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CRITICAL ANALYSIS OF STATUTORY MUSLIM PERSONAL LAWS RELATED TO TALAQ IN INDIA

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Abstract

Personal laws play very significant role in institution of marriage and other allied matters like maintenance, divorce and so on. Divorce in Muslim law is very critical in nature and most of the time it has been subject to severe criticism by the legal analysts. Personal laws are always considered as a hurdle in implementing in Unifor Civil Code. Muslim personal law though has not fully codified, but there are certain areas in respect to talaq to protect rights of Muslim women in respect of talaq. This paper critically analyses the statutory personal Muslim laws related to divorce. Part I opens the paper with remarks about the talaq and condition of Muslim women. Part II analyses constitution and Muslim personal laws especially uniform Civil code and talaq under Muslim law. Part III critically analyses the statutory laws related to talaq such as Dissolution of Muslim Marriage Act, 1939, Muslim Women (Protection of Rights on Divorce) Act, 1986, and Muslim Women (Protection of Rights on Marriage) Act, 2019. Part IV concludes the paper on the basis of discussion held in previous parts.

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INTRODUCTION

Personal laws play very significant role in institution of marriage and other allied matters like maintenance, divorce and so on. Divorce in Muslim law is very critical in nature and most of the time it has been subject to severe criticism by the legal analysts. The constitution of India gives space to every religion and promotes personal laws, though Article 44² of the constitution speaks about uniform civil code, but that is hard reality to be realized due to diverse society and various minorities, it is very difficult to implement uniform civil code. Cultural relativism has also significant issues with uniform civil code because cultural and religious minorities are having their own significant rituals which make the institution of marriage complete and these are essential practices for validity of marriage in the eyes of society³ so it is very difficult to apply a uniform law to regulate marriage, divorce and other personal issues. The Constitution of India, under Art. 44 provides uniform civil code to bring integration but it remain a dead letter and can never become reality, though religious and cultural minorities are against this code because of their traditional practices will vanish if this code will be implemented.⁴ Muslim personal law is very intricate and for marriage and divorce, religious scriptures plays very significant role and Muslim jurists have also developed various traditions for development of Muslim legal jurisprudence.

In previous paper we have discussed various sources of Muslim law which contain significant traditions and process for triple talaq especially under Quran and other sour primary sources. Apart from that statutory rules are also required to regulate personal matters, so there are various laws have been enacted for divorce in Muslim community. These laws have been discussed in detail in this paper. That is why personal laws having significant place Dissolution of Muslim Marriage Act, 1939 was first statute dealing with divorce in Muslims in India. These laws have been discussed in detail as following including personal laws passed during British period.

² The Constitution of India, 1950. Art. 44.

³ Shalina A Chibber, "Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code" 83 *Indian Law Journal* 695-717(2008).

⁴ Gerald James Larson (Ed.), *Religion and Personal Law in Secular India: A call to Judgment*, 33-40 (Indiana University Press, 2001).

CONSTITUTIONAL LAWS AND TRIPLE TALAQ

Constitution is fundamental supreme law of the land and all the laws enacted under the constitution. Part III of the constitution protects fundamental rights which are justifiable and enforceable by the courts. Part IV of the constitution contains directive principles of state policy, especially article 44 is very significant from the aspect of personal laws. Preamble of the constitution of India guarantees human dignity and equality to all its citizens. If we will talk about triple talaq, instant which is violative of gender equality and arbitrary enforcement of male dominance? Article 14⁵ provides equality before law and equal protection of laws. Talaq ul biddat is also considered violative of Article 15⁶ that discriminates based on sex because the Muslim male have right to give instant talaq which though not provided under any religious traditions but its arbitrary use of male power.

The court interpreting the constitution as living document and realizing rights held in *Manoj Narula v. Union of India*⁷:

“The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr Ambedkar had, throughout the debate, felt that the Constitution can live and grow on the bedrock of constitutional morality.”

Speaking on the same, he said:

“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.”

Apart from Articles 14 and 15, other constitutional provisions like Articles 19, 21, 25, 26 and 29 were held violative from fundamental rights perspective. Articles 14 and 15 on the one hand, and Articles 25 and 26 on the other, must be harmoniously construed with each other, to prevent discrimination against women, in a manner as would give effect to equality, irrespective of gender. It was contended, that it was totally irrelevant whether ‘personal law’ was founded on custom or religion, or was codified or uncodified, if it is law and “rule of decision”, it can be challenged

⁵ The Constitution of India, 1950. Art. 14

⁶ *Id.* Art. 15.

⁷ (2014) 9 SCC 1.

under Part III of the Constitution.⁸ The court considered that Muslim personal law does not approve talaq-ul-biddat, moreover the constitutional provisions are permitted fundamental rights but personal laws are not allowed to take fundamental rights away or cultural relativism should not become an hurdle in realization of fundamental rights of common people. Article 25 of the Constitution provides all persons having right to freedom of religion but that freedom is subject to various conditions that required to be fulfilled.

Talaq ul-bidat is not merely a violative of fundamental rights but its derogatory nature is violative of human dignity. The court ascertain human dignity in *Francis Coralie Mullin v. Union Territory of Delhi*⁹ the court held that human dignity is basic essential of component of right to life and expression. The court observed that:

“Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights”

Conferment of social status which is based on patriarchal system, prevalent in society is against the letters and spirit of the Articles 14 and 15 of the constitution. Male dominance is instant triple talaq, even which is not recognized under Muslim religious traditions depicts the picture of arbitrary enforcement of male behavior and that even education could not eliminate from its roots and bring gender equality.

Gender justice is a significant goal that needs to be achieved by the country otherwise half of the citizenry would fully not be able to enjoy their rights. For this we can refer Article 51 (A) clause (e)¹⁰ in the form of duty provided as:

“to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women”

Gender equality and human dignity are non-negotiable and these rights are not only essential for realizing their rights, rather quintessential for equal citizenship rights as well. Moreover right to equality and human dignity are required to be enforced in its true sense which is only possible, if

⁸ *Sharya Bano v. Union of India*, AIR 2017 SC 4609. para 48.

⁹ AIR 1981 SC 746.

¹⁰ The Constitution of India, 1950. Art. 51 A (e).

these patriarchal practices will be eliminated from the society, so women can claim their rights according to changing times and can feel part of democratic system.

Moreover, human rights can be advanced only if the constitutional philosophy will also follow the concept of living constitution and especially broadening the concept of secularism which is basic feature of the constitution and all human beings are free to express their decisions but not merely following the practices which may help in realizing gender equality.¹¹

Freedom of religion which has been ascertained under article 25 of the constitution is very broad. Art. 25 contains “all” persons “equally entitled to freedom of conscience, profess and practice and propagate the religion. Since the equality clause also has been imbibed in the said provisions then interpretation of religious practices should not be subject to patriarchal system, if it is so then these interpretations are required to be considered null and void. Talaq-ul-biddat which has not even been religiously endorsed under Islam, then this arbitrary practice should not be justified in the basis of religious and coloring it with patriarchal; power. The court considering the personal law aspect held that:

“that ‘personal laws’ ought to be examined, in the light of the overarching goal of gender justice, and dignity of women. The underlying idea behind the preservation of ‘personal laws’ was, to safeguard the plurality and diversity among the people of India. However, the sustenance of such diverse identities, according to the learned Attorney General, cannot be a pretext for denying women their rightful status and gender equality. It was submitted, that ‘personal law’ was a part and parcel of ‘law’ within the meaning of Article 13. And therefore, any such law (‘personal law’) which was inconsistent with fundamental rights, would have to be considered void.”¹²

UNIFORM CIVIL CODE AND MUSLIM PERSONAL LAW

Part IV of the Constitution contains directive principles of state policy which are significant and guidelines for the state to enact policies and law especially more focusing on socio-economic rights. Part IV is unjustifiable in nature and cannot be enforced by the courts. The court explaining the relationship between fundamental rights and directive principles held that:

“Fundamental rights are subservient to directive principles. Framers of the constitution did not contemplate or created disharmony among fundamental rights and directive principles, rather

¹¹ *Supra* note 7.

¹² *State of Bombay v. Narsu Appa Mali*, AIR 1951 Bom.84.

considered supplement to each other. The basic structure of the Constitution rests on the foundation that while the directive principles are the mandatory ends of government, those ends can be achieved only through permissible means which are set out in Part III of the Constitution. In other words, the mandatory ends set out in Part IV can be achieved not through totalitarian methods but only through those which are consistent with the fundamental rights conferred by Part III".¹³

Art. 44 of the constitution provides "*state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.*"¹⁴ Article 44 has been drafted with the intention that it should not conflict religion and personal law, though the society has always taken steps against uniform civil code because one law which will be applied in the entire state will ruin the cultural and religious traditions related to marriage and family matters.

The court for the first time spoke about UCC in *Mohd. Ahmad Khan v. Shah Bano Begum*¹⁵ held that the central government must enact uniform civil code for national integration. Mentioning of common civil code on the facts of this case is mystifying as the law it has interpret an apply in that case- sec.125 of CRPC had been long help to apply across the adherence of all religions, respective of their personal laws. If we look at the scenario of UCC, it is not supposed to override customary rituals, but the minorities are in fear of that UCC will usurp customary and minorities cultural practices.

The apex court in *Sarla Mudgil v. Union of India*¹⁶ held that

"Marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Art.44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."

The contention for UCC and personal law arise from that personal laws are not derived from the constitution rather these are originated from the religious scriptures and courts have also made it clear that Art. 25 contains mere faith and religious belief not religious practices that have

¹³ *Minerva Mills Ltd and Ors. v. Union of India*, AIR 1980 SC 1789.

¹⁴ The Constitution of India, 1950. Art. 44.

¹⁵ AIR 1985 SC 945.

¹⁶ (1995) 3 SCC 635.

constructed by the society. Minorities are afraid that implementation of UCC will destroy their cultural integrity and religious identity.

So far as the personal laws are concerned these have been given enough space under constitution and also significant from the aspect that, if personal laws will be harmed then it will lead to encroachment of the protection provided under the constitution. But it is also required that fundamental rights are non derogable. If the personal laws are violating individual rights provided under part III of the Constitution, then personal laws will be invalidated to the extent violating fundamental rights. Right to freedom of expression and individual autonomy are quintessential for human development, if any segment of society will be taken away then they will not be able to realize their rights in its fullest extent. Apart from that gender equality and justice are constitutional goals. Talaq ul-biddat is arbitrary in nature and enforcement of male dominance so it is unconstitutional.

PERSONAL LAWS RELATED TO TALAQ UNDER MUSLIM LAW

THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937¹⁷

This Act was enacted with the object to apply Muslim personal law (Shariat) on Muslims in India. This is very small legislation containing only 6 sections. Section 1 of the Act provides its nomenclature and its application, scope geographically.¹⁸ Section 2 provides application of shariat laws on Muslims in India. It provides that;

“Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, Ila, Zihar, Lian, Khula and Mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”¹⁹

¹⁷ Act No. 26 of 1937.

¹⁸ Id. s. 1.

¹⁹ Id. s. 2.

This section more focuses on personal law regarding marriage and dissolution of marriage and also containing all forms of talaq prevalent in the Muslim community like Ila, Zihar, Mubarat and so on.

Section 3 of the provides that a Muslim person has power to made self-declaration regarding he is a Muslim, he has competency to make a under Sec. 11 of the Indian Contract Act, 1872 and regarding is residential status.²⁰ But the declaration must be before any authority which will help to seek benefit of this section. After the declaration of this Act, provisions of Actions 2 will be application on the declaring and his minor children and descendants. Sub-section 2 contains that if declaration has not been accepted by the said authority under Sub-section 1 of the section 3, can apply to State through special or general appeal for such deceleration before the authorities appointed by the State government at state level official.²¹ The person who makes declaration will have to satisfy all the conditions for the declaration. Section 4 of the Act confers powers on the State Government to make rules regarding to effectuate the purposes of the Act. the Govt. can make rules for following matters:

- a. For prescribing the authority before whom and the form in which declaration under this Act shall be made;
- b. For prescribing the fees to be paid for the filing of the declaration and for the attendance at private residence of any person in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.²²

The rules must be published in the official gazette and rules made by the state government to be presented before the state legislature.

There are various cases which have been decided by the Supreme Court for the interpretation of the Shariat Act, 1937. In *Noor Jahan Begum v. Eugene Tiscenko*²³ the court observed that:

“The rules formulated by the Islamic jurists, which are under discussion, are still operative as part of the personal law of Muslims. He admits that, if that personal law conflicts with the personal

²⁰ Id. ss. 3(1).

²¹ Id. ss. 3(3).

²² Id. ss. 4(2).

²³ AIR 1941 Cal 582.

law of some other community, the matter must be decided according to the rules of justice, equity and good conscience, but he maintains that the right of a woman who has been converted to Islam to obtain dissolution of her marriage with an unconverted spouse, has been recognized as the law of India by the Courts in this country and that such right can be supported as being both equitable and just”.

In *A.S. Parveen v. Union of India*²⁴ the court held that section 2 of the Shariat Act, if it has been construed from taking talaq ul biddat in its context then it is violative of Articles 14, 15, 19 and 25 of the Constitution. The court considered that a talaq cannot be talaq unless it has not been tried for reconciliation, but in case of triple talaq it is arbitrary and imposition of whim and caprice of husband on the women. Therefore, it is illegal and unconditional and reduces a woman to mere an object.

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

This Act came into picture with an object of consolidating and clarifying the provisions regarding dissolution of muslim marriage according to Muslim law by married woman and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. This act is consisting of six sections. Section 1 of the Act provides nomenclature and its scope and extent of application.²⁵ Section 2 is very significant and it provides grounds of providing decree of dissolution of marriage. This section provides a woman can file a suit against her Muslim husband to obtain decree of dissolution of marriage under the grounds contained as following:

- a. Husband is not known for the period of last four years: if husband or his whereabouts are not known for the last four years then a Muslim woman can file a petition for dissolution of marriage.²⁶
- b. Husband's failure to provide maintenance for the period of two years: if a Muslim husband after the marriage unable to maintain his wife for two years then a woman has right to apply for decree of dissolution of marriage. The Kerala High Court in *Veran Sayvu Ravuthar v. Beevathumma*²⁷ held that a Muslim women can file a petition under section 2 (ii) for

²⁴ (2002) 3 K.L.T 537.

²⁵ Section 1

²⁶ Id. s. 2(1)

²⁷ II (2003) DMC 20.

dissolution of marriage if the husband unable to maintain her for two years. The court observed that:

“Marriage as per the Muslim law is in the nature of a contract. But it has got a religious sanction as well. That contract is to subsist during the life period of the couple or until they cannot live within the limits of the God. Divorce has to be viewed in this perspective by everyone who deals with Islamic law and not lightly.” Thus, the sanctity of marriage, the essential basis of family life, is recognized and upheld. But at the same time the incompatibility of individuals and weakness of human nature required certain outlets and safeguards, without ruining the sanctity of the marriage at the expense of human life.”

Therefore, if required conditions to live a healthy life are not met by the husband then wife can ask for divorce as matter of right.

- c. Husband sentenced to the imprisonment of seven years or upward: if a husband who has committed any serious crime and has been imprisoned for the period of seven years or upward, then a married Muslim woman has a right to file a petition for the dissolution of marriage under Muslim personal law and the court will look into the condition and will confer a decree on the satisfaction of the said conditions as asked by the court for the dissolution of marriage.²⁸
- d. Failure to perform marital obligations for the period of three years: if the husband failed to perform his marital obligations for the period of three years and even without any reasonable cause then a wife can file a petition for divorce under the said Act. the High Court of Kerala in *Ittoochalil Meethal Moossa vs Pachiparambath Meethal Fathimas*²⁹ observed that if a husband failed to perform obligations then a wife under clause (iv) of section 2 can file a divorce petition for the dissolution of marriage. clause II of the section does not mention “without any reasonable cause, whereas it has been mentioned under clause IV of the section. The court observed that: *“It must therefore be held that whatever the cause may be, the wife is entitled to a decree for the dissolution of her marriage if the husband fails to maintain her for a period of two years even though the wife may have contributed towards the failure of the maintenance by her husband. According to these decisions a wife's right to dissolution of marriage for the neglect or failure of the husband*

²⁸ Id. s. 2(ii)

²⁹ AIR 1983 Ker 283.

to provide for her maintenance cannot be linked up with her right to claim maintenance against the husband.”

- e. **Impotency of Husband:** clause (v) of the Section 2 provides if at the time of marriage the husband was impotent and continues to be so then wife can file a petition to seek dissolution of marriage. Karnataka High Court in *Abdul Azeem v. Fahunnisa Begum*³⁰ a petition was filed by a muslim wife for the dissolution of her marriage, on the basis that her husband was impotent at the time of marriage and continued to be so. They got married on 12 June 1960 and suit was filed on 3 October 1960. Husband was 20 years at the time of marriage and wife was 18 years old.

*“Impotence of the husband which is a ground for dissolution is the deficiency in the power of manhood produced by inability for consummation and is excluded where consummation is made impossible by the wife's frigidity or unreasonable opposition.” So, it would not be right to say that the subsequent acquisition of virility could be proved only through ability for the sexual act with the wife. “The view pressed on us to the contrary, if accepted, would make it the duty of the wife to make available her person to the husband again and again whenever demanded during the entire period of a year about which proviso (c) speaks for the fulfillment of the husband's hope that at some point of time during that period he might make the discovery that manhood has returned to him. An interpretation which subjects the wife to this queer predicament cannot be sound”.*³¹

- f. *Leprosy or venereal disease:* a wife can file a petition for dissolution of her marriage on the ground that her husband is suffered with leprosy or venereal disease which must be incurable. Though with the advancement of medical science leprosy is curable disease in its initial stage. But there is no period has been mentioned for leprosy. If the leprosy is at very malignant and contagious level then it is not curable and then it can be considered as ground of divorce but if it can be cured then court can take time to reach at conclusion if husband can be cured. Venereal diseases are also ground of dissolution of marriage and these are communicable.³²

³⁰ AIR 1969 Kant 226

³¹ Id. para 30.

³² Supra note ss. 2(vi).

- g. *Insanity*: sub-section (vi) of section 2 of the Act contains insanity as ground of dissolution of marriage. under the act period for insanity has been two years for dissolution of marriage. if the period is less than contained in the section then it will not be valid ground.³³
- h. *Option to exercise puberty*: if a girl was given in marriage by her father or guardian before she attained the age of fifteen years then she has right to repudiate the marriage before the age of eighteen years and but for this option marriage should not have been consummated. If the marriage has been consummated then person will not be able to exercise. Delay in exercising this option will not be considerable, except in exceptional cases.³⁴
- i. *Cruelty as ground of dissolution*: legal concept of cruelty has been varying from one place to another and one society to another and according to socio-economic conditions prevalent in that society. none of the personal law have given any definition of cruelty and what consisting of it. Courts have interpreted the law what amounts to cruelty. Cruelty can be of two types: physical and mental cruelty. Intention to be cruel is not material. If the husband is cruel and any kind of cruelty is there then a Muslim wife has right to file a suit for dissolution of marriage.³⁵
- j. *Any other valid ground*: sub-section (ix) of section 2³⁶ provides: on any other ground which is recognized as valid for the dissolution of marriages under Muslim law: Provided that
- (a) no decree shall be passed on ground (iii) until the sentence has become final;
- (b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfied the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and
- (c) before passing a decree on ground (v) the Court shall, on application by the husband, made an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

³³ Ibid.

³⁴ Id. ss. 2(vii).

³⁵ Id. ss. 2(viii).

³⁶ Id. ss. 2(ix).

Section 3 of the Act provides that notice must be served upon the legal heirs of the husband where the whereabouts of the husband is not known for the said period.³⁷ Section 4 of the Act provides that if a Muslim married woman converts to any other faith then it will not automatically dissolve her marriage, rather she will have to apply for dissolution of marriage and she can avail other grounds of dissolution of marriage.³⁸ section 5 of the Act protects right to dower which shall not be affected due to dissolution.

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

In April 1985, the Supreme Court of India in Shah Bano Case³⁹ held that a Muslim husband is responsible to pay maintenance under Section 125 of Criminal Procedure Code, 1973. The judgment in Shah Bano led to widespread community protests in India. The Muslim community's reaction against the Supreme Court verdict ranged from numerous meetings and conferences organized by several Muslim groups, such as the Jamiate-Ulema-e-Hind, the Jamia Millia Islamia, and the All Indian Muslim Personal Law Board to mass protests in various regions of India, including Uttar Pradesh and Bihar, which have a significant Muslim population. The Rajiv Gandhi government finally succumbed to the opposition and pressure of the community and enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986.⁴⁰ Section 1 of the Act provides scope and extent. The Act shall be applicable in India. Section 2 of the Act contains some definitions for the convenience of interpretation. The section defines "divorced women", "iddat period" and Magistrate.⁴¹ The most significant aspect of this Act is incorporation of Section 125 to 129 of the Code of Criminal Procedure for maintenance. Section 3 of the Act deals with Mahr and other properties that will be given to a woman after divorce. Section 3 (1)(a), of the Act contains provision for the maintenance of women during iddat period by her former husband. Prima facie it seems that under this Section parliament had not intended to impose obligation on the husband after the iddat period. Iddat period will consist of in case of divorced woman as three menstrual courses from the date of divorce if it has application. Or three lunar months after the divorce of the iddat is not going to be observed/ or if she is enceinte at the time of her divorce, the period between divorce and delivery of her child or the termination of her pregnancy whichever is earlier.

³⁷ Id. s. 3.

³⁸ Id. s. 4.

³⁹ Mohd. Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945.

⁴⁰ Act No. 25 of 1986.

⁴¹ Id. s. 2.

⁴² In *Daniel Latif and ors v. Union of India*⁴³ the Supreme Court held that the husband will be bound to pay maintenance during the iddat period means on or before the iddat period but not afterwards. If he fails to perform this obligation, then divorced wife has right to claim maintenance under section 3(3) of the Act. The Supreme Court rightly interpreted Section 3 of the Act in the light of objectives laid down in the preamble of the Act. An interpretation of Section 3(1) (a) definitely protects the interests of a divorced wife, but at the same time all husbands may not be in a position to make reasonable and fair provisions and maintenance on or before the expiration of the iddat period. So far as the punishments under the Act especially under section 3 of the Act are concerned are very mild and inadequate for non- performance of obligations.⁴⁴ Section 4 of the Act imposes obligation on the relatives, children to maintain divorced wife, especially who would inherit her property after her death.⁴⁵

Section 5 of the Act is very significant for the protection of interests of divorced women it offers an option to the parties either to pay maintenance under the Act or they can resort to remedies available under Code of Criminal Procedure, 1973 from Section 125 to 128. For the purpose of this Section, the date of the first hearing of the application according to explanation provided under Section 5 of the Act means the date fixed in the summons for the attendance of the respondent to the application. For the application of Sections 125 to 128, an 'affidavit' or 'declaration' in writing from both the parties is necessary. An 'affidavit' or 'declaration' according to Section 5 may be made either jointly or separately. As word 'and' is used in the Section, an affidavit by both the parties is mandatory. Further, word 'may' has been used in Section 5 of the Act, therefore, application of Sections 125 to 128 of Cr. P. Code 1973 is discretionary, and it has provided discretion to the parties, to be governed or not to be governed by Sections 125 to 128 of the Cr.P.C. 1973.

Section 6 of the Act confers powers on the Central Government to enact rules for the fulfillment of the objectives of the Act, especially any kind of declaration or form regarding section 5 of the Act, or any procedure that will be applied by the Magistrate to deal with the applications coming for maintenance of divorced women under the Act like including the serving of notices to the

⁴² Id. s.2(b).

⁴³ (2000) 7 SCC 740.

⁴⁴ Id. s.3.

⁴⁵ Id. s. 4.

parties to such applications, dates of hearing of such applications and other matter or there can be any other matter that needs to be prescribed.⁴⁶

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019.

The apex court on 22 August 2017 delivered *Sharya Bano v. Union of India*⁴⁷, a historical judgment where the court has considered triple talaq as unconstitutional and upheld the rights of Muslim women and held instant triple talaq is arbitrary and cruel in nature and also violative of fundamental rights of Muslim women and also takes away their right to decide and challenges personal autonomy. After the judgment, The Muslim Women (Protection of Rights on Marriage) Bill, 2019 was introduced in Lok Sabha by the Minister of Law and Justice, Mr. Ravi Shankar Prasad on June 21, 2019. It replaces an Ordinance promulgated on February 21, 2019. The Bill was passed by Lok Sabha 25 July 2019 and Rajya Sabha 30 July 2019. The Act is consisting of 8 Sections and divided into three papers.⁴⁸

The preamble of the Act protects the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide formatters connected therewith or incidental thereto.⁴⁹ Section 1 of the Act provides scope and extent of the Act. The Act shall be applicable to whole of India. Section 2⁵⁰ of the Act, defines number of terms for convenience of application of the Act.

Section 3 of the act criminalizes triple talaq in any form pronounced by the husband or it may be in any form electronic, pronounced or written which having instant effect. Talaq in any form will be void and illegal.⁵¹ If we look at the Islamic jurisprudence on triple talaq that is not even allowed, so such divorce does not exist though some people in Muslim society might have adopted instant triple talaq though not allowed in one sitting according to religious traditions. Talaq is not a crime under law and rather it is matter of right, though the process adopted by the people can be

⁴⁶ Id. s.6.

⁴⁷ AIR 2017 SC 9.

⁴⁸ Act No. 20 of 2019.

⁴⁹ Id. Preamble.

⁵⁰ Definitions.—In this Act, unless the context otherwise requires,— (a) “electronic form shall have the same meaning as assigned to it in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000);” (b) “Magistrate” “means a Judicial Magistrate of the first class exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974), in the area where the married Muslim woman resides”; and (c) “talaq” means “talaq-e-iddat or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband”.

⁵¹ Id. s. 3.

somewhat wrong. Section 4 of the Act imposes imprisonment up-to three years and fine if talaq will be pronounced under section 3.⁵² Triple talaq was an easy but cruel way for a Muslim husband to end the marriage. Getting it declared null and void by the SC was a result of a long and sustained campaign by Muslim women. It is quite possible that an ill-intentioned husband may still take recourse to the invalid procedure to end his marriage, just as harassment for dowry is not an uncommon practice among Hindus.

Such a divorce is illegal and amounts to abandonment. This is why the government justified that a law is needed to end the practice. But this does not address the problem of illegal abandonment: a Muslim husband can still get rid of his wife without uttering talaq three times and will face no criminal sanction. He may not even go through proper divorce proceedings, thus leaving the helpless wife to her own fate

Section 5 of the act protects subsistence rights like maintenance of Muslim wife upon whom talaq has been pronounced and including children and other allowances that are required for living life.⁵³ Section 6 of the Act provides custody of minor child, if triple talaq has been occurred and custody of the minor child will be given to married wife and the magistrate will determine the question of custody in accordance with existing law.⁵⁴

Section 7 of the Act makes offence of triple talaq cognizable and compoundable in accordance with code of criminal procedure, 1973 as:

“(a) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom talaq is pronounced or any person related to her by blood or marriage;

(b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom talaq is pronounced with the permission of the Magistrate, on such term and conditions as he may determine.

(c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman

⁵² *Id.* s. 4.

⁵³ *Id.* s. 5.

⁵⁴ *Id.*s.6.

upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.⁵⁵

The present act is violative of Article 14 of the constitution because it is not following equality before law and equal protection of law. If a Hindu male gets divorce according to Hindu marriage act is not crime, then how a Muslim man getting divorce according to Muslim personal law is crime.

Thus, the government's stand is **arbitrary and irrational**, and the data cited by it that its decision was influenced by over 60 cases of triple divorce pronounced, despite the Supreme Court's decision, is illegal. The belief that if wrongful conduct becomes a crime, people will refrain from indulging in it, is both erroneous and not been substantially established by any authentic empirical research. Since triple talaq no more dissolves marriage, its pronouncement is inconsequential and in no way adversely affects either the wife or the society. Thus, no legitimate state interest is adversely affected.

CONCLUSION

The above discussion has significantly provided an insight of personal laws and talaq-ul-biddat which is arbitrary and personal laws are not even endorsing its existing. The constitution of India which is supreme law of the land guarantees fundamental rights which are inherent and justifiable in nature signified in part III whereas part IV of the Constitution contains directive principles which are non-justifiable but are supplementary to each other it is duty of the state to enact uniform civil code. Apart from that Muslim personal laws provide an insight into existing scenario especially protecting rights of Muslim women especially maintenance and Mahr and post-divorce rights. Criminalization of instant triple talaq has not only given relief to women but will also empower them to challenge the religious practices which are violating gender equality and check on patriarchal system. The personal laws are meant to protect rights of divorced Muslim women. The Triple Talaq criminalization under 2019 Act is not mere criminalization but also usurpation of personal laws. Punishments under the Act are very inadequate but criminalization of triple talaq is not meeting the constitutional theory of justice because criminalization of personal decisions will somewhere impede personal laws.

⁵⁵ *Id.* s. 7.