section 1). The section 2 of the Act recognizes, even pronouncements in electronic form. The Act also declares the pronouncement of instant triple *Talaq* to be void and illegal (section 3) and also provides for punishment of imprisonment of 3 years and also provides for an imposition of fine on anyone who has done such an act (section 4). The act further also provides for the subsistence allowance for the victim and her dependent children, from her husband (section 5). The sec 6 of the Act vests the power to hold the custody of the child, with the victim i.e. the mother. The Act also recognizes the offence to be cognizable, compoundable, and that the bail would get sanctioned, only after the Magistrate hears the victim and is convinced that there lies enough reason for the bail to be granted (section 7). And ultimately, the section 8 of the Act repeals the ordinance of 2019, but however the Act provides retrospective effect and hence nothing done under provisions of the ordinance shall be held to be invalid or quashed.

Critical analysis of the muslim women (protection of rights on marriage) act, 2019:

Though the attitude of Indian Judiciary towards the evil practice of Tripe *Talaq* prevalent in the Indian society has been critical since late 20th century. Further, the validity of Triple *Talaq* given by husband is declared as void i.e. no *Talaq* at all. Despite the fact that Supreme Court has declared the practice as void in its judgment of *Shayara Bano case*, bringing the Triple *Talaq* Bill with the provisions of punishing the Muslim husband for merely uttering the words whose effect has already been nullified by Supreme Court, is nothing but putting a gloss on the actual process of providing the justice to Muslim women. A well-known gender rights activist, Flavia Agnes, opined that this Act, was a promulgation done without venturing into the decisions and the opinions of the rightful stakeholders, for it is intended to override a norm of the minority and that it is targeted towards the Muslim men (Agnes, 2018). While the judgment pronounced by the Supreme Court in the *Shayara Bano v Union of India and others*, only 'set aside' the practice of instant triple *Talaq*, the Act declares the pronouncement to be void and illegal.

3.1. Criminalization of an act which is perceived to be civil and private in nature:

The most convincing and a major contention that puts crime and a civil wrong at different hemispheres is the fact that the latter is a violation of a right in rem and the former is a violation of a right in personam. Crime, has been regarded to be an injury done to the public at large since ages, and it is perceived to be an act that violates the peace of the sovereign. It is a less rebutted fact that in private law the injury caused is to the "private interests of the parties" whereas in the case of a crime, the injury extends and thus is capable of harming those people or that part of the society which may not have been a direct party to the cause of action (Lamond, 2007). Further, Grant Lamond also goes on to explain, how 'intention' plays an important role in constituting a crime. He vindicates by saying how if the injury to the victim is caused by mere negligence, the best the non-parties to the cause of action can do, is sympathize with the victim. However , the scenario doesn't remain the same , when the matter is about the commission of a crime : A crime is mostly an act intended to cause harm , and the mere element of intention having been manifested in a way that has victimized the other person , is in itself a sufficient cause to hold that criminal acts are bound to be evoking a sense of 'fear' and 'distress' to the parties who are not involved in the matter as well. Thus, a criminal act is to be making space for **"social volatility"** (Lamond, 2007). Further, Becker opines, **"when the breach is only of interests of two or more private parties involved, then it doesn't constitute social volatility, where as a crime is capable of doing that**" (Becker, 1974).

Now, based on the inference derived above, an immediate question that could be raised is how, a breach of a marriage, which by law of religion is recognized to be a 'civil contract' (*Abdul Qadir v. Salima and Anr.* (1886) ILR 8 All 149), can be treated as a crime?

However, a slightly different and seemingly contradicting view on the matter is put forth by Glanville Williams , who asserts that what determines or classifies an act to just be a civil wrong or to be a crime is not solely the nature of the act , instead most of it assessed by the legal consequences that follow such a commission of an act (SMITH, 2019).

While social and legal jurisprudence experts **like Blackstone and Salmond, focus upon the fact that a crime is a "breach of public rights and duties due to the whole community" and that "it is an act deemed to be harmful to the society in general** ." **Hegel adds the concept of "fraud" also as an important facet of crime** (Nicholoson, 1982)**.** Now according to the statistics available, the number of cases related to instant triple *Talaq* instituted is as less than **0.2 %** (*Shayara Bano v. Union of India and Others*, (2017) 9 SCC 1**.** Further, even the Census of 2011 conveys that **5.63 per thousand women are divorced**, despite the fact there existed easier forms of divorce such as the instant triple *Talaq* (Agwan, 2016). In this regard, the Act fails to convince, on what basis the pronouncement of triple *Talaq* , a practice which is adopted by an almost negligible fragment of society, a practice which affects only the parties which are directly involved and fails to negatively impact the extended society at a significant level ,can be essentially treated to be a crime.

In consideration of the four conditions put forth by Jeremy Bentham, he underlined the parameters basing on which an act ought to be tested before criminalizing it. He emphasized that an act is not to be categorized as a criminal offence in situations where in such an action is groundless, inefficacious, unprofitable, and needless (Shrotriya & Chauhan, 2019). The criminalization of Instant Triple *Talaq* can be said to be groundless on similar lines as there is no effect of the words so pronounced by the husband to his wife. In circumstances that the husband does pronounce instant *Talaq*, the marriage will remain intact regardless. As far as the inefficaciousness is concerned, the object of the law, to curb the mischief, is far distant than how it appears. This infamous practice has been prevalent since time in memorial and the stamp of the religion has now inadvertently contributed to it being deeply rooted in the society and minds of people. There are high chances that the woman to whom the instant *Talaq* has been pronounced will deem it to be sinful to live with her husband, considering the fact that she is no more a wife in accordance to her religion. Furthermore, she might also be hesitant to approach the police or authority as putting the husband behind the bars might further aggravate the issue. The third pertinent point is the reflection of Bentham's utilitarianism theory that emphasizes on the theory that the harm produced by criminalizing an act must not be greater than the gain. In this case, one of the major purpose of the law is to protect the marriage but there are chances that the husband booked under this Act might divorce the wife in *Ahsan* form, which is still legal. Thus, making it counterproductive and resulting in greater harm than good. Lastly, the act is to be criminalized when there are no remedies available to address the problem. Adequate Civil, as well as criminal remedies, are already available. Injury is an essential element of the crime, by the pronouncement of a particular word thrice having no effect on the status of the marriage; the injury suffered by the victim will inevitably be mental injury. Civil, as well as criminal remedies for mental injury are available in the form of The Protection of Women from Domestic Violence Act, 2005 and section 498A of Indian Penal Code respectively.

Similar kind of concerns also rises to the surface when analyzing Andrew Ashworth's Principle of Minimal Criminalization. He argued that too much of human behavior is not to be criminalized. There are four major components of this principle; "1) the principle of respect for human rights, 2) the right not to be subjected to state punishment, 3) the principle that the criminal law should not be invoked unless other techniques are inappropriate, and 4) the principle that conduct should not be criminalized if the effects of doing so would be as bad as, or worse than, not doing so" (Ashworth, 2009). The initial two points can be argued upon but certainly, the Act does not fit when it comes to the latter two points of the principle for reasons discussed in the above-mentioned paragraph.

3.2. Quantum of Punishment:

The act by virtue of Section 4, also provides that the husband who has made a pronouncement of instant triple *Talaq* shall be imprisoned for three years and that the husband shall also be liable for an imposition of fine. The act fails to convince the legal enthusiasts as to what was the facets behind the determination of this quantum of punishment that was adopted. When compared with the offences, listed under the Indian Penal Code of 1860, it is inferable that the graveness of the offence has had a say in determining the quantum of punishment for the offence that has been created. To evaluate the ideology better, a few noticeable offences listed under the Indian Penal Code of 1860 shall be considered.

The Indian Penal Code of 1860, provides a punishment of imprisonment that is extendable up to 3 years for offences such as Sedition (Sec 124- A) which is cognizable, non bailable and non-compoundable; Public Servant Negligently suffering such prisoner to escape (Sec 129); Abetment of Assault by soldier, sailor or airman on his superior officer, when in execution of his office (sec 133); Rioting with deadly weapon (Sec 148); Assaulting or obstructing a public servant when suppressing riot (Sec 152); fabrication of false evidence (Sec193); Cheating by personation (sec 419), to mention a few.

However, if the above provisions are examined, and co-related with the earlier section of this paper, these offences are capable of causing social volatility, however the same cannot be accorded to an act, which the legislature has failed to convincingly hold as a crime. On the contrary, the Indian Penal Code of 1860, awards lesser quantum of punishment for more heinous crimes than the pronouncement of Instant Triple *Talaq* such as Punishment for non-treatment of a victim under sec 166 B of the IPC 1860; Punishment for Bribery under Section 171-E of the IPC 186; Punishment for Rioting under Section 147 of the IPC1 1860 and so on.

Nevertheless, the point to be inferred here is that, the offences which in fact cause more social volatility are awarded with lesser punishment in the IPC, whereas an offence which is prima facie seemingly civil in nature, and is in-capable of causing non negligible amount of social volatility has been awarded a punishment which is equal to the punishment awarded for much heinous crimes which often constitute the ones that are directly against the mandates of the sovereign.

Kirpal Singh Chabra, in his book governing the aspects of quantum of punishment to be awarded, clearly indicates the importance of such determination as it plays an important role in fulfilling the object of the Act thus promulgated and further also stresses on the need to use pragmatism and logic in such a determination (Chhabra, 1970). He also asserts of how, such an inconsistency in the penal laws of the land in determining the quantum of punishment defeats the very own purpose of having an effective system of criminal judicature. He asserts that such inconsistency, vests the judicature with more humongous responsibility,that is not capable of being discharged easily and thus writes – "**This carries with it the possibility of abuse of power by prosecution or even indulgence in corruption in exercising discretion for higher or lighter penal provision**" (Chhabra, 1970).

Thus, at this point, it can be intermediately concluded that, such a punishment which has been decided with no rational and basic tenets governing it, is a mere faux pau.

3.3. Subsistence Allowance:

Section 5 of the Act provides that the victim and her dependent children shall be vested with the right to claim subsistence maintenance from the husband. Again, with respect to this clause as well, the value of subsistence allowance that needs to be given is determined by magistrate. The Act thus fails to take into consideration, a scenario where the women is self-sufficient and financially better placed than her husband and overlooks the fact as to how the husband will able to cater to the financial needs of paying subsistence allowance while he is in fact serving a sentence in the jail. However, on a legal tone, the concept of subsistence allowance is borrowed from that of the labour laws (Shrotriya & Chauhan, 2019) and is forcefully tried to be made fit into that of the personal laws. Thus, the Act is blind towards the circumstances the husband may be subjected to.

Apart from this, it is still in the hands of the woman to initiate proceedings under sec. 125 of Criminal Procedure Code 1973, for maintenance.

3.4. Custody of the Child:

Article 3 of the Convention on the Rights of the Child provides, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." In the matters of custody of the child the International Human Rights laws are dominated by the best interest of the child. Similarly, the domestic laws have a comparable legal standard, principle of 'Welfare of the Child'. The courts in India have adopted the same

principle and all the matters pertaining to the custody of the child are decided on the basis of welfare of the child.

The Act in Section 6 provides, "Notwithstanding anything contained in any other law for the time being in force, 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." Firstly, when the pronouncement has been made void and illegal, it is an unambiguous fact that the marriage shall be held to have sustained. Despite, the Act uses the terms "custody" when it's about their dependent children, which is a contradiction. The said provision was not at all necessary and making it mandatory is uncalled. Secondly, the provision ignores the settled principle of welfare of the child. There might be an instance where the mother herself is not ready or fit to take the custody of the child due to varied reasons and that has been completely ignored.

3.5. Future of the Marriage:

The Apex court while setting aside the practice of Instant Triple *Talaq* has made an effort to protect the marital tie. The Act also provides that the main objective behind this law is to protect the rights of the Muslim women and thus preventing the Muslim men from pronouncing instant triple *Talaq* which indirectly points towards the ideology that the Act intends to save the marriage of the parties involved and thus promote the probability of reconciliation between the parties and with this, the Act makes the offence to be compoundable in nature. However, the Act fails to convince the socio-legal enthusiasts on how effective the provision of compoundable nature of the offence will be, once the husband has been brought to the court of law by the wife or the husband has had to serve a sentence, because of the FIR penned down by his wife.

Suggestions And Conclusions

When all the above points are read in toto, it can be said that the Act defeats its own purpose. Neither it empowers the Muslim women in any manner nor can it be said conclusively as safeguarding the marriage. The empowerment of the Muslim women could have been achieved if the stake-holders would have been consulted prior to the drafting of the law and this appears to be a missed opportunity. The Act fails to justify the criminalization of pronouncement of Instant Triple *Talaq* and appears to be a case of over criminalization. The issues covered under the Act would have been well covered under the existing laws prior to the Act. The injustice, hardship and mental agony if any caused to the Muslim woman by pronouncement of Instant Triple *Talaq*, would have been well covered under the provisions for cruelty i.e. section 498A of Indian Penal Code and Protection of Women from Domestic Violence Act, 2005 and the separate act is froth. Similarly, the provision for the subsistence allowance appears to be redundant considering the practicality and the needs of the wife as well as the child would have been taken care with the help of section 125 of Criminal Procedure Code. Lastly, the provision regarding the custody of the child doesn't arise at all with the marital tie not being affected.

The criminalization of pronouncement of instant triple *Talaq* appears much to do with punishing the Muslim men than empowering the Muslim women. The existing laws would have sufficed to deal with the injustice so caused to the wife. Instead, the payment of any monetary compensation by the husband to the wife in case of pronouncement of Instant Triple *Talaq* would have been a better option as it would have helped the wife to get economic stability as well. Going by the present situation instead of subsistence allowance and maintenance by the husband, the Waqf Boards could have been asked to pay for the monthly expenses of the wife and children

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