



The Muslim Women (Protection Of Rights On Marriage) Act, 2019: A Law With A Hollow Scheme

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Article History	Abstract
<p>Received: 15.09.23 Revised: 20.09.23 Accepted: 29.09.23</p> <p>CC License CC-BY-NC-SA 4.0</p>	<p>The fight of Muslim women in India is a crusade of rights. They have often remained a puppet in the name of “Women’s rights”. The major reason behind this is a lack of shrewdness of those women who give green signal to shallow and superfluous rights by victimizing their eternal rights. One such recent example which has been a subject of controversy is victimized Muslim women who assuredly need protection through the liberal rights discourse but are bestowed the insignificant rights through the currently enacted, The Muslim women (Protection of rights on marriage) Act, 2019. This Legislation has been highlighted as social reformation for married Muslim women which ensures Gender equality and helps promote married Muslim women’s fundamental rights and their empowerment. To the contrary, this act shows red eye towards Muslim husband by criminalizing the pronouncement of triple talaq. This paper explores the issue of criminalizing private conduct under the shade of Jurisprudence which determines State’s limit to regulate private behaviour. Furthermore, it advocates reviving the identity of Muslim women by unveiling the repercussions of the provisions of the Act. It further efforts to solve the issue of triple talaq by taking it to the plane of ‘Individual Autonomy’. The present research is descriptive in nature based on secondary data.</p> <p>Keywords- The Muslim Women (Protection of Rights on Marriage) Act 2019, Gender equality, Criminalization, Individual Autonomy.</p>

INTRODUCTION

Marriage in Islam is Sunnah and the whole purpose of the marriage is to attain tranquillity and peace. Hence, if either spouse is unhappy he or she has a right to dissolve the marriage and move on in their lives. To understand the concept of divorce the types of divorce are to be looked into first. Dr. Furkan Ahmed in his article has explained the categories of divorce. Accordingly,

“Talaq by husband (Talaq, Ila, Zihar)

Talaq by Wife (Talaq-e-Tafwid, Khula)

Talaq by common consent (Khula, Mubarat)

Talaq by Judicial Process (Lian, Fask)^{vi}

There is misconception on the issue of talaq. The Muslim law does confer a right to divorce not to only husband but to wife also. Talaq-e-Tafwid and Khula are the modes of divorce which entitles women to seek divorce. Islam permits only husband to pronounce talaq on his wife and not vice-versa. Nonetheless, a muslim husband by an agreement can delegate his power to divorce to his wife or a third person. This form of talaq is called Talaq-e-Tafwid, a delegated divorce. In Khula wife initiates talaq. She returns Mahr. Even though consent of husband is required in the form of Khula, that consent is a mere formality to decide that from when Khula becomes operational and the husband is left with no choice but to give consent to wife.

It is manifested that The Muslim Women (Protection of Rights on Marriage) Act 2019 is the triumph of Gender justice that will spread equality. This Act declares Instant triple talaq void and illegal and even declares it cognizable, compoundable and non-bailable criminal offence, which is punishable up to three years of imprisonment and fine. As the three words talaq have led this Act come into being the concept of Instant Triple Talaq that is Talaq-e-Biddat should be addressed first. Talaq is an Arabic word which means "To release from any bondage or contract". Marriage under Muslim law can be dissolved by way of Talaq. Under Muslim law marriage is considered as a contract, a sacred bondage serves as a mean to emotional gratification and tension reduction. The word Talaq itself is considered an evil in Urdu and Biddat connotes the meaning sinful. Instant triple talaq is more accepted non-statutory form of divorce among muslims. Prophet Mohamed (P.B.U.H.) discouraged and disapproved the practice of divorce. Despite this, instant triple talaq as a form of talaq has been prevailing. When it becomes impossible for spouses to live under same roof, they can dissolve it. It is meant only as a last resort when it has become truly inevitable.

Further, it has been proclaimed that the parliament has corrected the historical wrong by enacting law for victimized muslim women. Albeit, the only problem of triple talaq has not made a muslim woman victimised because the problems like divorce, domestic violence, separation are common in each community but only muslim women face a distinct problem of desertion is shown, which creates an image of a victimised muslim woman. Pertaining to this it has been mentioned by one of the activists that, "The violence, muslim woman endured is not important, it is her muslimness and the projection that she is the victim of archaic and oppressive personal laws which alone can give her that special status and set her apart from all other victims of domestic violence."ⁱⁱⁱ It is indeed necessary to point here that personal laws have always remained in central in forming and shaping the identity of each community.

PRESENT SCENARIO

In India instant triple talaq has ever been a subject of controversy and debate. On 22nd August 2017, the Indian Supreme court in Saira Bano case law declared talaq uttered thrice in one sitting void and illegal.ⁱⁱⁱ "Two judges out of five declared instant triple talaq unconstitutional while two ruled that the practice is constitutional but simultaneously asked the government to ban the practice by enacting law." Resultantly, despite the opposition of All India Muslim Personal Law Board (AIMPLB) and protest of plenty of muslims, The Muslim Women (Protection of Rights on Marriage) Act, 2019 has been passed.

PROVISIONS OF MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019^{iv}

Sec.3 of the Act makes instant triple talaq in any form void and illegal.

Sec.4 of the Act criminalises the pronouncement of triple talaq by imposing punishment up to 3 years and fine.

Sec. 5 of the Act entitles the muslim women for subsistence allowance from her husband for herself and her dependent children as may be determined by the magistrate.

Sec. 6 of the Act, being mandatory provision entitles the women to have the custody of minor children.

Sec. 7 of the Act, makes an offence cognizable, compoundable and non-bailable.

THE PROVISIONS AND INDIVIDUAL AUTONOMY: A CLASH

Individual autonomy means "to be in charge of one's own life and to have the freedom to make one's own choices."^v "It is the capacity of a rational individual to make an informed, un-coerced decision."^{vi} It is opined that the Act is with the hollow scheme, which has muddled things as it compromises the individuality and choice of women. The below discussion justifies this point of view.

- Section 3 of the Act makes women's status ambiguous. As on one hand, society and even she would consider herself divorcee on the other hand law would not. Hence, the status of women would be in a limbo and because of this muddy status no blood relatives would be willing to take her back as she can't marry again. This would lead a woman towards destitution.

- Sec. 4 Criminalization, an apple of discord of this Act seems unjust to man as well as woman as it dilutes the both status. Here what the current legislation does is, instead of protecting and empowering women it criminalises men and thereby erecting a thick wall which shuts the door of reconciliation between husband and wife and make the family life vagrant. Under Muslim law, Marriage is a contract and certainly breach or violation of contract does not lead criminal sanction. Hence, criminalising the utterance of triple talaq shows that the legislatures have put the civil wrong into criminal consequences. It seems that, as far as the question of criminalization is concerned the state must follow minimalist approach. To this reliance is kept on the words of Andrew Ashworthy and Jeremy Horder's book which depicts that-"The minimalist approach declines criminal sanction where prohibition will not serve the purpose as intended and likely to cause great harm to the society."^{vii}
- The purpose behind sec. 5 seems unclear as it ensures subsistence allowance to women and not the maintenance which has been offered by other laws. Here also a point of distinction can be raised because maintenance and subsistence allowance differ from each other.

Maintenance:- "Under the principles of social justice, it is the natural duty of a man to provide basic amenities like food, clothing, shelter, and other necessary to wife, parents and children to live a dignified life in the form of maintenance. This explanation depicts that maintenance includes the necessary things and comfort which a rational man expected to get."^{viii}

Subsistence allowance:-"Subsistence means the minimal resources that are necessary for survival."^{ix}

It can be inferred that subsistence means "Means of supporting life, especially a minimum livelihood." Now whether the subsistence allowance, only to muslim women, would be enough? To this question Mariam Dhawale, a human rights activist writes that "the Act talks about subsistence allowance under which women are to be given maintenance for the life she was already enjoying, but the Act provides subsistence allowance that would not be enough."^x Even after the divorce has taken place the muslim women is entitled for maintenance as per the principle laid down in the case of Danial Latifi, "The principle speaks that "the wife's right to maintenance is not extinguished after the iddat period but continues for her entire life."^{xi}

- Sec. 6 ignores children's paramount interest and creates a labyrinth. As very first the divorce has not affected the marriage so the marriage subsists, then from where a question of custody arises. It is a matter to be discussed post- divorce and because a husband is sent to jail as a matter of fact the children have no other option except to live with mother and in case mother is not financially strong enough to maintain herself as well as children in absence of a bread earner how will they survive? This question is a can of corn? It depicts that the correction of historical wrong would make a muslim woman stand on road.
- The most compelling argument lies with section 7 which confers discretion to wife or her blood relatives completely to initiate criminal proceedings. Here, the burden is upon muslim women to prove the utterance of triple talaq. In a case where the husband refuses of utterance how the women will prove it? This leads a muslim wife towards impoverishment. A simple question arises here is, will a husband who is already sent behind the bars accept the woman who sent him to jail? Certainly not. It in actual sense throws away the opportunity of reconciliation. Moreover, triple talaq has been declared cognizable and non-bailable offence that put the husband in traumatic situation when a false allegation is made. No opportunity of defence lies with husband. Further the cognizable and non bailable terms show the seriousness of the offence. The Indian Penal Code prescribes such a grave punishment of 3 years in serious offence like Sedition etc. Such a harsh punishment for a repugnant act seems unjustifiable.

CRIMINALISATION OF PRIVATE CONDUCT BY STATE, A SWOOP ON INDIVIDUAL AUTONOMY

Criminal law is the most direct expression of the relationship between State and its citizens. The primary purpose of criminal law is prevention of a wrongful act which directly and in serious degree threatens the security or wellbeing of the society and which cannot be redressable by way of only compensation. But if through less intrusive, less coercive than a criminal statute techniques or measures the incidence of wrongful action can be reduced to an acceptable rate than criminalization of private conduct by State raises a question mark on individual autonomy. Jurisprudence too determines State's limit to regulate private behaviour and corroborates the individualism.

- Wolfenden report settled that "It is not in our view, the function of law to intervene in the private lives of citizens or to seek to enforce any particular pattern or behaviour."^{xii}

- J.S.Mill expressed 'harm principle' in his popular book "On Liberty" in which he claimed that –“The only purpose for which power can be rightfully exercised over any number of civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant.”^{xiii}
- Jeremy Bentham in one of his famous books "An introduction to the principle of Morals and Legislation" enlists cases which can-not meet punishment. It denotes that “all punishment in itself is evil and therefore punishment ought not to be inflicted in following cases. Accordingly...
 1. Cases in which punishment is groundless for the acts not being mischievous. Here, triple talaq is not a mischievous act at all as through the current Act it has been declared void and illegal. Hence, no mischief has been committed which can give rise to punishment.
 2. Cases in which punishment must be inefficacious means punishment can't act so as to stop mischief. According to the provision of current legislation burden to prove pronouncement of talaq lies on the prosecution and in case a slightest doubt if is found in a prosecution story certainly accused will get the benefit of doubt as in criminal justice system the proceedings starts with the presumption of innocence because an individual is pitted against State. Hence, there will have a very low conviction rate and punishment will be inefficacious.
 3. Cases where punishment is unprofitable. Here, it depicts that where mischief and punishment both are compared punishment would produce greater harm than the mischief. The current law criminalises the act of triple talaq which pronouncement itself is ineffective and even if punishment is inflicted on its utterance, this punishment would produce greater harm because in absence of bread earner the wife as well as children would be helpless for three years and even after the period of three years no husband would allow his wife to keep who sent him to jail.
 4. Cases in which punishment is needless. Here, it speaks that where the mischief can be prevented with other means, punishment becomes needless. Triple talaq if is considered a mischief or an offence, can be prevented through instructions, understandings, social control and civil means which the other communities people do have in divorce matters.^{xiv}

It seems clear that Triple talaq falls in a category that does not meet punishment. Further divorce is not a crime and not even against the community rather it's a private matter hence, does not fall under the scope of criminal law because crime is always against the society at large. It's better not to drag the matters of personal rights into public law. Because public law should be used only in cases where issue at hand cannot be solved without the punishment of the State. As divorce is a matter of personal rights let it be solved through Personal laws. Further it seems like a hasty decision as no stakeholders like Muslim women or personal law Boards were consulted. The principle of legislation through representation also seems missing here. Further, husband's right of being heard is also seen to be jeopardized.

What exactly muslim people need with respect to divorce issue?

In case marriage is not working properly a springy perspective for its dissolution should be adopted. The meaningful solution is to incorporate the conditions for divorce in a Niqahnama. With regard to triple talaq protective approach is needed rather than punitive approach. An awareness programs should be initiated which provide Knowledge to the spouses of other modes of talaq in which reconciliation is possible as often it has been observed that most husbands turn to talaq-e-biddat in a situation of outrage or out of misunderstanding of the provisions of Muslim law. Further, it is fully wrong to consider talaq a stigma for a woman as it is same for the husband as well. As a husband who utters talaq whether spontaneously in outrage or not can never have his wife again as she was earlier.

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019 AND GENDER EQUALITY

Law within the class will be the same. This act has come into being in the name of gender equality yet, the Act discriminates between muslim males and other community males by making divorce a criminal act for the former and a civil act for the later. Equality means like should be treated alike but here it shows the unequal treatment to the equals, to the specific group. Of course, classification can be made but, it has to be reasonable, based on intelligible differentia and has a rational object to achieve. However, a case of Anwarali Sarkar^{xv} delineates the reasonable nexus test which directs- “the legislature action to be in correspondence with the objective that the legislature seeks to achieve from the Act.” The constant muddling question pertaining to muslim women's protections is that whether husband's imprisonment would attain the object sought when husband is not under the capacity to pay the subsistence being imprisoned? The answer to this

question is certainly negative hence, the object seems unachievable. And the classification seems unreasonable.

CONCLUSION

Criminal law is to be used as a last resort, Ultima ratio. To punish a man for an action which has no legal effect is like to multiply numbers by zero. The Current legislation plays with the individual autonomy as the marriage tie remains intact even after the pronouncement of triple talaq and binds the couple to stick to the relationship which they consider sinful. The practice of instant triple talaq has been prevailing for centuries being the part of belief, it is perhaps impossible to be detached from the mind set of muslims. Muslim woman's identity is directly and indirectly connected to her muslimness that cannot be divested from her. The Muslim Women (Protection of Rights on Marriage) Act, 2019 will certainly leave muslim men as well as women vulnerable as the punitive punishment has left no ways open for reconciliation which is a fundamental requirement for divorce. Blanketed by these challenges it is nothing wrong to say that the gap between husband and wife would increase and the legislation which has been enacted with a holistic approach to provide gender equality and women empowerment would not serve its purpose as this legislation compromises the individuality and choice of women.

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