

Critical appraisal of Talaq-e-biddat bill and a way forward

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Abstract

To protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto a Bill called the Muslim Women (Protection of Rights on Marriage) Bill, 2017 has been introduced in the Lok Sabha which is going to affect the development of Legal system in India and the very basic unit of the society i.e. the institution of marriage. Talaq-e-Biddat is made punishable, it is like punishment for a breach of a void agreement or void contract, or punishment for a void act or punishment for an "act" which is not an offence. The marriage between a Muslim man and a Muslim woman is a civil contract and the procedure to be followed in case of a breaking of matrimonial tie should be civil in nature and not criminal. The Bill has mingle it in between "civil nature & civil wrong" and prescribes punishment as criminal act without defining the crime. The remedy to a contractual wrong should not be introduced as a criminal offence. It is like deviation from well settled law on Criminal Jurisprudence. If talaq-e-biddat is null and void and it would have no impact on the marriages then what is the need of allowances and custody of children. There are a number of provisions in different laws that makes offences relating to marriage as non- cognizable & bailable. The main reason of making offences relating to marriage non- cognizable & bailable is that the Police should not interfere into the family matters as the family is considered to be the very basic unit of the society. These provisions are keeping police out of preview of family affairs; otherwise the Police will get unfettered power to interfere into family affairs, interference by the police in such matters will destroy the very basic unit of the society and can lead to chaos in the society.

Keywords: bill, *talaq-e-biddat*, police, muslim women, cognizable, society

Introduction

There is a *latin* maxim in Common Law system that "*the rex non potest peccare*" which means "A King can do no wrong" [1] or in other words "Parliament can do no wrong" [2]. In spite of the fact that only 149 out of 543 Parliamentarians are Post graduate [3]. Even some Ministers are 5th standard pass. The Lok Sabha has cleared [4] the Muslim Women (Protection of Rights on Marriage) Bill [5], 2017, and now it is sent to the Rajya Sabha for clearance. Only one MP has voted against the motion and two three parties decided to abstain from the voting.

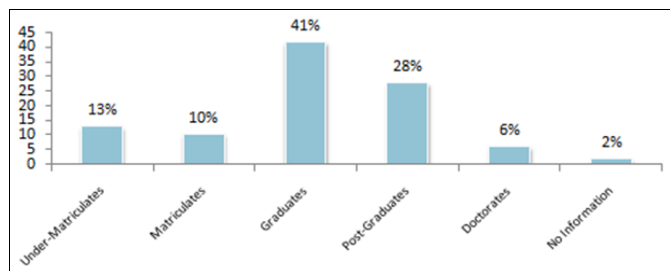


Fig 1: Education Profile of Members of 16th Lok Sabha

The following are the issues which may be the points of consideration after the introduction of the Bill:

- Whether this Bill is really going to help in the development of Legal system in India,
- Whether it is not going to disturb the well settled law of the Criminal jurisprudence,

- Whether is it really going to protect the rights of Muslim Women,
- Whether it is not going to destroy the very basic Unit of the Society, and
- Whether it is going to deter the Muslim husbands from pronouncing *Talaq-e-biddat*.

Let us explain and examine

The preamble of the bill starts with "*to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto*" [6]. The aim & objective of the bill contains "*It is seen that setting aside talaq-e-biddat by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims. It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce*" [7]; further it says "*in order to prevent the continued harassment being meted out to the hapless married Muslim women due to talaq-e-biddat, urgent suitable legislation is necessary to give some relief to them*" [8].

1. Section 2(b) of the Bill defines the word Talaq and says "talaq" means "*talaq-e-biddat*" or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband [9]; and Section-3 declared that any pronouncement of *talaq* by a person upon his wife, by

words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal^[10].

As we know the same act of *Talaq-e-biddat* (three pronouncement of Talaq at one and the same time) has been declared null and void by the Supreme Court of India in *Shayara Bano v. Union of India & others*^[11] on 22nd August, 2017, in a majority judgment of 3:2.

The court observed that “...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. Also, as understood by the Privy Council in *Rashid Ahmad (supra)*, such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after *Shamim Ara*^[12]. This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article- 14 of the Constitution of India.”

But again Parliament is declaring it as null & void, which means Parliament is giving its consent to the Supreme Court judgment. Here one thing is noticeable that Parliament has gone one step further and has declared the very act of *Talaq-e-biddat* as an illegal act. The point is, if the very act is *void-ab-initio*^[13] or in other words which is not in existence at all^[14], then why it is made punishable, it is like punishment for a breach of a void agreement or void contract, or punishment for a void act or we can say punishment for an "act" which is not an offence. Pronouncement of *Talaq-e-biddat* will have no effect on marriages as held by Supreme Court in *Shayara Bano v. Union of India & others*^[15]. Moreover the very act of *Talaq-e-biddat* is not declared as an offence in the Bill, it is simply declared as a void act. If it would have been an offence then the punishment is justifiable. Secondly, by declaring it as a void act, Parliament itself declared the very act as a "civil act or civil in nature" and prescribing punishment for the same is not justifiable.

2. Further Section-4^[16] prescribes the punishment and says whoever 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 fine. One must understand the difference between an “offence and illegal act”:

Offence is something which is formally an offence under the penal laws of the country. The law gives specific punishment for that offence and defines that offence. Nothing is an offence if not provided in Law. A crime is another term for an offence but may not be formally defined. Illegal is something which is illegal per se^[17] i.e. which is not supported by law and furnishes ground for civil action. It may or may not be an offence. The marriage between a Muslim man and a Muslim woman is a civil contract and the procedure to be followed in case of a breaking of matrimonial tie should be civil in nature and not criminal. So, here Parliament must define the very act of *Talaq-e-biddat* and not mingle it in between “civil nature & civil wrong” and should not prescribe punishment as criminal act without defining the crime. The remedy to a contractual wrong should not be introduced as a criminal offence. It is like

deviation from well settled law on Criminal Jurisprudence.

3. Section-5 laid down that a married Muslim woman upon whom *talaq (Talaq-e-biddat)* 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.^[18] Further Section-6 goes one step ahead and laid down that, 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^[19].

One must note a point here is that, if *Talaq-e-biddat* is null and void and it would have no impact on the marriage then what is the need of allowances and custody of children. Inserting such a provision itself indicate that the law makers are confused that, whether to make it like judicial separation so that allowances & custody may be granted or marriage still be continued to make husband criminally liable. Hence Section- 4 and Section 5 & 6 together are contradictory to each other.

4. And the most surprising section of this Bill is Section- 7 which says notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under this Act shall be "cognizable and non-bailable" within the meaning of the said Code.

As we know Section 2 (c) of The Cr.P.C., 1973 says that the cognizable offences or cognizable cases are those under which a police officer can arrest without an arrest warrant. Generally cognizable offenses are those offenses which are serious in nature for example- Murder, Rape, Dowry Death, Kidnapping, Theft, Criminal Breach of Trust, Unnatural Offences etc. Section 154 in the Code of Criminal Procedure, 1973 states that every information relating to the commission of a cognizable offence shall be reduced into writing by Police officer or under his direction, and be read over to the informant; and thereafter if a Cognizable offence has been committed, a Police officer has power to arrest & investigate the case without the order of Magistrate^[21].

Whereas the Non-Cognizable offences are those offences which are not much serious in nature and which are not affecting the society at large, for example- Assault, Cheating, Forgery, Defamation etc. and where police officer cannot arrest without warrant. Generally crime against State is being regarded as cognizable offences and generally punished with more than three years of imprisonment.

But at the same time there are certain offences which are serious in nature and punishable with more than three years of imprisonment but they are not made cognizable by the Parliament, for example Section 493 of IPC where cohabitation caused by a man deceitfully inducing a belief of lawful marriage, is punishable with Ten Years of imprisonment and made non- cognizable, similarly Section 494, 495, 496 and 497 are punishable with 5 years or 7 years, as the case may be, of imprisonment but made non-cognizable & bailable by the Parliament.

The main reason of making offences relating to marriage non cognizable & bailable is that the Police should not interfere in the family matters *as the family is considered to be the very basic unit of the society*. These provisions^[22] are keeping

police out of preview of family affairs; otherwise interference by the police in such matters will destroy the very basic unit of the society and can lead to chaos in the society.

But under Section- 7 of the Bill, it is made “*cognizable and non bailable*” which means it is going to affect the well settled law of criminal Jurisprudence on Marriage related issues and may lead to destroy the very basic Unit of the Society. The Police will get unfettered power to interfere into family matters. The offence being non-bailable the husband will be dependant upon the mercy of the judges for his personal liberty even though the husband may have been a polite and loving. Further, the offence of *talaq-e-biddat* have been made a non-compoundable offence and even if the husband resolves the issue with his wife, he will be forced to face trial.

Hypothetically let us take an example, suppose there is a Muslim husband & wife, if husband has pronounced *Talaq-e-biddat* upon his wife, which has no impact on the marriage at all, as it has been declared *null & void* and unconstitutional by the Supreme Court of India. Then, immediately after pronouncement of *Talaq-e-biddat* the police gets power to arrest without warrant, which means the police can interfere at any point of time into family affairs and again it is made non-bailable, which means the very basic unit of the society will get disturbed and unnecessarily harassed by the police authorities.

5. One positive aspect of criminalization of *talaq-e-biddat* is, it may deter the muslim husbands from pronouncing it ^[23] which has no sanction from Holy Quran. Of course criminalization of *Talaq-e-biddat* will deter the act, but at the same time it will close all the doors and let no scope for reconciliation between the parties and finally marital tie will come to-an- end. As once a husband received three years jail term for an act which is *void-ab-initio*, then the same husband will pronounce *Talaq-e-sunnah* and get separated for that woman.

The provisions in the Bill will give an additional weapon in the hands of wives ^[24]. No married person can ever deny that married couples fight. The fights can sometimes turn ugly and this bill if turned into a law will give a very deadly weapon in the hands of the wives. The present Bill therefore without giving any protection to husband will pave a way for harassment. So the government should include a mid-way of conciliation instead of such a harsh punishment.

Dilemma Regarding Burden of Proof

The Bill does not mention any provision regarding burden of proof. So, the burden of proof shall lie as per the Indian Evidence Act, 1872 on the woman. Further, it is not clarified that whether it is rebuttable presumption of law or irrebuttable presumption of Law. It is also not clear that only on wife’s testimony the husband is put behind the bar. Presumptions are very essential in matrimonial offences because it is difficult to get evidence ^[25].

If the act of *talaq-e-biddat* would be treated as in tune with the offences against women then burden of proof shall lie on husband. Pronouncement of *talaq-e-biddat* is mostly oral and one can imagine how a man will be able to prove that he has not pronounced *talaq-e-biddat* on his wife. To prove that the

husband has pronounced *talaq-e-biddat* under the Evidence Act would put the husband's word against that of his wife and as the law stands today, the wife's words would be treated as gospel truth. The wife will not even be required to prove any cruelty, mental or physical yet the husband will find himself in jail.

Conclusion

So, The Muslim Women (Protection of Rights on Marriage) Bill, 2017 is in no way going to protect the rights of Muslim Women and there is need for a better solution. Rather than focusing on breaking the marital tie the emphasis should be given on reconciliation to protect the institution of marriage as by divorce, the whole family gets affected. In order to bring social change most importantly we must focus on literacy, so that we may produce national wealth, which will further take part in national development and eradicate evil within the community. If really Parliament wanted to protect the rights of Muslim women then it must implement the Justice Sachar Committee Report so that condition of women in the society may improve.

References

1. The maxim *rex non potest peccare* is rendered on p. 1580 of Jowitt's Dictionary of English Law as (the King can do no wrong).
2. It is not to be presumed that the king will do or sanction anything contrary to law, to which he is subject. But if an evil act is done, it, though emanating from the king personally, will be imputed to his ministers, for whose acts the king is in no way responsible. *Regina v. Canadian Broadcasting Corporation et al.* 30O.R. (2d) 239, 115 D.L.R. (3d) 684
3. <http://www.prsindia.org/media/media-updates/profile-of-the-16th-lok-sabha-3276>, PRS Legislative Research v Institute for Policy Research Studies. 75% of the MPs elected in the 2014 general elections have at least a graduate degree. This is slightly lesser than the 15th Lok Sabha in which 79% of MPs held at least a graduate degree. Interestingly, the percentage of MPs elected in the 2014 general elections who do not have a matriculate degree is significantly higher in this election (13%) in comparison to the 15th Lok Sabha (3%). At the same time, the number of MPs with just a matriculate degree has decreased in the 16th Lok Sabha to 10% from 17% in the 15th Lok Sabha. The number of Members with a doctoral degree has also increased in the 16th Lok Sabha to 6% from 3% in the 15th Lok Sabha.
4. The Muslim Women (Protection of Rights on Marriage) Bill, 2017 was introduced in *Lok Sabha* by the Minister of Law and Justice, Mr. Ravi Shankar Prasad on December 28, 2017.
5. <http://www.thehindu.com/news/national/lok-sabha-passes-the-triple-talaq-bill/article22319663.ece,NEW> DELHI, DECEMBER 28, 2017 20:12 IST
6. Preamble of the Muslim Women (Protection of Rights on Marriage) Bill, 2017.
7. Aim & objective of the Bill as introduced in Lok Sabha.
8. *ibid*
9. Section 2 (b) "talaq" means *talaq-e-biddat* or any other

- similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband;
10. Section- 3, Talaq to be void and illegal: Any pronouncement of *talaq* by a person upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.
 11. Supreme Court of India judgment, Writ Petition (C) No. 118 of 2016
 12. *ShamimAravs State Of U.P. &Anr, Appeal (crl.) 465 of 1996*
 13. Void-ab-initio: A Latin phrase meaning a contract or agreement is void from the outset or having no legal force from the very beginning.
 14. Void. Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended, Black's law Dictionary 2nd Edition.
 15. Supreme Court of India judgment, Writ Petition (C) No. 118 of 2016.
 16. Section- 4, Punishment for pronouncing talaq: Whoever 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 fine.
 17. Illegal: Not authorized by law; Illicit; unlawful; contrary to law. Sometimes this term means merely that which lacks authority of or support from law; but more frequently it imports a violation. Etymologically, the word seems to convey the negative meaning only. But in ordinary use it has a severer, stronger signification; the idea of censure or condemnation for breaking law is usually presented. But the law implied in illegal is not necessarily an express statute. Tilings are called "illegal" for a violation of common-law principles. And the term does not imply that the act spoken of is immoral or wicked; it implies only a breach of the law. See *State v. Ilaynorth*, 3Sneed (Tenn.) 65; *Tiedt v. Carstensen*, 61 Iowa, 334, 10 N. W. 214; *Chadhournev.Newcastle*, 48 N. II.199; *People v. Kelly*, 1 Abb. Prac. N. S., (N. Y.) 437; Ex parteScwartz, 2 Tex. App. 80.
 18. Section- 5: Subsistence allowance: 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.
 19. Section 6: Custody of minor children: 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.
 20. Offences to be cognizable and non-bailable: Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under this Act shall be cognizable and non-bailable within the meaning of the said Code
 21. Cr.P.C. 154: Section 154 of the Criminal Procedure Code, 1973. Information in cognizable cases:
 1. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer; Provided further that-
 - 1) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;
 - 2) the recording of such information shall be video graphed;
 - 3) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of section 164 as soon as possible.
 2. A copy of the information as recorded under Sub-Section (1) shall be given forthwith, free of cost, to the informant.
 3. Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-Section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.
 22. The provisions relating to offences against marriage
 23. Where the Talaq-e-biddat has been pronounced on trivial and flimsy grounds; for instance where a muslim husband pronounced tripletalaq for demanding Rs 20, a muslim husband divorced his wife after she refused to give him a packet of beedis, or triple talaq through letter, whatsapp or facebook.
 24. The Supreme Court has in the case of *Arnesh Kumar v. State of Bihar*; SLP(Cr. Appeal No.9127 of 2013) observed that the provisions of 498A, which deals with harassment of married women, were being misused and therefore

provided certain guidelines to protect the aggrieved husband and in-laws.

25. There are three main provisions regarding the presumption in context of matrimonial offences.

1. Presumption as to abetment of suicide by a married woman which is dealt in section 113A of Indian Evidence Act

2. Presumption as to dowry death which is dealt in 113B of Indian Evidence Act\

3. Birth during marriage conclusive proof of legitimacy dealt in section 112 of the Indian Evidence Act