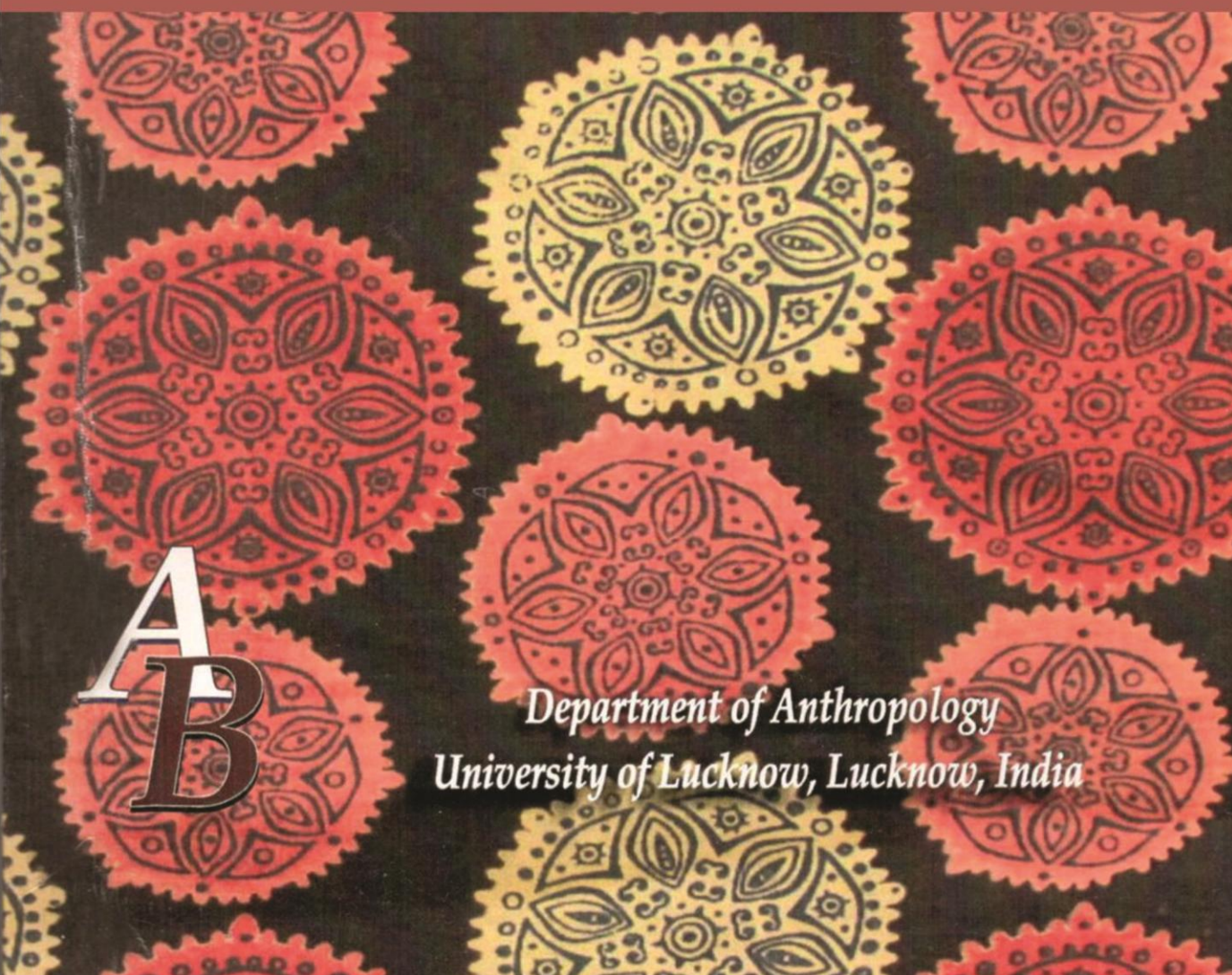


Volume 13, Issue 1
July 2019

ISSN No.:2348-4667

Anthropological *Bulletin*

a peer reviewed international journal



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Debate against separate law on Muslim Men over Triple Talaq

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ABSTRACT

Laws in India have been subjected to judicial reviews whenever the needs have arisen but then there were laws which did not have legal binding, instead had cultural basis, and post-Independence status quo was maintained. State interventions, in order to put a check on the misuse of marital rights, have framed a new legal framework against an alleged malpractice among Muslims, Triple Talaq or Talaq e Biddat. The Indian government was of view that exercising the right to instantly divorce the woman in marriage, as has been followed in Muslims, was a malpractice and is tantamount to desertion of women and issues too. According to Muslim Law, the marriage can be dissolved through a process known as Triple Talaq, in which the husband can grant his wife a divorce by saying Talaq three times in a row. It is not necessary for the wife to be there; a valid excuse is not necessary. The term "Talaq" refers to the husband's rejection of the marriage under Islamic law. Since ancient times, Triple Talaq has been a common practice in the Islamic world as in India. Triple Talaq should be prohibited in light of the aforementioned. In addition to being against the letter of the Constitution and un-Quranic, it is also unjust and inhuman. After getting divorced, a woman may find herself homeless the next day, abandoned with no one to help her raise her kids, or she may suffer permanent trauma that makes it difficult to recover from the shock. The Indian government responded by taking action against Triple Talaq when, in a judgment on Prakash and Others v. Phulavati and Others in October 2016, Judge Anil R Dave and Justice Adarsh Kumar Goel noted that Muslim women face prejudice. This paper happens to be an academic inquiry into this subject of high significance that still awaits its consequences in the years to come. The findings show that despite the jolt in terms of authority and control which Muslim men enjoyed earlier, the application of law has been suggestive largely. This paper explores existing laws and draws its conclusion on their basis, surmising that a new legislation on the same was not necessary. Existing laws could have been cited in support and used to protect the rights of Muslim women. It draws largely from interviews with Legal Luminaries and Rights experts like Dr. Salman Khursheed and Flavia Agnes who agree that a new law on the subject was more a propaganda measure than an effort to deliver justice to Muslim women.

Keywords: *Law, Muslim, Women, Triple Talaq, Quran*

Introduction:

The Triple Talaq Bill issue as a whole has to be examined through the lens of intersectionality, based on the petitions submitted by Sharaya Bano and other petitioners as

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well as the Supreme Court's *suo moto* PIL. According to this PIL, the Indian Constitution's protections for women's rights are violated by some Islamic personal laws that promote gender discrimination.

From the outside, the entire *Triple Talaq* controversy appears to be a conflict between tradition and modernity. It is neither rational nor acceptable to categorize people's experiences into simplistic categories because Muslim women are largely products of the very power dynamics that keep them in submissive positions.

The author addresses the issue of *Triple Talaq* in light of the recent Supreme Court petition that sought to invalidate *Triple Talaq*. It considers the effects of such a measure, would it come to pass, the laws already in place that preclude the need for new legislation, as well as the views of legal experts and progressive Islamic scholars on the matter.

Background

In the Shayara Bano case, the Supreme Court of India, which was composed of a five-judge constitution bench, issued a major decision in the history of *Triple Talaq* by outlawing the practice. Muslim *Triple Talaq* practice in India was declared unconstitutional and abolished by a 3:2 majority. In front of two witnesses, Shayara Bano (the wife) contested the *talaqnama* that her husband had handed to her. She argued that the divorce should be declared *invalid ab initio* before the Supreme Court, on the claim that it breaches her fundamental rights (Shayara Bano petition). Following this, the Muslim Women (Protection of Rights on Marriage) Bill, 2017 was introduced in the Lok Sabha. This Bill makes instant *Triple Talaq* or *Talaq-e-Biddat* a punishable offence. It follows the Supreme Court judgment on August 22, 2017 in the case of Shayara Bano vs. Union of India.

The apex court set aside instant *Talaq* as a "*manifestly arbitrary*" practice. It also said,

"Given the fact that *Triple Talaq* is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place."

The Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 (Agnes 2017) was reportedly signed by the then President Ram Nath Kovind. The disputed *Triple Talaq* ordinance has been reissued with approval from the cabinet as well. The Rajya Sabha is now debating the *Talaq-e-Biddat* Prohibition Bill, which was approved by the Lok Sabha. A man serving time in prison for divorcing his wife, according to Opposition parties and local authorities, is "*legally impossible*." According to the government, Muslim women are treated fairly and equally (Soman, 2016)

The Muslim Women (Protection of Rights on Marriage) Ordinance, 2019, states that immediate *Triple Talaq* divorces are invalid, illegal, and subject to a three-year prison sentence for the husband. The Rajya Sabha was considering an earlier measure to alter the prior ordinance, which was published in September 2018. A new ordinance was released because the previous one failed to receive parliamentary approval.

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The woman upon whom *Talaq* is pronounced will have to receive an allowance from her husband, and she retains custody of her children.

Clauses 5 and 6 of the Bill say,

"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," and "shall be entitled to custody of her minor children in the event of pronouncement of *Talaq* by her husband."

The Law Minister, Mr. Ravi Shankar Prasad, in the statement of objects and reasons attached to the Bill has said the law will,

"help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help sub serve their fundamental rights of non-discrimination and empowerment."

The Bill's usage of the term "*sustenance allowance*" just makes matters worse. Today, a married woman is legally entitled to an equal share of the family's assets and the right to live in the home (matrimonial residence) without fear of abuse.

Feminists all over India and abroad are hailing the move to grant a Muslim woman right over her children as a welcome initiative since Muslim Personal Law has so far been in the news for all the wrong reasons and suspected of denying Muslim women the right over the custody of their children beyond a certain age. This is a fallacy. In almost all custody battles, courts are bound by one principle alone which is the best interest of the child—especially if he/she is a minor and in most cases the courts decide that the best interest of the child lies with the mother. A Muslim couple is governed by the Guardians and Wards Act of 1890. In any case, when the marriage is intact, where is the question of deciding custody? The very words "*sustenance allowance*" and "*child custody*" convey that the marriage has been dissolved after the utterance of the words *Talaq* thrice, a position which is contrary to the Supreme Court verdict.

As has been believed since the beginning of time, the Supreme Court's decision to declare *Triple Talaq* invalid essentially means that the pronouncement of a *Triple Talaq* in one go is treated as a single *Talaq* as such, but the man would still have the opportunity to retract it or pronounce it again during the *iddat* period. Nothing else is different. Given the situation, it is absurd to hold someone criminally responsible for an action that has no corresponding legal repercussions.

Even if it were decided as a matter of policy that some type of deterrent was necessary, it could have been accomplished without using criminal responsibility. Comparing this to other crimes is pointless because there is always a penalty associated with them, but thanks to the Supreme Court's ruling, there is no penalty associated with saying the word "*Talaq*" three times in a row.

Good public policy dictates that criminal law should not intrude on citizens' private affairs unless there is a compelling reason, such physical assault. There are numerous domestic abuse grounds that can lead to divorce, but they almost never warrant legal action.

The Reality:

According to Census 2011 data on Indians' marital status, among all divorced women the percentage of Muslim women is 23.3 percent and 68 percent among Hindus, respectively. Census 2011 also reveals that 5.5 out of every 1,000 Hindu couples are likely to split up, including instances when wives are left behind/ deserted by their husbands. As a result, there are 7.3 legal divorces and separations for every 1,000 women among Hindus. This highlights the fact that the divorce and separation rates among Hindus are significantly higher than those among Muslims. Just 5.63 out of every thousand Muslim women were separated or abandoned as per the 2011 census, and *Triple Talaq* and easy divorce were both factors responsible for the same. (Qasmi, 2017).

The contentious discussions around the *Triple Talaq* problem present the stereotyped image of a Muslim woman who has been wronged, abandoned by her husband, and who needs protectionist measures. The fact is that women per se in India, in both cultures Hindus and Muslims, face this issue on a regular basis. This fact has largely gone unnoticed. It has been implied that Muslim women are the only ones who experience domestic abuse and desertion. She seems to have that particular status, distinguishing herself from all of her other sisters who are also victims of spousal abuse, due to her projection as a victim of an antiquated system, her alienation from her faith and the society she belongs to and the burden of restrictive personal rules. (Agnes, 2018)

An Insight on Talaq under Muslim Law

The two types of divorce recognized by Muslim law are judicial and extrajudicial. The latter includes the husband's declaration of divorce, his wife's divorce initiative, and divorce by consent of both parties. An uncontested divorce may be classified as *Talaq al-Sunna*, or "authorized," if it is carried out in accordance with the guidelines [set by the Prophet], or *Talaq al-Bid'at*, or "new" or "unapproved." Although reconciliation between the spouses is conceivable, "approved" divorce implies that the husband must wait three months after the first (single) use of the word *Talaq*. When a divorce is "unapproved," the marriage is deemed to have been irrevocably dissolved as soon as the spouse used the "Triple Talaq" procedure and there is no hope of reconciliation...

When the word "*Talaq*" is uttered for the last and final third time at the end of *iddat* it becomes final, though even without the third time, *Talaq* becomes final when *iddat* expires. The only difference between utterances of *Talaq* once and three times is that the couple is free to remarry in case of the latter but not in case of the former. The triple instantaneous *Talaq* is – or was – essentially the word "*Talaq*" uttered three times but said at one sitting instead of over three months. So, essentially the only difference was that the husband would have denied himself the right to take it back or indeed to remarry the ex-wife after *iddat*. For the woman there was no real difference so long as the husband's obligation of the *iddat* period was observed, as they must.

With the advancement of new technology in recent years, there have been several transformations in the Indian tradition under discussion. Traditional behaviours are not leveled by technological advancement; rather, it encourages their continuation or even abuse, as in the example of the Muslim "divorce formula," a warped version of modernization. In accordance with Sharia law, husbands must say the word "*Talaq*" in front of witnesses or at the very least in the presence of a wife.

At the same time, there are many instances of males sending their partners texts that read "*Talaq, Talaq, Talaq*" or similar messages through messenger apps like WhatsApp, Skype, etc. So, during the past ten years (2007–2017), the Muslim Movement of India has documented numerous examples of such a "high-tech" divorce, as a result of which women with children were abruptly found shown the door.

According to writer, scholar and international gender issues Asma Barlas, when Muslims assert that divorce under Islam is easy and offers many "privileges" for males, they frequently either don't comprehend or disregard the teachings of the Qur'an. According to Barlas, if men took this matter seriously, going through a divorce would be one of their toughest tests. (Barlas 2013)

Thus, there is no evidence against *Talaq* in and of itself or the entire Islamic system of matrimony and divorce, as stated by Justice Rohinton Nariman (one of the five judges of the bench on *Triple Talaq*) as "astonishingly modern". The learned judge clearly had in mind that "contrary to the widely believed fact, Islam provides for a woman's right to seek *Talaq* by delegation, *Khula* or dissolution of marriage, *fask* or annulment, *mubaraat* or dissolution by

mutual consent. Besides for the marriage itself the woman has a right to *meher* or consideration to give her consent. The *nikahnama* (marriage contract) is integral to the wedding ceremony and is signed by witnesses in addition to the parties." (SC Judgment, 2017)

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"Ironically the present legislation is titled the Muslim Women (Protection of Rights on Marriage) Bill 2017. The real intent is clearly to chip away at Personal Laws to bring in the Uniform Civil Code. Under the same circumstances, the punishment to a Hindu male is only one year, so it smacks of a communal agenda in the guise of gender justice. Also, what about the rights of the woman and her maintenance and that of her family during the three-year period?" says Salman Khurshid, special counsel to the Supreme Court on the *Triple Talaq* case.

Is there a rationale for a new law?

"The conceptualization of intersectionality works best where we can better acknowledge and ground the difference among us and negotiate the means by which these differences will find expression in constructing group politics." (Kimberley, 1991)

Mass media has long been a propaganda tool with its heavy "reliance on market forces, internalized assumptions, and self-censorship, [...] without significant over coercion." It is said to "manufacture consent" by a process of repeatedly presenting particular topics in a specific way. As a result, the media contributes to racial stereotypes and beliefs being established in society. (Herman and Chomsky, 1988)

The arguments are "apparently naturalized representations of events and situations [...] which have racist premises and propositions inscribed in them as a set of unquestioned assumptions" (Hall, 2003). The minds of the public are thus, in Hall's own words, "impregnated with unconscious racism" towards Muslims and Islam.

There is a belief that the reality of a woman's religion and culture must be disregarded in order to advance women's emancipation. Though she resides inside the two and must construct her identity between those two realities of her religion and culture, doing so would reduce the fight for her rights to a myth. Women must therefore learn to define themselves and fight for their rights while living in the religious and cultural cocoon that serves as their environment.

Flavia Agnes, human rights' lawyer is of the opinion that

"Demonizing Muslim men has been an important political plank for the Modi government. The *Triple Talaq* Bill fits in perfectly with it. The Muslim Personal law Board has risen up in arms against the Bill calling it an infringement of the personal laws of Muslims, a liberty granted to them under the Constitution of India. It is ironic that a government which pledges support to the concept of a Uniform Civil Code, instead of strengthening an existing law which secures the rights of Muslim women, is proposing to place them under a special statute meant only for Muslim women in order to gain political mileage." (Agnes, 2018)

The Bill is ostensibly in support of women's rights and gender equality, and as such, it cannot be contested on the grounds that it violates the human rights of Muslim men, even if on closer inspection, that is precisely what the Bill is about..

Due to the fact that Muslim women themselves requested it, it has been made to appear as though the Bill represents their interests. Some Muslim women, like Shayara Bano, Ishrat Jahan, Aafreen, Farah Faiz, Zakia Soman, Noor Jehan, and members of their organization, the Bharatiya Muslim Mahila Andolan, have undoubtedly welcomed this Bill (BMMA). Jahan recently joined BJP among them. Rashtrawadi Muslim Mahila Sangh, which is linked with the RSS, is presided over by Faiz, an intervener in the *Triple Talaq* case. Bano recently received assistance from the UP Finance Minister and earlier in Pune from BJP leaders, despite the fact that she is engaged in a judicial struggle to obtain custody of her children. These have evolved into symbols for the governing part.

The co-founders of BMMA – Zakia Soman and Noorjehan Safia Niaz in their letter to the Prime Minister in December 2015, had requested the codification of Muslim family law. They had identified instant *Triple Talaq* and polygamy as issues requiring most urgent attention outweighing worries about poverty, illiteracy, and marginalization. They had requested a new law in order to assist these ladies rather than utilizing current legal procedures. The claim made at the time was that women are too poor to approach the court. How will the same women navigate the complex criminal justice system now? (Soman and Niaz, 2015)

Rationale of the clerics:

Under the same circumstances, the punishment to a Hindu male is only one year, so it smacks of a communal agenda in the guise of gender justice. Also, what about the rights of the woman and her maintenance and that of her family during the three-year period?

Dr. Kalbe Sadiq, senior Shia cleric and Vice President of the All India Muslim Personal Law Board, stated:

"Triple Talaq is non-existent among the Shia community. There are very clear guidelines and procedures laid down for divorce under Shia Islamic Laws. The issue is not relevant to the Shia sect of Muslims." Says Flavia Agnes, Human Rights' lawyer:

"The Triple Talaq Bill fits in perfectly with it. The Muslim Personal law Board has risen up in arms against the Bill calling it an infringement of the personal laws of Muslims, a liberty granted to them under the Constitution of India."

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Detrimental Impact of Introducing 'Criminality'

Since the Supreme Court's ruling, saying "*Talaq*" three times does not end a marriage, but saying it will result in criminal proceedings being brought against the husband. A furious husband will either announce *Talaq* in the prescribed form during a 90-day period or, as Hindu husbands do, simply desert her, leaving her high and dry.

The Protection of Women from Domestic Violence Act was passed in 2005 to safeguard all women's rights and give them the ability to assert their rights even when a marriage is still in existence. Women of all religions are included by this law. A Uniform Civil Law applies here. Under this statute, there is already a well-oiled machine in place.

Ironically, a government that publicly supports the idea of a Unified Civil Code is seeking to include Muslim women under a separate statute intended specifically for Muslim women. This was done in order to advance its political interests, rather than enhancing an existing legislation that protects their rights. During the Lok Sabha debates, this statute was not brought up. The very idea that strict laws will serve as a deterrent has serious flaws. In instances of dowry killings, rape, or child sex abuse, it has not been successful. In what ways

will it serve as a deterrence in *Triple Talaq* situations? What demand will follow if the spouses are released on bond after their initial detention and the trials drag on for years—immediate justice by public flogging?

According to Flavia Agnes, the accounts of the exploitation and prejudice of Gudiya (1999) and Imrana (2005) are given more credence than the agency of those Muslim women who have fought for justice in the courts. Muslim women's '*backwardness*' always finds a cultural equivalent, but not an educational or economic one. There aren't many analogies made in light of their marginalization. Muslim women's diverse experiences, like those of women of other religions, are influenced by their class, geography, and sect. (Agnes, 2016)

One of the most famous cases cited are that of Gudiya who was married to Arif in 1999, some ten days before her husband was called on sapper duty to Kargil. After the war Arif failed to return and was declared a deserter. However it was later disclosed that he had been taken a prisoner of war by the Pakistani authorities and was actually in Pakistan. By the time he could return back to his native village after 6 years, Gudiya had been remarried by her relatives to Taufiq in 2003 and carrying the latter's child. When the story was picked up by the media and Gudiya questioned, she averred that she wanted to live with her first husband Arif. Islamic scholars worked to annul her 2nd marriage as she had not taken divorce from Arif. Gudiya and Arif were finally reunited at the behest of Islamic scholars and the village council. Tariq approached the court to get Gudiya back but the council ruled in favour of Arif, and Gudiya was made to live with Arif. Arif accepted her on condition that when the baby was old enough, Gudiya would send him back to Tariq. However Gudiya developed anaemia and suffered a miscarriage. She also developed septicemia and 15 months after returning to Arif succumbed to her ailments at the Army research and Referral Hospital in Delhi. Gudiya passed away in December 2006. A famous film on her life, *Ek Guidiya ki Kahani* has documented her story (Times of India online, 2006). The film maker Prabhakar Shukla has gone on record saying:

"Gudiya died due to excessive mental trauma that led to multiple organ failure . Her death is the most tragic part of the entire episode and the film questions why it happened to her." (Kumar, 2006).

Regarding the *Talaq* conundrum, the two incidents mentioned above are frequently discussed. The proposed law's addition of the "*criminality*" dimension to interpersonal interactions would be harmful to Muslim women since it opens the door for further manipulation. The unintended consequence of these rules could be an increase in Muslim women's reliance on Jamaat or Sharia Courts if the civil court processes become more complex due to the "*criminality*" component. (Agnes, 2017)

The Sharia court was established as a valid arbitrator, mediator, negotiator, and conciliator of family and civil disputes and was not at odds with the secular judiciary in India's family law system in 2014 when the Supreme Court recognized these religious adjudication bodies as "alternative dispute resolution" (ADR) forums (Chakrabarty and Ghosh, 2017). Is criminalizing the "*utterance*" of words that have been declared void by the law a good way to ensure gender justice? A strong gap between the procedural difficulties of civil law and local systems for justice may be further exacerbated by this strict Bill.

Survey results on Muslim women's opinions of Personal Law reforms in Maharashtra were stunning. According to the Bharatiya Muslim Mahila Andolan (BMMA), one of the petitioners in the Supreme Court challenging *Triple Talaq* restriction on the improper use of immediate *Triple Talaq* was requested by more than 90 per cent of those polled. Their study, *Seeking Justice Within Family: A National Study on Muslim Women's Views on Reforms in Muslim Personal Law*, revealed the socio-economic vulnerability of the women who spoke out against *Talaq*.

Another crucial aspect is that it draws attention to the internalized collective struggle of women and the creation of a gender-inclusive understanding of Islam among the oppressed. Muslim women did not speak up for change in the 1985 Shah Bano case as a group seeking justice. In many regions of India in 2017, their opinions have become more formally arranged. They can be identified by the current administration as both resisters and negotiators; this transformation must be addressed. (Sur, 2018)

Furthermore, despite the fact that it was obvious that the woman had experienced open cruelty, including dowry demands and abandonment, the PIL makes no reference of the Protection of Women from Domestic Violence Act, 2005. The aforementioned act contains a number of provisions that make it easier to administer justice, especially in light of the particulars and circumstances of this case. (Tiwari, 2017)

It is significant to note that the Muslim Personal Law Board's defensive stances and misunderstanding of the progressive legal advancements available to women of all religions, including Muslims, have contributed to the perception in the community that we are fighting against "them." As usual, such a division will be harmful to women since it eliminates the practical reality of women from the battle between the oppressed and the civilized. It is unknown whether enforcing criminal responsibility and outlawing *Triple Talaq* can solve their issues.

Even when the subject of their rights is brought up, it is impossible to deny that the elevated voices pose as messiahs who will free these women from the oppressive, dictatorial, and stereotyped limitations of their society. However, do the Muslim women themselves seek that as a substitute? Thus, the entire topic of "*women's rights*" is distorted to suit various political objectives. Instead of finding answers that are in line with their religious and societal demands, it proposes solutions that force individuals to rebel against the culture around them rather than resolving the dispute amicably.

The Hindutva authorities are out to denigrate Islam in order to portray a marginalized group while ignoring their own persecution of Muslim women. On the other hand, the Ulema of All India Muslim Personal Law Board are intended to safeguard Muslim patriarchy and keep its dominance among the predominantly uneducated population of Indian Muslims.

The Muslim community, like all communities, is not gender-based; women, the helpless victims of *Triple Talaq*, and the violent men who pronounce *Triple Talaq* are all a member of the same composite group that is being driven more and further into a survival-or-suffering situation. They are politically voiceless. They haven't experienced economic growth. They have a ghettoized life on the fringes of society. (Tiwari, 2017)

Instances brought to light before the media seem to intertwine Muslim identity with gender subjugation and repression. As such the petition has brought Muslim women to a crossroad where their rights can only be assured through a confrontation with their religious identity. Taking cue from Third Wave Feminism the identity of Muslim women must be understood at the intersection of gender and religion.

The question remains, however, as to whether outlawing *Triple Talaq* would truly help Muslim women's circumstances in any way. The Muslim lady would only be pitted against her close family and society as a result. It has to be seen if the lady, who most likely already leads a subordinate life in society, is willing to engage in this conflict. Thus, it is necessary to comprehend how the Muslim woman's subjectivity is produced within the societal norms that she must adhere to. Since she must exist within the same social framework, we cannot separate her identity from it. She cannot be separated from her Muslim identity because it is an integral part of her identity and an intrinsic part of who she is.

The only positive to come out of this entire argument is the maturation of Indian Muslim women who have been thrust to the centrestage and are no longer content to watch helplessly as others write their futures. In a male-dominated culture that is rife with racists and hypocrites, this doubly disenfranchised minority inside a minority is finally making an effort to assert itself and find its place.

With excerpts from interviews with and writings by:

- Mr. Salman Khurshid Special Counsel for the Supreme Court on the Triple Talaq Bill
- Ms. Flavia Agnes Noted Women's Right lawyer
- Islamic Scholar Late Dr. Kalbe Sadiq

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