

**INSTANT TRIPLE TALAQ AND THE MUSLIM WOMEN (PROTECTION OF
RIGHTS ON MARRIAGE) ACT, 2019:
PERSPECTIVES AND COUNTER-PERSPECTIVES**

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Abstract

The Muslim Women (Protection of Rights on Marriage) Act, 2019 has declared the practice of instant triple *talaq* illegal and void and has also laid down that any husband indulging in such practice would be liable to be punished with imprisonment up to 3 years. It also engages with the issues of maintenance and custody. The bone of contention in this Act has been the criminalisation aspect of the Act which is essentially civil in nature. This paper seeks to explore the issues dealt with in the Act, including the jurisprudential aspect of criminalising private conduct, briefly delving into Bentham and Mill's ideas of the limits of State action to regulate private behavior, and both—the pros and cons—of the criminalisation aspect.

I. Introduction

II. Status of the Muslim wife

III. Maintenance and Custody

IV. Criminalisation

V. Conclusion

I. Introduction

Matrimonial alliance in Islam is a social contract, and divorce is considered to be natural corollary of marital right. But at the same time, marital ties are ascribed piety of the highest order and divorce considered as a necessary evil, to be employed only as a last resort. Triple *talaq*, and more particularly instant triple *talaq*, is only one of the several forms of divorce under the Muslim law.

Forms of *Talaq*

Mulla has categorized the practice of divorce in Muslim law under three heads:¹

The contract of marriage under the Mahomedan law may be dissolved in any one of the following ways: (1) by the husband at his will, without the

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¹ Mulla, *Principles of Mahomedan Law*, Chapter XVI (LexisNexis India, 20th edn., 2013).

intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention of a Court; (3) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage, but she may, in some cases, obtain a divorce by judicial decree.

Divorce under these three heads are, respectively, called *talaq*, *mubara'at* and *faskh*. Divorce at the instance of the wife is called *khula*.

Dr. Furqan Ahmad, in an article to clarify the law of divorce under Muslim law, has further explained these categories of divorce under specific heads:²

1. By the husband:

a. *Talaq* (Repudiation): This form of *talaq* operates with the pronouncement of *talaq*, with a clear, unambiguous intention. It can further be divided into revocable (approved) form, known as *talaq al-sunna* (i.e., in conformity with the dictates of the Prophet), or irrevocable (unapproved) form, known as *talaq al-bida* (i.e., of innovation, therefore, not in conformity with the dictates of the Prophet). The first form is further divided into *ahsan* (the most approved) and *hasan* (approved), while the latter may be divided in the form of three declarations at one time (the so-called triple divorce) or one irrevocable declaration (generally in writing). *Ahsan* consists of one single pronouncement made during the wife's *tuhr*³, followed by abstinence from sexual intercourse for the space of three *tuhurs*. *Hasan* consists of three pronouncements made during three successive *tuhurs*, at the time when no intercourse has taken place during that period of purity. Hence, it is only the unapproved form, i.e., *talaq al-bida*, where three pronouncements are made in a single *tuhr*, which is instant and irrevocable that comes under contention as triple *talaq*, which has been invalidated by the instant Act and which this article purports to discuss.

The rest of the forms are non-prevalent forms of divorce and hence of little practical importance.

b. *Ila* (Vow of continence): The husband swears to not have intercourse with the wife and abstains for four months or more.

c. *Zihar* (Injurious assimilation): The husband swears that to him the wife is like the 'back of his mother'.

² Furqan Ahmad, "Understanding the Islamic Law of Divorce", 45 *Journal of Indian Law Institute* 484-508 (2003).

³ The period of purity, i.e., the period between two menstruations.

2. By the wife:

- a. *Talaq-i-Tafwid* (Delegated divorce): The Muslim wife can, at the time of marriage, reserve in the marriage deed the right for herself to dissolve the marriage under specific circumstances.
- b. *Khula* (Redemption): The attributes of this form are *mutatis mutandis* the same as of man's right of *talaq* and every Muslim wife has the right of *khula* irrespective of incorporation of a clause in the marriage deed. The husband may attempt persuasion and reconciliation but cannot force the wife to cohabit.

3. By common consent:

- a. *Khula* (Redemption): If the husband, after the wife's option of *khula*, tries to maintain the marital bond against her wishes, she may go to court for a decree, without having to give reasons for exercising the option.
- b. *Mubara'at* (Mutual freeing): A couple may have agreed upon mutual terms to dissolve the marriage extra-judicially.

4. By judicial Process:

- a. *Lian* (Mutual imprecation): In case a husband falsely accuses his wife of adultery, the wife may file for divorce on such grounds.
- b. *Faskh* (Judicial rescission): This refers to the power of the Muslim *qadi* to annul a marriage on the application of wife in certain miserable circumstances.

As noted above, it is only *talaq al-bida*, the irrevocable instantaneous form of triple *talaq* that has been under contention and it is this form that has been discussed henceforth.

Instant triple *talaq* and Indian Judiciary

The attitude of the judiciary towards the practice of instant triple *talaq* has always been critical. Various High Court judgments, prior to the watershed judgment of *Shayara Bano v. Union of India*⁴ gave different interpretations about the practice of instant triple *talaq*. While some held the practice to be bad in theology but good in law, some others held that Muslim law does not, in fact, allow an instantaneous and irrevocable *talaq* without any attempts at reconciliation in between the pronouncements.⁵ According to the Quranic injunction, triple

⁴ *Shayara Bano v. Union of India*, 2017 (9) SCC 1, hereinafter referred to as *Shayara Bano*. The petitioners challenged section 2 of the Muslim Personal Law (Shariat) Application Act, 1937. The Constitution Bench declared the practice of instant triple *talaq* as not permissible under law, by a majority of 3:2. Among the majority, two learned judges declared this practice of instant triple *talaq* under section 2 as unconstitutional while one learned judge declared it as against Islamic law.

⁵ See generally, *Jiauddin Ahmed v. Anwara Begum*, (1981) 1 GLR 358, *Rukia Khatoon v. Abdul Khalique Laskar*, (1981) 1 GLR 375, *Nazeer v. Shemeema*, 2017 (1) KLT 300.

talaq must be on reasonable grounds and there must be intermittent mediation facilitated by two arbitrators, one from each side of the family, if need be. The practice has been declared to be unacceptable by the Apex court in a number of cases, too. However, it was struck down conclusively by the Court in the case of *Shayara Bano* in August 2017. The minority opinion in this judgment directed the legislature to come up with a law in this regard. Subsequently, the Muslim Women (Protection of Rights on Marriage) Bill, 2017 was passed in the Lok Sabha. The bill declared the practice to be void and illegal. At the same time, it also made the pronouncement of triple *talaq* an offence punishable with a maximum imprisonment of three years. While the Bill was pending in the Rajya Sabha, the session came to an end. The Bill was then promulgated as an ordinance multiple times. The Bill was finally passed by both the Houses on 30th July, 2019 despite consistent opposition and demands to send the Bill to the Rajya Sabha Select Committee.

II. Status of the Muslim Wife

Section 3 of the Act declares that pronouncement of *talaq* by a Muslim husband upon his wife shall be void and illegal.⁶ Were a Muslim marriage treated as a contract plain and simple, such declaration by law would have been enough to address a unilateral breach of contract by the husband. However, the problem isn't that simple. Marriage, even if a social contract, has a sacrosanct standing in the society and is treated as such. The practice of triple *talaq* has been prevalent and accepted in the Muslim society for centuries and is deeply ingrained in their thinking. Thus, just a declaration of it being void by law doesn't change the circumstances immediately. A woman who has internalized the idea of divorce by triple pronouncement may think it *haram* to live with her husband despite it not being recognized as divorce by the law. The society as well, may still continue to treat instant triple *talaq* as valid. For this reason, it is generally argued that a reform in personal laws must come from within the religious community rather than the law imposing it from the outside. Flavia Agnes has observed:⁷

Several studies have shown that rather than approaching the formal structures of law, women from marginalised sections use informal community-based mechanisms to negotiate for their rights. Women find the religion-based

⁶ Section 3. Any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be *void* and illegal.

⁷ Flavia Agnes, "The Politics Behind Criminalising Triple *Talaq*", 53 *Economic & Political Weekly* 13 (2018).

dispute resolution fora such as *darulqazas* more accessible than courts and police stations as there is a general fear among the poor of accessing these formal structures.

Anindita Chakrabarti and Suchandra Ghosh, amassed practical experience, doing fieldwork at a sharia court in a large Muslim ghetto in Kanpur for two years. They have argued that in issues related to family disputes, women are mostly concerned with kinship rules, household economies, and family intrigues.⁸

In such scenario, the blunt instrument of law seldom works. As observed in the case of *Harvinder Kaur v. Harmender Singh Chaudhary*⁹, by Delhi High Court, introducing Constitutional law in a matrimonial home is like “introducing a bull in a china shop.”

The law may even be said to have muddled things further as the status of woman would be in a limbo, where, on the one hand, the society and she herself may deem her divorced but the law would not, hence, making it impossible to enforce her rights as a divorced woman through legal mechanisms. It has also been argued that the Act might as well encourage husbands to willfully abandon their wives rather than pronounce triple *talaq*. Because of the muddy status of the disempowered woman, her blood relatives may also be reluctant to take her back since she cannot marry again. It is not far off to argue that the law’s not being in sync with societal expectations would lead to destitution of Muslim womanhood, protection of whose rights was the sole objective of the legislation.

III. Maintenance and Custody

Section 5 of the Act ensures that a woman on whom triple *talaq* has been pronounced will be entitled to subsistence allowance from her husband as determined by the magistrate.¹⁰ Pertinent to note is the language of the section. It ensures only a “subsistence allowance” and not “maintenance” as under other laws pertaining to women’s rights. Maintenance implies the amount of money required to continue living according to a person’s standing in the society, while subsistence allowance is the bare minimum amount required to meet the expenses of day-to-day living. However, the provision is “without prejudice to the generality of

⁸ Anindita Chakrabarti and Suchandra Ghosh, “Judicial Reform vs Adjudication of Personal Law,” 52 *Economic & Political Weekly* 12-14 (2017).

⁹ AIR 1984 Delhi 66.

¹⁰ Section 5. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.

provisions contained in any other law”, which means the woman is still free to initiate proceedings for maintenance under section 125 of the CrPC, 1973. A married Muslim woman is also entitled to maintenance known as *Nafaqah*, irrespective of whether she can maintain herself or not. Hence, it is unclear what the purport of the given section is, in the form of a subsistence allowance.

Another question that arises is due to the aspect of criminalisation under this Act. Given that the Act criminalises pronouncement of triple *talaq* and in the same breath, entitles a woman to subsistence allowance, in a case where the husband is reported and sentenced to imprisonment, whence does the proposed allowance come?

Section 6 of the Act provides that a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband.¹¹ Thus, she is entitled to such custody as a matter of law. The first question which arises is about the need for a provision for custody of child when the marriage is still subsisting and no divorce has taken place. Additionally, making such a provision mandatory is unreasonable. In other statutes governing divorce, the custody of children is left for determination by the courts. Other factors such as best interest of children are given paramount interest. This provision provides for no exceptions and no proper criteria to determine the custody of the children. There might be scenarios where the mother herself is not financially or mentally fit to take care of the child, or the child does not wish to live with the mother, etc. Such exceptional situations have not been taken into account while drafting this provision.

IV. Criminalisation

Section 4 of the Act lays down the punishment for pronouncement of triple *talaq* by a husband, viz. imprisonment up to three years and fine.¹² This point has mainly been the bone of contention in this Act. There are compelling arguments on both sides of the debate and the authors have tried to explore both the facets in this article.

Human conduct is regulated by various means. While civil means are enough to regulate most of human behavior, sometimes deterrence is required where civil law fails to regulate

¹¹ Section 6. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

¹² Section 4. Any Muslim husband who pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

behavior which shows serious departure from norms and is capable of infringing on the lives of other citizens.

Criminalisation of Private Conduct: Jurisprudential Engagement

The debate over criminalisation of private matters goes back to the publication of the Wolfenden Report¹³ in 1957 and the subsequent arguments propounded by Patrick Devlin and H. L. A. Hart about the involvement of the state in imposing morality in the private realm. The Report, which pertained to homosexuality and prostitution, rooted itself in the liberal democratic framework, and settled that there are functions and limits within which criminal law should operate. “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 of behaviour.” The idea was that private morality constitutes a space which must be beyond the domain of law.

Thus, while Devlin argued that the State can enforce morals in the larger societal interest,¹⁴ Hart argued that State had no right to enforce conformity with the collective moral standards.¹⁵

The findings of the Wolfenden Committee report as well as Hart’s arguments were based on the “Harm principle” expounded by J. S. Mill in his famous essay *On Liberty*.¹⁶ In his own words, “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.”

Mill was trying to contend the State’s growing tendency to control every aspect of an individual citizen’s life. His point was that just because the society doesn’t approve of a certain kind of social behaviour that does not give it the right to dress up such disapproval as *moral laws*, irrespective of the fact that they pose any real harm or danger to the society or not.

It has been observed in the Stanford Encyclopedia of Philosophy that:¹⁷

¹³ Home Office, Scottish Home Department, “Report of the Committee on Homosexual Offences and Prostitution” (1957), available at <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/collections/sexual-offences-act-1967/wolfenden-report/> (last visited on September 28, 2019).

¹⁴ Sir Patrick Devlin, “The Enforcement of Morals”, Maccabean Lecture in Jurisprudence, read March 18, 1959.

¹⁵ H. L. A. Hart, *Law, Liberty and Morality* (1963); “The Enforcement of Morality” (Lecture II in *The Morality of the Criminal Law* (1965)).

¹⁶ J. S. Mill, “On Liberty” (1859).

¹⁷ James Edwards, “Theories of Criminal Law”, in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), available at <https://plato.stanford.edu/entries/criminal-law/> (last visited on: September 28, 2019).

Whatever a theory of criminal law may be, it must explain why criminal law is distinctive—why it is a body of law worthy of separate attention. It must identify features of criminal law that make it so, ask what functions that body of law fulfils, and what justifies its creation and continued existence. If criminal law should be retained, we must consider its proper limits. We must consider the conditions under which agents should be criminally responsible for whatever falls within those limits. And we must ask which rules of procedure and evidence should govern efforts to establish criminal responsibility.

Perspectives

The primary problem associated with criminalising the pronouncement of instant triple *talaq* is that by doing so, the legislature is imposing penal and criminal consequences for a civil wrong. Marriage under Islam is a contract. The breach of a contract should not ideally lead to the attraction of criminal sanction. As far as criminalisation is concerned, the state should adopt a minimalist approach. Curtailing the liberty of a person should be the last resort. Criminal law is only one of many mechanisms to censure and prevent deviant conduct. Only the most serious violations should attract law's most coercive and condemnatory technique, i.e., criminalization.¹⁸ State must adopt a minimalist approach in criminalisation of offences because a stronger justification is required where an offence is made punishable with imprisonment.¹⁹

Jeremy Bentham, in his book, *An Introduction to the Principles of Morals and Legislation*, enlisted four conditions where an act should not be classified as a criminal offence.²⁰ Firstly, where it is groundless, which means that there is no mischief which needs to be prevented. As far as instant triple *talaq* is concerned, criminalising it seems to be groundless, because the act is void and inconsequential. Secondly, where it is inefficacious, and thus it won't be able to prevent the mischief. In case of instant triple *talaq*, putting the husband behind bars might aggravate the marital discord and thus disincentivize the wife from reporting the incident. And if it is not reported, there would hardly be any deterrent effect. Thirdly, where it is unprofitable, which means that the harm produced would be greater than the gain. Lastly, where it is needless, which means that the problem can be addressed through other means.

¹⁸ Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' 116 *LQR* 225 (2000).

¹⁹ *Joseph Shine v. Union of India*, 2018 (11) SCALE 556.

²⁰ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislations* 134 (Clarendon Press, Oxford, 1907).

The practice of instant triple *talaq* can be checked by civil means as well. Criminalisation can be the last resort when the civil remedies have been exhausted.

The minimalist approach advocates for leaving out of the purview of criminal sanction, such conducts where prohibition is unlikely to be effective, or where it would cause greater social harm than not penalizing it.²¹ In other words, punishing a person should not become counterproductive. In the case of criminalisation of instant triple *talaq*, this is very likely to happen. The Act aims to prohibit instant triple *talaq* and protect the rights of married Muslim women. It is pertinent to note that if the man is imprisoned, it is very likely that all his family members, including the wife, would become destitute. Additionally, the act of pronouncement has already been declared void by section 3 of the Act. Thus, such pronouncement would lead to no consequences at all and would have no effect on the marriage. The marriage would still subsist in the eyes of law. However, it is a bit optimistic to expect that the marriage would not suffer. There is a possibility that if the husband is imprisoned, it would lead to irreconcilable differences among the couple. Also, the husband might very well divorce his wife by following the proper Quranic procedure once he is released. Also, such imprisonment would lead to unfair denial of conjugal rights to the Muslim married couple. The fear of such adverse consequences would discourage women from reporting such incidents. This would mean that there would be little deterrent effect of such a provision. Thus, the woman is left with no recourse at all. Since the offence is a cognizable one, the police officers have the liberty to make an arrest without any preliminary investigation. The woman would have little say in the procedure.

Also, neither the Courts nor the Shariat law has declared the practice to be a crime. The Hanafi school, which recognizes this form of divorce, considers it to be sinful and abominable.²² It is bad in theology, but not a crime.

Additionally, the prescribed punishment is not proportionate to the gravity of the wrong. The foundation of every justifiable criminal sentence is the requirement of the principle of 'just deserts'. The punishment of three years has been prescribed for much graver offences under the Indian Penal Code which include sedition, promoting enmity between classes of people, rioting armed with deadly weapon, etc. Imposing such a punishment for an inconsequential act does not seem justified.

Counter-perspectives

²¹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, Oxford, 2013).

²² Asaf A.A. Fyzee, *Outlines of Muhammadan Law* 147 (Oxford University Press, Oxford, 2008).

The first argument against criminalisation that needs to be addressed pertains to article 14 of the Constitution. It is argued that the Act discriminates between Hindu and Muslim males as it makes divorce a criminal act for the latter while leaving it as a civil act for the former.²³ It must be understood that the equality envisioned by Article 14 applies to equals, not to unequals. There is, in fact, an intelligible differentia between the Hindu and Muslim in regard to the practice of divorce. The Hindu law does not recognize or permit unilateral divorce at the whim of the husband. The grounds of divorce under the Hindu Marriage Act, 1955 are either the consent of both spouses or exigent circumstances, such as cruelty, adultery or desertion. The impoverishment of a Hindu wife does not result from divorce. However, if it be argued that willful desertion of the wife leads to impoverishment and the Act will lead to more Muslim husbands taking such steps, then desertion may be made punishable across all religious communities. The aim of the law is to protect the rights of the unempowered female section of the society and it was high time for the Muslim divorce law to have been brought at par with the Hindu law on divorce, to stop the practice of unilateral divorce at the whim of the husband. Another major difference between the Hindu and Muslim personal laws to the detriment of the wife is exception to section 494²⁴ of the IPC. Section 494 punishes bigamy and there are no exceptions on the pretext of religion and yet, due to the Constitutional guarantee of freedom to practice religion under Article 25, Muslim men are treated as an exception to this provision and there are still at least some instances of bigamy by the Muslim husbands even in the present day, if not many. The Law Commission of India has also observed that "...bigamous relationships, where men are permitted more than one wife is a blatant violation of equality."²⁵ Further, it suggested that "the *Nikahnama* itself should make it clear that polygamy is a criminal offence and section 494 of IPC and it will apply to all communities. This is not recommended owing to merely a moral position on bigamy, or to glorify monogamy, but emanates from the fact that only a man is permitted multiple wives which is unfair."²⁶

²³ Kavita Krishnan, "Civil Offence for Hindus, Crime for Muslims: The Triple *Talaq* Ordinance is Plainly Discriminatory", *Scroll.in*, September 24, 2018, available at <https://scroll.in/article/895448/civil-offence-for-hindus-crime-for-muslims-the-triple-talaq-ordinance-is-plainly-discriminatory> (last visited September 10, 2019).

²⁴ Section 494. Marrying again during lifetime of husband or wife—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

(Exception)—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

²⁵ Law Commission of India, "Consultation Paper on Reform of Family Law", (August 31, 2018) at *para* 2.91.

²⁶ *Id.* at *para* 2.99.

The fact is that the practice of instant triple *talaq* causes insurmountable hardships to the Muslim wife and is grossly unjust to her dignity. It is a form of cruelty and must be penalized as such under section 498A of the IPC.²⁷ Therefore, the penalization of instant triple *talaq* is not novel but just its restatement as a subset of cruelty. Besides, even the definition of domestic violence under the Protection of Women from Domestic Violence Act, 2005 would cover pronouncement of instant triple *talaq* as a form of “verbal and emotional abuse” under section 3 of the Act,²⁸ thus penalizing the husband for the same. In fact, the Law

²⁷ Section 498A. Husband or relative of husband of a woman subjecting her to cruelty—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purpose of this section, “cruelty” means—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

²⁸ Section 3. Definition of domestic violence—For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.—For the purposes of this section,—

(i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(iii) “verbal and emotional abuse” includes—

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) “economic abuse” includes—

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence” under this section, the overall facts and circumstances of the case shall be taken into consideration.

Commission of India, agreeing with the judgment of Nariman, J. in the *Shayara Bano* case, has observed that:²⁹

[S]ince the practice permits to break the matrimonial tie by the husband, without even any scope of reconciliation to save it, it is unconstitutional. The practice now should be squarely covered under the Domestic Violence Act, 2005, and in case abandonment of wife is caused through pronouncement of instant triple *talaq*, should be covered under the 2005 Act's provisions on economic abuse, right to residence, maintenance among others.

Further:³⁰

Any man resorting to unilateral divorce should be penalised, imposing a fine and/or punishment as per the provisions of the Protection of Women from Domestic Violence Act, 2005 and anti-cruelty provisions of IPC, 1860, especially section 498 (Enticing or taking away or detaining with criminal intent a married woman). Bringing an end to the practice of instant triple *talaq* should automatically curb the number of cases for *Nikah Halala*.

Thus, the criminalisation of instant triple *talaq* also fits squarely into the realm of Mill's Harm Principle as the assertion of the State's power is only in order to prevent harm to a significant portion of the community, i.e., its disempowered woman population.

A second argument against criminalisation is the civil nature of the act of pronouncing instant triple *talaq* and that the State must not step into the private realm of the individual's life. However, it is to be noted that the practice of instant triple *talaq*, even though considered irregular and bad in theology, has continued for more than fourteen hundred years, and yet there are objections against banning it. One may argue for reform to come from within the society but if a particular social evil has existed for centuries and there is no hope from the society for its change on the horizon, at some point the State must step in to protect the most vulnerable section of the society from the blatant injustice being wreaked upon them in the name of religion. The ban of the practice of Sati, first attempted through the Bengal Sati Regulation, 1829 (or Regulation XVII), was also not a reform that came from within, but a change that was enforced from the outside by State action. Following a series of legislative efforts on the part of the State system, the Rajasthan Sati Prevention Ordinance, 1987 was promulgated in response to the outcry after the sati of Roop Kanwar, which finally culminated into the Commission of Sati (Prevention) Act, 1987. Another example is the

²⁹ *Supra* note 25 at para 2.84.

³⁰ *Supra* note 25 at para 2.90.

practice of dowry, which has been a part of the Hindu nuptial festivities and was always sought to be justified on the pretext of the benefit of the bride, which was sought to be regulated by the Dowry Prohibition Act, 1961, despite very vocal opposition from varied sections of the society.

The most compelling argument yet, is the devil—or, in this case, the saving grace—that lies in the detail of the Act itself. Under section 7³¹, the discretion to initiate criminal proceedings lies completely and squarely in the hands of the Muslim wife or her relatives by blood or marriage. The language of the section makes cognizance, compounding and bail subjective only on a complaint received by the Muslim wife or her relatives. The very contenders who argue that criminalisation would lead to even more impoverishment of Muslim women fall into a fallacy of their own creation. On the one hand, the State is deterred to stay away from the private realm on the alleged argument that it must stop acting paternalistic and making choices for women who are vulnerable and, in its eyes, do not know the right path. In the same breath, these contenders themselves assume a paternalistic role in arguing that a Muslim woman knocking at the door of a police station does not have sufficient discernment to know of the repercussions of her actions. If the Muslim male has had the power to snip at the sword of Damocles hanging over the wife's head for centuries, why must we now shrink from a graded power of law being handed to the wife to right the centuries of oppression?

There have also been reports of what came to be notoriously known as “kidney marriages”. Rich sheikhs from the Middle East visited India on the pretext of medical tourism, needing kidney replacement and would marry poor Muslim girls to extract a kidney since the Indian law allows donation of organs by the relatives. These girls would later be abandoned by the sheikhs after their purpose was served.³² In such a background, providing for a penal provision that can come into action only at the behest of the irreverently divorced Muslim wife is, in the writer's considered opinion, a step in the right direction.

³¹ Section 7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—

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

³² See, “Why Triple *Talaq* Ordinance: For Law Without Justice is Wound Without Cure”, *The Indian Express*, September 24, 2018, available at <https://indianexpress.com/article/explained/why-triple-talaq-ordinance-for-law-without-justice-is-wound-without-cure-5371018/> (last visited on September 10, 2019); “End to Male Privilege of Instant Divorce”, *The Asian Age*, December 23, 2018, available at <https://www.asianage.com/age-on-sunday/221218/end-to-male-privilege-of-instant-divorce.html> (last visited on September 10, 2019).

V. Conclusion

The Act, with all its pros and cons, is still a bundle of contradictions and procedurally inconsistent. It is a case of two steps forward and one step back as its provisions lay down a paradigm without any backward or forward roadmap. It surely is a hurried piece of legislation, passed with much theatrics amidst a lot of hullabaloo on paternalistic morals and not enough substance. The crux of the whole debate has been lost in the clamour of right-wing and left-wing politics. It is unsubstantiated and myopic, but at least a small step forward in the direction of women's emancipation. In the end, Law is only as good as the institutions that implement it, and for now, we are witnessing more violation than compliance with their provisions. It is observed that:³³

Entrenched patriarchy is a great stumbling block that repeatedly comes in the way of the implementation of even the best designed legislation. Patriarchy infects not only most of our citizens but also institutions like the government, administration and judiciary, which are invested with the responsibility of implementing these (and other laws). While there is a great rise in the incidence of [women-centric offences], laws dealing with them are being whittled down in some cases or are simply not being implemented in others.

What continues to be the predominant factor in the background of all our women-centered legislations is the overwhelming majority of male legislators who barely even scratch the surface of the lived realities of women in a male-dominated society, much less make room for their voices to be heard. It is a sad truth that the biggest minority of this country *i.e* womenhas a meagre 14% representation in the Lok Sabha, which, for the record, is also the highest number of women MPs till date.³⁴ The fact of the matter is that we cannot build a gender-just system without dismantling the patriarchy entrenched within our society. What is of utmost importance... is the strengthening and prioritising of social reform movements that challenge orthodoxy and patriarchy.³⁵

³³ Subhashini Ali, "The Triple Talaq Ruling is a Step Forward, but There is a Long Way to Go for Gender Justice Laws", *The Wire*, August 24, 2017, available at <https://thewire.in/communalism/triple-talaq-uniform-civil-code-gender-justice> (last visited on September 10, 2019).

³⁴ See, "At 14%, 17th Lok Sabha has the Highest Number of Women MPs", *Livemint*, May 24, 2019, available at <https://www.livemint.com/elections/lok-sabha-elections/at-14-17th-lok-sabha-has-highest-number-of-women-mps-1558699824177.html> (last visited on September 10, 2019); "17th Lok Sabha Elects Most Women MPs Ever", *Indiaspend*, May 24, 2019, available at <https://www.indiaspend.com/17th-lok-sabha-elects-most-women-mps-ever/> (last visited on September 10, 2019).

³⁵ *Supra* note 33.