



## MAINSTREAMING MISCONCEPTIONS - DEMONIZING MUSLIM PERSONAL LAW: A COMMENT ON THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

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### Abstract

The media is awash with reports portraying an immensely inhuman picture of Muslim Personal Law which treats women like objects, devoid of any rights. Deeply embedded misconceptions in the media about marriage and divorce, together with legislations based on flawed understanding of Islamic law have led to demonizing of Muslim Personal Law and othering of Muslims in the society. The objective of the paper is to firstly, dispel misconceptions perpetuated by mainstream media and secondly, to critically analyse the Muslim Women (Protection of Rights on Marriage) Act, 2019. The paper is schematically divided into two main parts. The idea of marriage and divorce under Islamic law is discussed first. Thereafter, the problem as projected by the media and the solution provided in the form of legislation by the state is critically analysed. A conclusion is arrived at on the basis of the discussion in the two parts.

### I. INTRODUCTION

In 1982, B R Chopra's family drama *Nikaah* released and triggered drawing room discussions on the demonic concepts of Muslim Personal Law like *talaq* and *nikah halala* in the country. Thirty-seven years later, the discussions continue to grow and feature prominently in the media with far greater intensity than ever. Scanning through the media news reports of the past few years, one cannot escape noticing portrayal of an immensely inhuman picture of Muslim Personal Law which treats women like objects, devoid of any rights. The news of the AIMPLB taking a stand against outlawing *nikah halala* had not died down when another report of issuance of a fatwa against a woman in Bareilly for speaking against triple *talaq* surfaced.<sup>1</sup> All news debate starting from the Bill criminalizing triple *talaq* to *nikah halala* and polygamy present an image of Muslim personal law which is unjust, barbaric and perpetuating inequality, misogyny and patriarchy. Sensationalising news headlines, of the AIMPLB's statements as *nikah halala* being a *Quranic* practice which cannot be questioned by any court of law<sup>2</sup> or issuance of *fatwa* denying

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<sup>1</sup> See "AIMPLB against outlawing of 'nikah halala', but wants it to be discouraged" July 17, 2018, available at [http://timesofindia.indiatimes.com/articleshow/65016748.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/65016748.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) (last visited on July 15, 2019). Also see, Avaneesh Mishra, "Fatwa against two Bareilly women for 'speaking out against Islamic practices' July 22, 2018, available at <https://indianexpress.com/article/cities/lucknow/fatwa-against-two-bareilly-women-for-speaking-out-against-islamic-practices-5269546/> (last visited on July 15, 2019).

<sup>2</sup> See Parbina Purkayastha, "Muslim Law Board Endorses Nikah Halala, Says It Is Quranic Practice And Cannot Be Challenged" July 15, 2018, available at <https://www.indiatoday.in/india/story/muslim-law-board-endorses-nikah-halala-says-it-is-quranic-practice-and-cannot-be-challenged-1286497-2018-07-15> (last visited on July 15, 2019).

religious burial in case of death for simply speaking against triple *talaq*,<sup>3</sup> play to a gallery which views issues pertaining to Muslims only with a political lens, completely ignoring the legal as well as the social aspects of the issue at hand. Meaningless debates by fake *mullahs* and aspiring politicians abound,<sup>4</sup> there has not been an iota of effort by either the Muslim community (intelligentsia, laymen and religious scholars) or the liberal non-Muslims to address the problem from a non-political perspective, especially in the media. The misconceptions deeply embedded in the media about the Muslim Personal law are further solidified by the legislative efforts of the Central Government. The Muslim Women (Protection of Rights on Divorce) Act, 1986 and the Muslim Women (Protection of Rights on Marriage) Act, 2019<sup>5</sup> being the prime examples of legislations based on flawed understanding of Islamic law that are ignited by populist agendas and drafted with political objectives, perpetuating misconceptions and ignorance in the society.

For anyone not familiar with the Islamic belief system, understanding Islamic law and the insistence of Muslims in wanting to be governed by the same can be extremely perplexing. There is however a pressing need to discuss the same at length. I have argued elsewhere that the notions of gender inequality being perpetuated by Muslim Personal Law is mis founded and it is the deep rooted cultural patriarchy, together with discriminatory laws which is responsible for the sorry state of affairs of Muslim women who are ignorant about *usul-ul-fiqh* and the rights guaranteed to them by Islam.<sup>6</sup> Extending the same argument, in this article, my objective is twofold. *First*, to dispel the misconceptions perpetuated by mainstream media either due to sheer ignorance about Islamic law or due to political agendas. *Second*, to critically analyse the Muslim Women (Protection of rights on Marriage) Act 2019 and see if it would in any ways help alleviate gender inequality.

The paper is schematically divided in to two main parts. The idea of marriage and divorce under Islamic law is discussed first. Thereafter, the problem as projected by the media and the solution provided in the form of legislation by the state is critically analysed. A conclusion is arrived at on the basis of the discussion in the two parts.

<sup>3</sup> See Abhishek Chakraborty , “No Medicine, No Burial At Graveyard: "Fatwa" Against Triple *Talaq* Victim” July 17, 2018, available at <https://www.ndtv.com/cities/no-medicine-no-burial-at-graveyard-fatwa-against-triple-talaq-victim-1884603> (last visited on July 15, 2019).

<sup>4</sup> Most television debates operate with the objective to shock, sensationalize and scandalize for the sake of TRP. The idea remains to create further controversial content to discuss and hype rather than having a meaningful dialogue. See for instance “Maulana Ejaz Arshad Qasmi arrested for slapping advocate Farah Faiz on Live TV: Twitter reacts” July 18, 2018, available at <https://www.dnaindia.com/india/report-maulana-ejaz-arshad-qasmi-arrested-for-slapping-advocate-farah-faiz-on-zee-hindustan-live-tv-debate-twitter-reacts-2638590> (last visited on July 10, 2019).

<sup>5</sup> The Muslim Women (Protection of Rights on Marriage) Bill was finally passed by the Rajya Sabha on July 30, 2019 after a contentious chequered history and shall replace the Ordinance after receiving assent from the President.

<sup>6</sup> Please see “*Muslim Personal Law and Gender Equality Concerns In India*” presented at 1<sup>st</sup> International Conference on Law and Justice (ICLJ 2017) organized by Faculty of Shariah and Law, State Islamic University (UIN) Syarif Hidayatullah, Jakarta held in BSD-City, South Tangerang, Indonesia, November, 7-8, 2017, available at <https://www.atlantis-press.com/proceedings/iclj-17/25891413> (last visited on June 15, 2019).

## II. DECODING MARRIAGE AND DIVORCE IN ISLAM

Before starting the discussion on Muslim Personal Law, it is imperative for us to be kept in mind is that the Muslim community in India is not homogenous in nature. Even though, the *Quran* commands the believers not to be divided into various sects,<sup>7</sup> Muslims are divided not only on the basis of various schools of thoughts but also on the basis of caste, culture and geography.<sup>8</sup> Muslims from North India are culturally different from Muslims in the Southern states and the same holds true for Muslims from East and the West. Within a state too, there are noticeable dissimilarities between the Muslims. For Example, Muslims from Bengal are different than their brothers in UP and within UP, *Shias* and *Sunnis* have their conspicuous differences. Again, within Sunnis, *Barelwis* and *Deobandis* are visibly different in their practice of Islam. As far as the differences on the basis of school of thought is concerned, majority of the *Sunnis* in India are *Hanafi* and majority *Shias* are *Ithna Ashari*. Even though ordinary Muslims are ignorant about the nuances of *usul-ul-fiqh* in general and not well versed with the differences between various school of thoughts, the practical result of *ulemas* of a given school sticking to patriarchal interpretations and refraining from *ijtihad* becomes an important reason for spreading ignorance and misconceptions about the law on dissolution of marriage.<sup>9</sup>

Muslims, generally, in the Indian subcontinent and especially in India are heavily influenced by the Hindu culture which is evident in all walks of life, particularly family life. Joint family system, the concept of *suhagan*, societal disapproval of divorcees and their remarriage, especially women, are some examples of cultural influences in Muslim community in India. Since family is the basic unit of society which is founded by the institution of marriage, it is very important to understand what place marriage has in a Muslims' life according to *Sharia* before we discuss divorce.

Marriage in Islam, unlike Hinduism, is not an eternal bond. It is more in the nature of a contract though not purely so. The institution of marriage, as visualized in Islam, is rooted in pragmatism. While taking into consideration, the complexities and frivolities of life, marriage is made easy, so is divorce. Happiness and peace in marriage is conceptualised as important as it brings one closer to Almighty. Marriage in Islam is *sunnah*, a way of completing a believers' *deen*. The whole purpose of marriage is to attain tranquillity and peace<sup>10</sup> Consequently, if any of the spouse is unhappy in marriage or the marriage has broken down even without any fault of the other spouse, they have a right to dissolve the marriage and move on with their lives. This right of dissolution, contrary to the popular misconception is with both husband and the wife. *Talaq* is not the only way to dissolve a marriage. Broadly, there are four modes of dissolving a Muslim

<sup>7</sup> See verse 3:103 and 6:159 *Al Quran*.

<sup>8</sup> See Umar Faruq Abd-Allah, "Islam and the Cultural Imperative", 8 *J. Islamic L. & Culture* 89 (2003) for a better understanding of interplay of culture and Islam.

<sup>9</sup> For example, the patriarchal interpretation of *hadith on khula* in India. For details see my work titled "Understanding *Khula*: A Muslim wife's Right to Divorce" in Furqan Ahmad (ed.), *Dispelling Rhetorics: Law of Divorce and Gender Inequality in Islam* (ILI Publications, New Delhi, 2019).

<sup>10</sup> See, 30:21 *Al Quran* "And of His signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought."

marriage- *Talaq* (from husband's side), *Khula* (from wife's side), *Mubbarat* (by mutual consent) or *faskh* (by *qazi*). Both *talaq* and *khula* are unilateral dissolutions at the instance of husband and wife respectively. Even though consent of husband is required in the instance of *khula* but that consent is not more than a mere formality for deciding the actual moment from which the *khula* becomes operational as the husband has no choice but to say yes to the wife's demand.<sup>11</sup>

This very idea of unilateral dissolution of marriage at the instance of one of the spouses appears a little hard to digest to a majority of Indians, especially Hindus, for whom marriage is a *sanskar* and an eternal bond. Divorce was not even available as an option before the enactment of Hindu Marriage Act, 1955 for Hindus who view marriage as an eternal bond. The original Act of 1955 provided for dissolution of marriage only on fault grounds and no-fault divorce by mutual consent was added as a ground for divorce only in 1976 (section 13B of the HMA, 1956). The ground of irretrievable breakdown of marriage though judicially recognized<sup>12</sup> has still not found place in the statute. This ground of irretrievable breakdown of marriage which the Supreme Court has time and again recognised as a ground for dissolution of marriage in order to do complete justice in a matter is akin to *talaq* and *khula* as unilateral dissolution of marriage at the instance of one of the spouses when the other spouse is not willing to end the matrimonial relationship.

Thus, we see that in Hindu personal law, the movement has been from viewing marriage as an unbreakable bond, to recognizing divorce on fault grounds, to divorce by mutual consent and then finally, irretrievable breakdown of marriage. It is pertinent here to remember that this progressive growth in Hindu law, guaranteeing rights to hapless married women to come out of the shackles of bad marriages, was a result of codification. The codification process took a long time and was met with a lot of resistance from the orthodox and patriarchal forces within the Hindu community. Even after almost seventy years of codified Hindu law giving the right to remarry, divorced women still find it difficult to tie the knot again due to societal disapproval of the same. It is also imperative to note that despite the codified law guaranteeing Hindu women space to exit bad marriages by recognising marriage to be a breakable bond, the popular media portrayal of marriage especially in television and movies is that of marriage as an eternal bond.<sup>13</sup>

At this juncture, it is important to note two things: *first*, Islamic law, from the beginning provides a window for dissolution of marriage, thereby, providing a remedy to unhappy spouses in the form of *talaq* and *khula*; *second*, that second marriage is encouraged by the teachings of *Quran* in case of dissolution of marriage either by death or divorce<sup>14</sup>. It is worth remembering that Prophet *Muhammad (PBUH)* was married monogamously to *Khadija (RA)*, a businesswoman, 15 years older than him and who had been married twice earlier.

<sup>11</sup> For a detailed discussion on law regarding *Khula*, see *supra* note 9.

<sup>12</sup> See, *V. Bhagat v. D. Bhagat* AIR 1974 SC 710, *Jorden Diengdeh v. S.S. Chopra* AIR 1985 SC 935, *Chanderkala Trivedi v. Dr. S. P. Trivedi*, II(1993) DMC271SC, *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675.

<sup>13</sup> The contribution of Balaji telefilms in this regard is undeniably huge with characters like *Tulsi* and *Parvati* in iconic serials like *Kyunki Saas bhi kabhi Bahu thi* and *Kahani ghar ghar ki* being portrayed as the epitome of perfect Indian wife.

<sup>14</sup> See Verses 2:232, 2:234, 2:235 and 2:240 *Al Quran*.

While deliberating upon marriage and divorce in Muslim Personal law, there are three very important interlinked key concepts which need to be understood. *First*, unlike Hindu belief system, marriage does not sever a woman's bond from her natal family. A married Muslim woman remains as much as her father's daughter and is not supposed to take up her husband's surname as name identifies lineage<sup>15</sup> and is entitled to inheritance.<sup>16</sup> Marriage does not in any which ways affect the share in inheritance of a daughter/sister/mother. It is astonishing to think that 1400 years ago, Islamic law guaranteed Muslim women right of inheritance which their Hindu sisters could get only in the year 2006 after a long struggle. *Second*, with respect to law on maintenance, a stipulated time after the dissolution of marriage, it is the responsibility of the parents or siblings to maintain the woman. *Third*, on marriage, a woman's personality is not merged with that of the husband. She is her own person, independent to hold property and independently liable for her deeds as a Muslim. There is no concept of vicarious liability in Islam. Every person is responsible for his or her own deeds. No bearer of burdens can bear the burden of another.<sup>17</sup> A Muslim couple before being husband and wife are at first individuals, striving to attain the higher end of achieving nearness to God. Since, believing in One God and returning to that one Supreme power on the day of judgment remains central to the Islamic thought, marriage becomes just a part of a believer's sojourn in this world and not the ultimate goal of his/her existence. Understanding these three concepts is central to the whole debate on Muslim personal law and uniform civil code in general and *talaq* in particular.

### III. THE PROBLEM

#### Demonizing Muslims by Mainstreaming Misconceptions in the Media

Propagation of misconceptions by mainstream media by ways of movies, television serials and the news media has led to the 'othering' of Muslims in the society. Muslim men are portrayed savages or lechers having insatiable sexual appetite who are not satisfied with one woman. The portrayal of *Alaudin Khilji* by Ranveer Singh in the Sanjay Leela Bhansali period drama *Padmavat* being the prime example on point. Polygamy is portrayed to be a norm in Muslim community in both television serials as well as film media. For example, in the popular television show *Beintehaa* aired on Colors, the main protagonist *Zain's* elder brother, *Fahad* has two wives who live in the same house and keep on bickering while the husband keeps on shuttling between the two of them. In the movie *Gullyboy*, the main protagonist *Murad's* father *Aftaab* played by Vijay Raz casually

<sup>15</sup> Verse 33:5 *Al Quran* "Call them by [the names of] their fathers; it is more just in the sight of Allah." Even though this verse is specifically with respect to adopted sons, the underlying idea remains that of identifying lineage. The daughters of the Prophet were known by his name and the Prophets' wives by the name of their fathers.

<sup>16</sup> Verse 4:11 *Al Quran* "Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt."

<sup>17</sup> Verse 6:164 "And every soul earns not [blame] except against itself, and no bearer of burdens will bear the burden of another." also see 35:18 and 53:38 *Al Quran*.

marries again and brings the new wife to the same house where he is residing with his family that includes his mother, wife and two sons. *Murad* and his mother though upset, accept the fact that *Aftaab* has married again and continue with their lives. *Aftaab's* mother appears to be totally unaffected by the fact that her son has married again and in fact is unhappy when her grandson *Murad* shifts to another house with his mother to save her from the abusive husband.

Contrary to what is generally propagated, polygamy is not the rule but an exception in Islamic law to be exercised subject to condition of treating both the wives equally<sup>18</sup> with God Almighty stressing that “*Ye are never able to be fair and just as between women even if it is your ardent desire..*”<sup>19</sup> It becomes amply clear from a plain reading of the Quranic verses that monogamy is the rule and polygamy is an exception but since we live in a patriarchal society where men boast of having multiple sexual partners,<sup>20</sup> the exception is propagated as a rule both with sneer and envy. Muslim women are constantly portrayed as oppressed and victims of domestic/sexual abuse who have resigned themselves into submission of slavery by men in the house and are constantly living in fear of divorce.

Acting upon the abysmal portrayal of Muslim Women in the media, with reports of incidences of *triple talaq* across the country, despite the Supreme Court holding *triple talaq* as unconstitutional,<sup>21</sup> the Central Government took to itself the cause of criminalizing *Talaq* by passing an Ordinance when the Bill couldn't be cleared in Rajya Sabha. The Bill was finally passed in Rajya Sabha in its third attempt on July 30, 2019, nineteen long months after the first attempt made in December 2017. The Bill, once it gets the formal assent of the President shall become the law of the land.

The media is gloating in the victory of Muslim women from decades of oppression and misery inflicted upon them at the hands of cruel husbands taking recourse to demonic Islamic law.<sup>22</sup> The media hype of the new founded freedom from unjust practice of *triple talaq* conveniently overlooks the fact that it is well accepted by the majority of school of thoughts that *triple talaq* or *talaq-ul-biddat* is un-Islamic as being in stark opposition to procedure of *talaq*

<sup>18</sup> See verse 4:3 *Al Quran* “And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice].”

<sup>19</sup> Verse 4:129 *Al Quran*

<sup>20</sup> In Raju Hiran's movie *Sanju*, the main protagonist *Sanju* boasts of having slept with 308 girls in front of his wife. Casual objectification of women as sexual objects has been a constant part of the talk show *Koffee with Karan* where the host Karan Johar regularly probes his male guests with questions about their sex life.

<sup>21</sup> *Shayara Bano v. Union of India*, 2017(9) SCALE 178.

<sup>22</sup> See generally “Passage of Triple Talaq Bill a moment of great import for India's legislative history” available at: <https://economictimes.indiatimes.com/opinion/et-view/et-view-passage-of-triple-talaq-bill-a-moment-of-great-import-for-indias-legislative-history/articleshow/70459771.cms> (last visited on July 15, 2019); Shashwati Das, “In victory for NDA, Rajya Sabha passes bill to ban instant triple talaq”, available at <https://www.livemint.com/politics/news/in-victory-for-nda-rajya-sabha-passes-bill-to-ban-instant-triple-talaq-1564492574995.html>. (last visited on July 15, 2019); “Muslim women thank PM Modi on passage of Triple Talaq Bill”, available at: <https://timesofindia.indiatimes.com/india/muslim-women-thank-pm-modi-on-passage-of-triple-talaq-bill/articleshow/70464189.cms> (last visited on July 15, 2019).

prescribed in the Holy Quran.<sup>23</sup> The Supreme Court with *Shayra Bano* had already held triple *talaq* to be unconstitutional.<sup>24</sup> Earlier the Delhi High court in 2009 in *Masroor Ahmad v. NCT of Delhi*,<sup>25</sup> had held that triple *talaq* or three pronouncements of *talaq* given in one sitting would be counted as one. Back in 2002, the Supreme Court in *Shamim Ara v. State of U.P.*,<sup>26</sup> had already clarified that for a valid *talaq*, it is mandatory to follow the pre *talaq* process prescribed by the *Quran*.

We are living in sad times when news reporting has been reduced to nothing but mockery of journalism. Wardrobe malfunctions, celebrity affairs and breakups, celebrity deaths and mourning are being sensationalised, so are reports pertaining to rapes. Reports of women being raped in the name of *nikah halala* makes for sensational headlines because nothing shocks more than sexual perversion in the name of religion.<sup>27</sup> Story of a daughter-in-law being forced to marry the father-in-law, who would divorce after raping her so that the son can marry her again, is vilely sensational and thus, more newsworthy than the headline reporting a woman being raped by the father-in-law. The question of validity of a *Nikah* with father-in-law is simply lost in the process of painting a demonic picture of Muslim Personal law.

From B. R Chopra's *Nikaah* to Sony's *Hina* and Color's *Beintehaa*, the struggle of a remorseful husband in finding the perfect second husband for marrying off the divorced wife with pre condition of divorce has been a tried and tested successful plot in television and movies alike. The simple fact that a *Nikah* with the idea of getting divorced in future is not a valid *Nikah* at all, is completely immaterial for anyone concerned in the making of the movie/television show.<sup>28</sup> With minimal censorship requirements for web-based streaming platforms, a series based on *Nikah halala* provides a perfect platform for depicting sex scenes for voyeuristic consumption.

*Nikah halala* is not a custom tailored for sexual exploitation of woman. It is a simple permission given to the now divorced spouses to re-marry provided the second marriage of the woman is dissolved due to death or divorce<sup>29</sup>. It is important to note that the process of *talaq* which is prescribed by the Quran allows for contracting a fresh *nikah* with the wife after divorcing

<sup>23</sup> For detailed discussion on *Triple Talaq* see Samreen Hussain, "Triple Talaq: A Socio-Legal Analysis *ILI Law Review* 130 (2010) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1597858](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597858) (last visited on July 15, 2019).

<sup>24</sup> *Shayara Bano v. Union of India (UOI)*, 2017(9) SCALE 178.

<sup>25</sup> (2007) ILR 2 Delhi 1329.

<sup>26</sup> AIR 2002 SC 3551.

<sup>27</sup> PTI, "Woman alleges 'forced to undergo nikah halala', raped by father-in-law; 5 booked", Sept 03, 2018, available at <https://www.hindustantimes.com/india-news/woman-alleges-forced-to-undergo-nikah-halala-raped-by-father-in-law-5-booked/story-huKME0br0bvm85TMDJPXxL.html> (last visited on July 15, 2019). Also see Mirror now, "Another nikah-halala horror! Woman gang-raped by husband, father-in-law, uncle and 2 clerics" September 03, 2018, available at <https://www.timesnownews.com/mirror-now/crime/article/woman-forced-to-undergo-nikah-halala-gangraped-by-father-in-law-husband-his-uncle-and-two-clerics/278939> (last visited on July 15, 2019). It is important to mention here that *nikah* with father of divorced husband is not valid in Islamic law.

<sup>28</sup> Even though a marriage contract may stipulate conditions for maintenance and protection of rights in case of divorce in future, it cannot stipulate a provision of divorce in advance.

<sup>29</sup> See verse 2:230 which reads "And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah. These are the limits of Allah, which He makes clear to a people who know."

her twice but not after the third pronouncement which makes the divorce irrevocable. Remarrying the first husband after dissolution of second marriage is just an option available to the woman and cannot be forced upon her.<sup>30</sup>

Sadly, ignorance of *usul-u-fiqh* in Muslims and misinformation propagated by the news & entertainment media has led to demonization of Muslim personal law whose only objective seems to be sexual exploitation and oppression of women. A rape is what it is- a heinous crime against the person of a woman and should be dealt like a crime. Sensationalising rape by citing senseless religious justifications given by the accused is akin to mocking the whole system while belittling the agony of the woman.

### **Mainstreaming misconceptions by legislation**

The Muslim Women (Protection of Rights on Marriage) Act, 2019 is a small piece of legislation with just eight sections in total but is bound to have large ramifications for a simple reason. It brings in criminal law into the horizons of family law. How far the law goes in alleviating the Muslim women is a question that can only be answered with the help of an impact study done in future. At present, the analysis of the law can only be rooted in theory and whatever little data is available on the subject.

The Act is applicable to the whole of India except the State of Jammu & Kashmir. Section 2 specifies that “unless the context requires otherwise the term “electronic form” has the same meaning as in the IT Act, the term “magistrate” means a Judicial magistrate of the First Class and most importantly “*talaq*” means *talaq-e biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by the husband.

Chapter II of the Act contains two provisions. Section 3 makes the pronouncement of *talaq* as void and illegal and section 4 makes any such pronouncement an offence attracting three years of imprisonment along with fine. Chapter III of the Act is titled “Protection of Rights of Muslim Women” and deals with two specific rights- one that of subsistence allowance and custody of minor children. Section 5 provides that “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.” Section 6 provides that “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.” Section 7 makes the offence of pronouncing *talaq* a cognizable and compoundable offence and bail is made conditional on first providing a hearing to the woman on whom *talaq* has been pronounced.<sup>31</sup>

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<sup>30</sup> 2:230 *Al Quran*

<sup>31</sup> Section 7 reads- 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

Criminalization of pronouncement of *talaq* by section 4 is the core of controversy for the simple reason that it defies the settled principles of criminalization like principle of legality,<sup>32</sup> proportionality<sup>33</sup> and principle of minimal criminalisation.<sup>34</sup>

### *Principle of Legality*

The Act penalizes pronouncement of *talaq* without clearly codifying the process of a valid *talaq*. In the absence of codification of the process of *talaq* by the legislature it is only the scattered judgements of the Supreme Court from *Shamim Ara* to *Shayara Bano*, which discuss the process of *talaq* along with the traditional texts used by the *Ulemas* for the purpose of disposing matters between the divorcing couples. *Ulemas* across wide spectrum of sects do not have uniformity on the process of *talaq* and the judgments of the Supreme Court which are in English language not easily comprehensible to general Muslims.<sup>35</sup> Confusion is bound to occur in the interpretation of the term “*talaq*” despite a half-hearted attempt to define *talaq* in section 2 of the Act. The definition of “*talaq*” makes it amply clear that *ahsan talaq* is outside the ambit of the Act as it is *talaq-e-sunnat* and a single revocable divorce. However, confusion may still arise in case of *hasan talaq* which though not instantaneous is irrevocable in nature. Question may also arise with regard to the interpretation of “*talaq- e biddat*” itself, which as clarified by the Delhi High Court in *Masroor Ahmad* and also according to various schools of thoughts<sup>36</sup> is to be counted as a single revocable *talaq*.

### *Principle of Proportionality*

According to this principle, the punishment has to be in proportion with the seriousness of the offence and to deal with the same a way of grading the seriousness of harm suffered by the victim needs to be done.<sup>37</sup> In assessing the degree of harm, one has to first determine the interest of the victim that have been interfered with and then considering the extent of the interference. Pronouncement of triple *talaq* is generally understood to be an arbitrary act and this arbitrary act is void in the eyes of the civil law. This act interferes with the right of the woman to reside with

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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.

<sup>32</sup> According to the principle of legality, the law must be clear, capable of being obeyed and be readily available to the Public. See Jonathan Herring, *Criminal Law: Text, Cases and Materials* 9 (7<sup>th</sup> ed., Oxford University Press, Oxford, 2016).

<sup>33</sup> According to the principle of proportionality, the sentence accorded to a crime should reflect the seriousness of the offence. See *id.* at 13.

<sup>34</sup> According to the principle of minimal criminalization, criminal law should prohibit something only if absolutely necessary. See *id.* at 10. Also see Andrew Ashworth, “Is Criminal Law a Lost Cause?”, 116 *Law Quarterly Review* 225 (2000).

<sup>35</sup> Given the dismal state of affairs of English education in the Muslim community. See A Report on Social, Economic and Educational Status of the Muslim Community of India by Prime Minister’s High Level Committee Cabinet Secretariat Government of India November, 2006 available at [http://mhrd.gov.in/sites/upload\\_files/mhrd/files/sachar\\_comm.pdf](http://mhrd.gov.in/sites/upload_files/mhrd/files/sachar_comm.pdf) (last visited on July 10, 2019).

<sup>36</sup> According to the *Shia* schools and the *Ahl-e Hadith* sect amongst the Sunnis.

<sup>37</sup> See Jonathan Herring, *Criminal Law: Text, Cases and Materials* 13 (7<sup>th</sup> ed., Oxford University Press, Oxford, 2016).

the man peacefully in the matrimonial home and seek maintenance for herself. Penalizing the act of pronouncing *talaq* does not remedy the loss of residence of the wife but only provides for seeking of subsistence allowance for herself and the minor children. The question that arises now is that - how would the guilty husband provide for her subsistence while being imprisoned. In absence of the penalty of imprisonment, it would make sense that the husband would be in a position of providing subsistence allowance to the wife and children.

Logically, if triple *talaq* is considered to be a single revocable *talaq*, the chances of reconciliation between the spouses are higher as the wife is entitled to live in the matrimonial home during the period of *iddat* according to the Islamic law. In case of non-conciliation, provision of maintenance until the woman remarries after *talaq* would have been a better option. Such a provision would also have been at parity with section 25 of the Hindu Marriage Act and section 125 of the Cr.Pc, thereby negating any questions about disparity of treatment of divorcing Hindu and Muslim husbands. In the current state of affairs, if a Hindu husband secures a divorce decree on the judicially recognized ground of irretrievable breakdown of marriage, where the wife is not at all willing to end the marriage, he is only liable under civil law to provide maintenance and does not attract the criminal sanction of three years imprisonment. On the other hand, a Muslim husband exercising his right to unilateral divorce under the personal law, in case of breakdown of marriage, would attract a jail term along with fine and somehow would also be expected to make the arrangements for providing subsistence allowance to the wife and minor children from the prison.

#### *Principle of minimal criminalisation*

According to this principle, law should provide for criminal sanction only when absolutely necessary and the conduct in question is sufficiently serious to warrant intervention by the criminal law.<sup>38</sup> The question that need to be answered in light of this principle is that- whether the practice of triple *talaq* is so rampant in the society so as to warrant criminal sanction for the same? According to the census of 2011, divorce rate in India is 0.24% with divorce rate among Muslims at 0.56% and 0.76% for Hindus. According to the census, 0.49 % of Muslim women had been divorced in general with no data pointer for the type of divorce.

A study conducted by Sreeparna Chattopadhyay to assess whether divorce puts Muslim women at a greater disadvantage, highlights a very interesting finding.<sup>39</sup> States which have positive gender indicators like better female literacy, less skewed sex ratio, have lower or similar rates of divorce among Hindu and Muslim women. In states where women's lives are marked by extensive inequities, a higher rate of divorce among Muslim women is seen, suggesting that a husband's unilateral right to divorce may be increasing the percentage of women in a regime of more intense patriarchy.<sup>40</sup> Thus, focussing on improving gender indicators like female literacy, employment would help in alleviating gender inequality and also reduce the divorce rate at the same time.

<sup>38</sup> See, Andrew Ashworth, "Is Criminal Law a Lost Cause?", 116 *Law Quarterly Review* 225 (2000).

<sup>39</sup> See, Sreeparna Chattopadhyay, "Muslim Women and Divorce in India: Insights from Census 2011" working paper 2017, available at [https://www.researchgate.net/publication/316876926\\_Muslim\\_women\\_and\\_divorce\\_in\\_India-Insights\\_from\\_Census\\_2011](https://www.researchgate.net/publication/316876926_Muslim_women_and_divorce_in_India-Insights_from_Census_2011). DoI 10.13140/RG.2.2.31147.44327 (last visited on July 5, 2019).

<sup>40</sup> *Ibid.*

In absence of any specific empirical study conducted by the Government on Triple *talaq*, it can safely be inferred from the census data that triple talaq is not an epidemic plaguing Muslim woman and criminalizing triple talaq is encroachment of criminal law in the family arena.

#### IV. CONCLUSION

Though the term “demonization” might appear to be a bit of an exaggeration as the process of propagating misconceptions about Muslims is subtle when not sensationalized; it is nonetheless used in this article as the portrayal achieves the same goal- demonizing an entire community based on stereotypes and sheer ignorance to suit the political narratives. It is important to question in a free society based on democratic principles, the absence or existence of political undertones of such a demonic media portrayal of Muslims in the name of journalistic and artistic freedom. *Nikah* is not a joke, neither is *talaq*. Unfortunately, that is what it has been reduced to by the mainstream media, politicians and fake *mullahs* accentuated by ignorance of general public.

By no stretch of imagination am I arguing for censorship of any kind of news reporting on issues of relevance. What I am arguing instead is a sensible and informed discourse on *usul-u-fiqh* and the codification of Muslim law in light of the same, without any political agendas. Non-Codification of Muslim personal law holistically and distrust of the judicial system created by the fake *mullahs* and politicians posing as guardians of the oppressed community as witnessed in the aftermath of *Shahbano*, is a major problem faced by Muslims in India. Uninformed debates on *triple talaq* after *Shayara Bano* and criminalizing of *talaq* by the Muslim Women (Protection of Rights on Marriage) Act, 2019 without an iota of understanding the institution of marriage in Islam have further aggravated the distrust of the government which in all probability would continue to grow. The criminalisation of *talaq*, in the name of protection of Muslim women, in absence of codification of rights and duties in a marriage, serves no purpose other than politics. It is just a political gimmick which violates the basic principles of criminal law and would go a long way in further alienating the Muslim community from the mainstream.