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Triple Talak – A Recent Judicial Perspective – An Analysis

Abstract

On August 22, 2017 the Indian Supreme Court declared Triple Talaq among Sunni Muslims as unconstitutional by a majority of 3:2 . By way of Triple Talaq (talaq–e–biddat) Muslim men could divorce their wives instantly and without state intervention by pronouncing the word "talaq" thrice. The case had been brought before the court by the petitioner Shayara Bano and other women who had been divorced in this way. Different Muslim women's groups had intervened to support them. On the outcome, the court was split three to two. The three judges in the majority regarded triple talaq invalid, but used different reasoning to arrive at their conclusion. Justices Rohington Nariman and U. U. Lalit held that the 1937 Muslim Personal Law (Shariat) Application Act, in so far as it refers to triple talaq, violated Article 14 of the Indian constitution - the right to equality. Justice Kurian Joseph instead argued that triple talaq was not a valid practice in Islam and was therefore illegal. The minority view, held by Chief Justice Jagdish Singh Khehar and Justice Abdul Nazeer, was that though triple talaq was undesired, the courts could not strike it down, and only the parliament could regulate on the matter. The judgment is a landmark case in the Indian women's movement's agitating for more rights under religion based personal laws.

Keywords: Talak-e-biddat, Constitution, Shariat, Judgment.

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Introduction

Like many other post-colonial states, India maintains a personal law system, according to which certain family and property matters (marriage, divorce, maintenance, guardianship, adoption, succession and inheritance) of Hindus, Muslims, Parsis and Christians as well as Jews are governed by their respective religious laws. While personal laws per se are an ancient phenomenon, the Indian personal law system in its present form has been shaped considerably during the colonial rule. After independence, the goal of enacting a Uniform Civil Code (UCC) in the area of family law was placed in India's new constitution (Article 44). However, as of the present day, such a UCC has not been implemented. Rather, while maintaining the plural legal system as such, the different personal laws have been reformed to varying degrees via legislation and judicial interpretation. From a gendered point of view, the personal laws (of all religious communities, not only those of Muslims) are problematic as they contain inherent inequalities between men and women, for instance with regard to inheritance rights, polygamy, divorce grounds, child adoption and guardianship rights[1].

Object of the Paper

The aim of this paper is to actually deliberate on the customary practice of triple talak among Sunni people in muslim law. The custom which has no base and good history was practiced like anything and violating the rights of a muslim law since long. The honorable judiciary in India was never ever in favor of this cultural misnorm. That's why the Supreme Court became firm recently to curb the same. Thus this paper is focused upon the discussionon triple talak through ages and times.

Review of Literature

To furnish the full paper, a thorough study on the historical part of this custom was done by the author. In this reference, The further mention list of books and articles were reviewed . The author named Tanja Herkoltz wrote the paper " Shayara Bano versus Union of India and Others.

The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice. And Saloni Sharma wrote " Triple Talak : a Critical Analysis." Moin Qazi, "Tracing the history of Triple Talaq to look to the future."

Avantika Tiwari," Triple Talaq- Counter Perspective with Specific Reference to Shayara Bano. Saptarshi Mandal wrote" Triple Talaq Judgment and the Continuing Confusion about the Constitutional Status of Personal Law. All these papers were well focused on the applicability and discriminating nature of customary practice of triple talak against muslim wives. Along with this the judgments of Privy Council, High Courts and Supreme Court were also analyzed and reviewed before writing down the present research work.

Reforming the personal laws in some way or another has therefore long been on the agenda of the Indian women's rights movement. Suggestions on how to go about doing this range from small step by step community led reforms to large state-led reforms such as the introduction of a secular UCC. Muslim women's rights activists and organizations have played an active role in calling for reforms of Muslim personal law, thereby forming part of broader Islamic feminist movements. The key legislation in the case at hand is the Muslim Personal Law (Shariat) Application Act of 1937 (also referred to as the 1937 Act). Section 2 of this Act declares Muslim personal law (Shariat) applicable to the adjudication of cases between Muslims, while negating "customs and usages". The Act specifically refers to "provisions of Personal Law, marriage, dissolution of marriage, including talaq". Muslim personal law regards marriage as a dissoluble contract and provides for different modes of divorce both at the wife's and the husband's initiative. While the Quran itself only refers to divorce to a limited extent, it is Islamic legal scholarship that has categorized the modes of divorce more clearly. Talaq is divorce at the husband's initiative and three different modes of this form of divorce are usually distinguished: talaq-e-ahsan, talaq-e- hasan, and that discussed here, talaq-e-biddat or triple talaq. Other than in the former two forms of talaq (in which a defined time period lies between the first pronouncement of talaq and the point at which the divorce becomes effective), triple talaq refers to three pronouncements of the word "talaq" in one sitting; it is effective forthwith and is irrevocable[2].

Muslim wives do not enjoy an equivalent right. The immediate effectiveness of this form of talaq, which leaves no room for planning and preparing for divorce makes it particularly problematic. With modern technology, there have been instances where wives have been divorced through triple talaq being pronounced over Skype, Whatsapp or Facebook. Notably, triple talaq is not acknowledged by all Muslims. Shia Muslims and some schools among the Sunni Muslims do not recognise it, while the Hanafi school of Sunni Muslims does accept it as legally valid[3].

Triple Talaq- Introduction

Triple talaq is one of the obnoxious practices that have been followed by the Muslim where in pronouncement of talaq word three times leads to dismissal of marriage. It is a custom that is being followed by the Muslims. This Talaq is also known as Talaq-i-Bain. It is a disapproved mode of divorce. A peculiar feature of this Talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. The Prophet never approved a Talaq in which there was no opportunity for reconciliation. Therefore, the irrevocable Talaq was not in practice during his life. The Talaq-l-Biddat has its origin in the second century of the Islamic-era[4].

The Nature of Triple Talaq

Triple Talaq is a contested Islamic way of getting a divorce where a husband can dissolve a marriage in the blink of an eye only by saying or writing the word Talaq—meaning divorce—three times in a row to his wife. Example, by saying “I reject you”, “I divorce thee”. A Talaq is a unilateral divorce by a husband’s oral declaration as against Khula which is a divorce initiated on the application of the wife. Quite apart from denying women’s rights, this custom has inherent absurdities. The moment a Muslim male utters “Talaq, Talaq, Talaq”, his wife becomes unlawful to him, even if he has uttered those words under coercion, in a fit of rage, in jest or drunken state and regrets his utterance the very next moment[5].

The only way out is for the woman to marry someone else, consummate the marriage, get the second husband to divorce her and then re-marry the first husband. This process is known as Nikah Halala and is actually a deterrent for men against this practice[6].

Several scholastic understandings of divorce within Islam do not support the notion of triple talaq in its current form. It is banned or not practiced in many Muslim countries, including Algeria, Tunisia, Malaysia, Iran, Pakistan, Saudi Arabia, Turkey, Tunisia, Algeria, Iraq, Indonesia and Bangladesh[7].

Pre Decision Position of the Muslim Law

There has been plethora of cases both in the Supreme Court and several high courts declaring instantaneous triple talaq to be invalid. The apex court in Shamim Ara v. State of U.P[8] has already invalidated instantaneous triple talaq. While quoting Rukia Khatun v. Abdul Khalique Laskar[9] the court observed: the correct law of talaq, as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be affected[10].

The court further added: None of the ancient holy books or scriptures mentions such form of divorce. No such text has been brought to our notice which provides that a recital in any document, incorporating a statement by the husband that he has divorced his wife could be an effective divorce on the date on which the wife learns of such a statement contained in an affidavit or pleading served on her. Therefore from the above judgment it is clear that a plain affidavit or talaqnama without any efforts of reconciliation cannot effectuate a talaq. Further in the Dagdu Pathan v. Rahimbi Pathan[11] the full bench of the High Court of Bombay held that a Muslim husband cannot repudiate the marriage at will. The court added

that “to divorce the wife without reason, only to harm her or to avenge her for resisting the husband’s unlawful demands and to divorce her in violation of the procedure prescribed by the Shariat is haram”. In Mansroor Ahmed v. State (NCT of Delhi)[12] the High Court of Delhi while interpreting the Shamim Ara[13] judgment held that: A revocable talaq, the dissolution of marriage does not take place at the time of pronouncement but is automatically deferred till the end of the iddat period. This duration is specifically provided so that the man may review his decision and reconciliation can be attempted. A hasan talaq is revocable. So also are the first two talaq pronouncements in the case ccof ahsan talaq. Now, talaq-ebidaat has also been held by me to be operative as a single revocable talaq. In the recent ruling of Shakil Ahmad Shaikh v. Vahida Shakil Shaikh[14] the High Court of Bombay reaffirmed that the plea taken by the husband that he had given talaq to his wife at an earlier date does not amount to the dissolution of marriage, unless the talaq is duly proved and it is further proved that it was given by following the conditions precedent, namely, arbitration/reconciliation and valid reasons.

In Daniel Latifi case[15] the court had held that the wife’s right to maintenance is not extinguished after the iddat period but continues for her entire life.

Brief Facts of the Case of Shayara Bano

Rizwan Ahmad was the husband of the petitioner (Shayara Bano) pronounced ‘Talaq’ thrice at time, in the attendance of two eyewitnesses and conveyed a ‘Talaqnama’ which was signed on 10th of October, 2015 to Shayara Bano. The wife (Shayara Bano) challenged it in the court, urging for an order to be delivered by the Supreme Court stating “Triple Talaq” as “void ab initio” on the basis that it infringed her fundamental rights. At this moment, the statutory validity of Triple Talaq was taken into consideration as substantial question of law before the Constitution bench of the Supreme Court consist of five Learned Judges[16].

Contentions of the Petitioners[17]

The petitioner and the intervening women's groups based their contention mainly on the argument that triple talaq violated fundamental rights, namely Articles 14, 15 and 21. With reference to Masilamani Mudaliar as well as other cases in which the Supreme Court has tested the personal laws on the touchstone of fundamental rights, it was opined that Muslim personal law should be considered as "law in force" within the meaning of Article 13(1). Triple talaq, it was argued, was arbitrary and discriminatory and thus a violation of Articles 14 and 15. As held in Kesavananda Bharati and Minerva Mills, it was the courts' duty to intervene in cases of violation of any individual's fundamental right, and to render justice. This was even more so in cases where the parliament was reluctant in bringing out legislation - presumably due to political considerations. It was further held that the Constitution's provisions on religious freedom did not in any manner impair the jurisdiction of the Court. Article 25 itself postulated that religious freedom was subject to other provisions in part III. Articles 14 and 15, on the other hand, were not subject to any restrictions.

Triple talaq was in fact not even protected by Article 25, because it would not form an "essential practice" of religion. Additionally, the argumentation also relied on international treaties and covenants to which India is a party, such as the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women and the respective references to gender equality, non-discrimination and human dignity therein. Beyond that, it was held that triple talaq was not in tune with the prevailing social conditions, as Muslim women were vociferously protesting against the practice. It was held that triple talaq should be abolished in the same manner as the state had done away with practices once prevalent in the Hindu com- munity, such as sati, devdasi and polygamy. The fact that a number of countries, including theocratic states and countries with large Muslim majorities, had prohibited triple talaq not only showed that the state was indeed capable of interfering with personal law, but also led to the paradox that Muslim women in secular India had lesser rights than Muslim women in Islamic states.

Contentions of the Respondent[18]

The rebuttal of the petitioners' contentions drew on Narasu Appa Mali and Ahmedabad Women Action Group held that the constitutionality of personal laws could not be tested by the court. It was argued that there was a clear distinction between "laws" and "laws in force" in Article 13 and that this article would have to be read along with Article 372, which mandates that all laws in force in the territory of India immediately before the commencement of the constitution would continue to remain in force, until altered, repealed or amended by a competent legislature or other competent authority. Triple talaq, could therefore only be interfered with by way of legislation. Other countries, too, had banned triple talaq through legislative acts. It was further opined that triple talaq - a mode of divorce that had been practised for 1400 years - was part and parcel of the personal law and thus part of the faith of Sunni Muslims belonging to the Hanafi school. The practice was therefore protected under Article 25. Furthermore, it was argued that individual Muslim couples were free to declare triple talaq invalid in their marriage contract (nikahnama) or opt to be governed under the secular Special Marriage Act and could thus decide for themselves whether or not triple talaq would be valid in their case. Generally, it was held that social reforms with reference to personal laws should emerge from the concerned community itself without the court's interference. The Indian state had followed a policy of non-interference in personal law affairs. As a part of this policy, India had also expressed clear reservations in regard to the mentioned international conventions, which was why international law provisions were not applicable here.

Position of Triple-Talaq in Quran

In the Holy Quran there is nowhere been ordained the three divorces pronounced in a single

breath would amount to three separate divorces. The verse of Quran relied upon is verse 2:229: "Divorce must be pronounced twice and then (a woman) may be retained in honor or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them, except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is not sin for either of them if the woman ransom herself. These are the limits (imposed by) Allah. Transgress them not. For whoso transgresses the Allah's limit, such are wrong doers[19]."

Quran has been specific as to when talaq could be done and what all procedures are to be followed. Going through the Quranic principles it is pretty much obvious that God discourages divorce and encourages the continuation of marriage. Striving to preserve marriage is a duty for both husband and wife, even in extreme cases of misbehavior (4:34, 4:128). The discouragement of divorce is understood in the light of 2:226-227 where a 4-month cooling off period is issued before considering the decision of separation, in 4:35 where it is decreed that an arbitrator from each side should be appointed to try to reconcile the couple, in 4:22-23, where God is stating that unlawful marriages (out of ignorance) are not to be broken, in 2:232 where it states that reconciling after divorce is purer and more righteous choice, and in 2:229 where two chances are given to the divorced couple to get back together[20].

Position of Triple-Talaq in the Traditions of Prophet

There is no express direction in the tradition of the Prophet (PBUH) regarding the validity of three divorces together at one time. Abdullah bin Abbas, a companion of the Prophet said that triple talaq in one sitting was considered as only one talaq during the Prophet's time, the period of the first caliph Abu Bakr and during the early years of the second caliph Umar (Sahih Muslim, 1482)[21].

Triple Talak as Religious Faith

The two two-judge opinions in the Shayara case take diametrically opposite approaches to the question of constitutionality. Justice Khehar's opinion to which Justice Nazeer joins, takes the view that those parts of Muslim personal law on which the state has enacted a law – such as the Dissolution of Muslim Marriage Act, 1939 or the Muslim Women's (Protection of Rights on Divorce) Act, 1986 – can be tested for compliance with the Fundamental Rights, but those parts that were uncodified cannot be. He bases this on the view that the Muslim Personal Law (Shariat) Application Act, 1937, which provided that Shariat was the only law applicable to the Muslims and not customary law, had a limited purpose. That limited purpose, according to Khehar, was to only state that customary law was not applicable to the Muslims in matters of marriage, divorce, inheritance, and so on. The 1937 Act did not automatically bring the uncodified part of Muslim personal law within the state's jurisdiction, and as a result, it did not come within the phrase "laws in force" in Article 13 of the Constitution[22].

Triple Talak as Manifest Arbitrariness

Justices Nariman's opinion with which Justice Lalit concurs goes in the opposite direction. Nariman takes the view that the function performed by the 1937 Act was not only to abrogate the application of customary law to Muslims. It also performed a positive function, in that it also provided what was the applicable law. The entity "Muslim personal law" according to on this view, was brought into existence by the state in exercise of its civil authority, which brought it squarely within the phrase "laws in force" in Article 13. Thus, according to Nariman, even uncodified Muslim personal law can be tested for compliance with the Fundamental Rights. The judge contradicts the rationale on which Narasu was based. Further, he sets aside an earlier two-judge bench decision of the Supreme Court that had relied on Narasu. But curiously, having rejected Narasu in both substance and application, he notes that the question of whether Narasu is still valid law should be examined in a "suitable case"[23].

The centerpiece of Justice Nariman's opinion is the position that what is "manifestly arbitrary" is also unreasonable and can be struck down under Article 14, which is concerned with equality before law and equal protection of the laws. Justice Nariman notes that ITT is an "irregular or heretical form of talaq" since though lawful, it is considered to be incurring the wrath of God. For him, the arbitrariness of IIT, when seen through the lens of constitutional reasoning, its arbitrariness is thrown into sharper focus[24].

Triple Talak as Unislamic

Justice Joseph does not fully join either of the above positions, but follows a different path. On the question of the nature of the 1937 Act, he agrees with Justice Khehar and disagrees with Justice Nariman. Thus, though he agrees with Justice Nariman's view of arbitrariness as an appropriate test for Article 14, he holds that the 1937 Act cannot be subjected to it. But he disagrees with Justice Khehar too. Justice Khehar held against determining the validity of ITT by referring to the Hadiths, as he felt that it was beyond the judicial role and expertise. Justice Joseph on the other hand is of the opinion that the 1937 Act, having declared Shariat to be the law applicable to Muslims, had essentially left it to the judges to find out what the Shariat said on an issue. Therefore, leaving the question of constitutionality aside, what he pursues in his opinion is:

"...whether what is Quranically wrong can be legally right …. the simple question that needs to be answered in this case is only whether triple talaq has any legal sanctity." (Shayara Bano v Union of India 2017: para 1)[25].

His reading of the relevant verses leads him to conclude that "an attempt for reconciliation and if it succeeds, then revocation are the Quranic essential steps before talaq attains finality" (Shayara Bano v Union of India 2017: para 10)[26].

This was the view adopted by a number of high courts since the 1980s and this was endorsed by the Supreme Court in Shamim Ara v State of UP in 2002. Further, between 2002 and 2017, a number of

high court benches had relied on the Shamim Ara case and invalidated ITT.

Final Verdict of Hon'ble Court[27]

The constitutionality of triple talaq was tested by the court in different steps. The first question to answer was whether triple talaq had been codified into statutory law by the Muslim Personal Law (Shariat) Application Act, 1937. If this were the case, it would be subject to fundamental rights scrutiny. If it were not the case, the following question would be whether triple talaq was part of uncodified personal law and whether as such it could be tested against the constitution.

The first question was decided in different ways by the different judges. Justices Nariman and Lalit argued that the 1937 Act did indeed codify triple talaq under statutory law. They held that "all forms of Talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include Triple Talaq" (para 18). As a pre-constitutional law, the 1937 Act would fall within the expression "laws in force" and would be "hit by Article 13(1) if found to be inconsistent with the provisions in Part III of the Constitution" (para 19)Justices Joseph, Khehar and Nazeer disagreed with this opinion. In the words of Justice Joseph, "[t]he 1937 Act simply makes Shariat applicable as the rule of decision [...]. There- fore, while talaq is governed by Shariat, the specific grounds and procedures for talaq have not been codified in the 1937 Act" (para 4).

The question that followed and again found different answers - was whether triple talaq, was instead part of uncodified Muslim personal law. Justice Joseph answered this question in the negative, while Justices Khehar and Nazeer answered it in the affirmative. Justice Joseph arrived at his opinion through an engagement with the Quran and Islamic legal scholarship. The Quran, in his understanding, permits talaq only when there has been a previous attempt at reconciliation. However, since in the case of triple talaq, reconciliation is not possible, the practice must be held to be against the basic tenets of the Holy Quran and consequently, it violates Shariat(para 10).This argumentation resembles the above-mentioned judgments by the Gauhati High Court33 as well as the Supreme Court's opinion in Shamim Ara.34 Justice Joseph stated: "Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible" (para 24) and concluded: "What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well" (para 26).

Justices Khehar and Nazeer, on the other hand, regarded triple talaq as a part of uncodified Muslim personal law (for Sunni Muslims belonging to the Hanafi school) (para 145) and consequently had to answer whether or not the same could be tested against the constitution by the court. The two justices answered this question in the negative. This was because, in their opinion, the personal laws of any religious community were "protected from invasion and breach, except as provided by and under Article 25" (para 146). This interpretation in particular has been criticized as it regards a law rather than an individual as being protected under Article 25.35 The justices did not see a reason to engage with the relationship between Articles 25 vis-à-vis Articles 14, 15 and 21 as "other provisions of this part", which the freedom of religion is "subject to" (Article 25(1)), as they held that these rights were only applicable to State action against individuals (para 165). They concluded that the court "cannot nullify and declare as unacceptable in law, what the constitution decrees us, not only to protect, but also to enforce. [...] Article 25 obliges all Constitutional Courts to protect 'personal laws' and not to find fault therewith. Interference in matters of 'personal law' is clearly beyond judicial examination" (para 195). The judges "direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'"

Returning to the judgement by Justices Nariman and Lalit, who had regarded triple talaq as codified into statutory law by the 1937 Act and thus subject to fundamental rights scrutiny, the next question was whether Section 2 of the 1937 Act, to the extent that it authorised triple talaq, actually violated any constitutional provisions and was therefore insofar unconstitutional and void. Before engaging with a violation of Article 14, the justices in a similar vein to Justices Khehar and Nazeer above proved whether triple talaq was "saved" by Article 25. Other than their fellow judges, however, Nariman and Lalit denied such a saving through Article 25. They argued instead that triple talaq - which was perceived as sinful in theology - did not constitute an "essential religious practices" and was therefore not protected under Article 25(1) (para 25). The judges held that there was no need that "the ball must be bounced back to the legislature" (para 25), and that the court could decide on the matter. The Supreme Court's judgment in the Ahmedabad Women Action Group case was in this context dismissed as having "no ratio" and being contradictory in itself (para 30).

Having said this, the judges engaged with the core issue of the case: the question of whether the 1937 Act, insofar as it seeks to enforce triple talaq, was a violation of any constitutional provision, in this case Article 14. With extensive reference to the Supreme Court's jurisprudence, the judges argued that "legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution" (para 54). This "test of manifest arbitrariness" was then applied to the case at hand. Since triple talaq was valid without any "reasonable cause" and did not allow for "any attempt at reconciliation between the husband and wife" (para 56), the judges concluded that:

"This form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression 'laws in force' in Article 13(1) and must be struck

down as being void to the extent that it recognizes and enforces Triple Talaq" (para 57).

Overall, though via a different argumentation, Justices Nariman and Lalit thereby came to the same conclusion as Justice Kurian Joseph and by a majority of 3:2 the practice of triple talaq was set aside.

Evaluation and Critique

Compared to the court's earlier strategy of avoiding to engage in-depth with the personal laws, this judgment was indeed rather bold and might rightfully be called a "landmark decision", which marks "a signpost moment of the women's movement in India." The multi-faith composition of the bench, which aimed at providing a "neutral" and differentiated view on the matter, was also a laudable approach. Thus, while the decision was a step in the right direction, it did not go as far as it could have gone, had gender equality been taken seriously. Despite long elaborations on whether or not triple talaq was "protected" by Article 25, the court did not position itself clearly on the relationship between gender equality (Article 14 and 15) and religious freedom (Article 25). It also refrained from expressively overruling Narasu Appa Mali. And since the court only set aside one specific form of talaq, this means that the other forms - talaq-e-ahsan and talaq-e-hasan - remain in place and Muslim men retain their right to divorce their wives by pronouncing talaq over a period of a few months. Thus, the decision is limited insofar as it constrains itself to a small aspect of law and does not actually set a precedent in terms of generally applicable standards for further engagements with discriminatory personal law provisions.

Post Decision Position

India is currently mired in a war between theology and law as it tries to articulate an appropriate policy response to the controversial triple talaq issue. With the triple talaq already been declared invalid by the Supreme Court, the government's haste in trying to criminalizing it reeks of a misplaced agenda. Muslims have welcomed the judicial verdict and are themselves keen to build a cultural environment conducive to it to take firm roots. Wisdom demands that we wait and see how the law translates on the ground. The resistance to the government's move is rooted in the Muslim community's fear that it would amount to an encroachment on their cultural and religious space and would set precedence for the undermining of their minority rights—part of the reason why the ruling was delivered with a hesitant 3-2 majority. Muslims feel that a progressive judgment of the Supreme Court is being used to formulate a regressive law[28].

Passing of Ordinance

Stating that there was an "overpowering urgency" to bring the measure as instances of this mode of divorce continued unabated despite the Supreme Court striking it down, the Union Cabinet passed the Ordinance to amend provisions of the Triple Talaq Bill. President Ram Nath Kovind signed the Ordinance. The official name for the law is the Muslim Women (Protection of Rights of Marriage) Ordinance 2018. The Ordinance states that even though the Muslim Women (Protection of Rights on Marriage) Bill, 2017 is pending in the Rajya Sabha and despite the Supreme Court has observed that the practice of Triple Talaq is unconstitutional, the practice still carries on.

Here are a few of the key features of the Ordinance[29]:

1. The Ordinance is applicable to the whole of India but it is not extended to the State of Jammu and Kashmir
2. According to the Ordinance, any pronouncement of 'talaq' by a Muslim husband to his wife in any manner, spoken or written, shall be void and illegal.
3. Any Muslim husband who communicates the 'talaq' orally or in writing may face a punishment upto three years in jail. The punishment may be also extended.
4. The Ordinance also states that despite the presence of general laws in force, if a Muslim man pronounces 'talaq' to his wife, then the woman and her children are entitled to receive an allowance for subsistence. Such amount can be determined by a Judicial Magistrate of the First Class.
5. The Ordinance also states that a Muslim woman is entitled to the custody of her minor children even if her husband has pronounced 'talaq' to her.
6. The offence is pronouncing talaq is cognizable if the Muslim woman on whom it is pronounced, communicates the information to a police officer.
7. The offence is also compoundable, if the Muslim woman insists for the same and the Magistrates allows certain terms and conditions which he may determine.
8. A person accused of this offence cannot be granted bail unless an application is filed by the accused after a hearing in the presence of the Muslim woman (on whom talaq is pronounced) is conducted and the Magistrate is satisfied about the reasonable grounds for granting bail.

Way Forward

If we throw light on the provisions of the ordinance, and on the basis of principles of Islam, then it is making the marriage as regular, and giving a legitimate status, even after the pronouncement of Talaq on the wife, and compelling the Muslim husband to live with the divorced spouse, which is strictly prohibited in Islam and against the spirit of Muhammaden Law. It is advised that instead of criminalizing the dissolution of marriage by uttering 'Talaq' and giving a legitimate effect to the marriage of divorced woman, the administrative machinery could launch an awareness programme in which they should make it in the knowledge of the spouses; the best approved method of Talaq (as defined supra) and other form of Talaq in which reconciliation is possible, in order to ensure fair justice and smooth running of law and order and also to provide equal justice to the Muslim woman especially.

End Notes

1. *Tanja Herkoltz, "Shayara Bano versus Union of India and Others. The Indian Supreme Court's*

Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice " available at https://www.researchgate.net/publication/322335780_Shayara_Bano_versus_Union_of_India_and_Others_The_Indian_Supreme_Court's_Ban_of_Triple_Talaq_and_the_Debate_around_Muslim_Personal_Law_and_Gender_Justice , visited on August 25 2018 at 10:00 a.m.

2. *Supra Note 1*
3. *Supra Note 1*
4. *Saloni Sharma, " Triple Talak : a Critical Analysis ", available at :http://racolblegal.com/triple-talaq-a-critical-analysis/ visited on 10 september 2018.*
5. *Moin Qazi, " Tracing the history of Triple Talaq to look to the future ", available at: https://qrius.com/history-triple-talaq-future/ assessed on 15 September 2018*
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Add Conclusion in your paper.