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## Constitutional equality and emancipation of Muslim women in India via triple Talaq law: Whether feasible without equal family code?

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### Abstract

Muslim women are such susceptible section of women within the vulnerable who have been incessantly fighting for their rights since time immemorial. In patriarchal chauvinistic society like India, women rights are always kept in abeyance, but after seventy-four years of independence and unrelenting struggle within their own social structure now it's high time that these equal citizens (Muslim female) forming 6.9 % population of the countries should be given their equal rights. The list of inequalities is long and hefty but in this article the researcher will be focussing on one of such issues regarding Muslim women, which was recently in limelight i.e. related to divorce or triple talaq. The few questions which the researcher try to ponder over in present article are what is Triple talaq, how it is different from other talaq types. On what grounds talaq is given by Muslim male. If Muslim female do not want divorce, what is the remedy available to her. Whether right to have a quality life is hampered by the unbridled power of divorce in hand of husband. Also, the stand/tussle of legislature and judiciary will be seen. Whether the present act, criminalising triple talaq, is enough to redress the long-standing call for equality by Muslim women. In the present article the researcher will try to focus on these imperative issues and try to figure out some suggestions also, necessary for the upliftment of the condition of Muslim Women today.

**Keywords:** triple talaq, muslim women, talaq-e-biddat, iddat, divorce rights, judicial view on divorce, equal law

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### Introduction

#### Prologue

After independence, there was a ray of hope in the hearts of millions of women in this country specially belonging to Muslim community, of equal rights, being equal citizen of this democracy under one of the best constitutions of the world. But this optimism is getting blurred after years and years of struggle for basic rights. In Indian democracy, women have not been accepted as a free citizen but she is recognised from which religion, caste, community she belongs to, her rights are seen not as human rights, but the political rights under a particular community, which can be conferred only on the sweet will of the patriarchs of that community, totally establishing her subsidiary status as a living being/citizen in this country. The plight of Muslim women has aptly been described by justice V.R. Krishna Iyer in one of the judgments as follows 'Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed.'(p.514).' Even in the 21<sup>st</sup> century, in the present era of information technology and social media, in the name of equality and protection, Muslim women of our country are getting what kind of equal law, the reward of their long struggle from *Shah Bano to Shyara Bano* case, as presently came in form of an ordinance which later on gets converted into an act in 2019. The struggle for equality is long drawn asking for various reforms in form of uniform/ equal law for Muslim male and female, but the final outcome in form of abovementioned act seems disappointing to millions of Muslim females suffering from decades in the hope of justice.

Is this the kind of equality we seek for the millions of Muslim women of our Country. After more than seven decades of independence, our government is still playing appeasement policy for male voters and trying to silence the long pending struggle and demand for an equal law by just abolishing something already forbidden in Quran and banned way back by almost 23 Islamic countries the world over. What can be more brutal blow to this long pending demand of equality by citizens of our independent Democracy. As well observed by justice D.P.Madon 'The Triple Talaq in this form not only makes Muslim women victims of arbitrary and whimsical decisions of their husbands, but being unilateral in nature, it also robs them of the liberty to choose the form of divorce they want'

### Legal materials and Methods

The proposed research paper primarily based on qualitative research. The researcher has adopted a mix blend of Doctrinal, Historical, Analytical and Descriptive approaches in the proposed work for exploring the different dimensions related to theme. A thorough doctrinal study has been carried out by examining various existing laws, case laws/judgments with different approaches/schools of thought propounded by various scholars.

### Triple Talaq: Issues and Challenges

Triple talaq or talaq-e-biddat is the method of talaq by a Muslim husband to his wife any time just by pronouncing talaq three times without giving any reason. In this kind of talaq the talaq become final with pronouncement and there is no scope for reconciliation, that's why it is also a prohibited form of talaq under Quran itself and discarded by Muslim nations around the world. This form is different from other types of divorce under Muslim personal law in sense that under Talaq -e- Sunnat, by *hasan or ahasan* method also the Muslim male can divorce his wife without sighting any reason at his sweet will anytime by pronouncing divorce in three successive *tuhr* (period of purity) periods and abstaining from having marital relation in the meantime. Main difference between *talaq-e-biddat* and *talaq-e-sunnat* is that in the latter method there is scope and time for reconciliation and a time period of three months is there for the same. The problem has been clearly picturised by justice Lahoti in Shamim Ara case quoting justice 'V. Khalid, J., as His Lordship then was, observed in Mohammed Haneefa Vs. Pathummal Beevi, 1972 K.L.T. 512 - "I feel it my duty to alert public opinion towards a painful aspect that this case reveals. A Division Bench of this court, the highest court for this State, has clearly indicated the extent of the unbridled power of a Muslim husband to divorce his wife. I am extracting below what Their Lordships have said in Pathayi v. Moideen (1968 KLT 763)". The only condition necessary for the valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion, or in jest, or in anger that is considered perfectly valid. No special form is necessary for effecting divorce under Hanafi law. The husband can effect if by conveying to the wife that he is repudiating the alliance. It need not even be addressed to her. It takes effect the moment it comes to her knowledge'. So these are the kind of unrestrained power one spouse has against other in the prevalent form of divorce. A code has also been brought namely Muslim women protection of rights on divorce act, 1939, which provides grounds of divorce, on which a Muslim woman can ask for divorce through court, but till today the same type of act or code is awaited for Muslim male to bring them in parity with their female counterparts.

### Position on Muslim divorce Talaq-e-Biddat worldwide

Twenty three islamic countries including Arab countries like Algeria, Egypt, Morocco and United Arab Emirates, South Asian countries like Pakistan, Bangladesh, South East Asian countries Indonesia, Malaysia etc. most of whom have majority of Sunni population and Islam as their state religion have codified law on divorce for Muslim, almost three decades back. Presently, most of the countries around the world practising Muslim religions have progressive laws regarding marriage and divorce as per the need of time and society. Since early 1950's and 1960's most of the Muslim dominated countries around the world brought codes regarding their family matters and later on with amendments from time to time improvement can be seen in approach towards condition of women. Few examples with such equal practice are Indonesia and Malaysia, with sunni Muslim majority, where divorce must be sought through courts only, with the giving chances of reconciliation and only for sufficient ground indicating breakdown of marriage. Other examples are neighbouring Indian states Pakistan and Bangladesh, both Sunni Muslim dominated states with Islam as official religion. Regarding issue of triple talaq Pakistan enacted legislation in 1961, which was emulated by Bangladesh, that: "Any man who wishes to divorce his wife shall, as soon as may be after the rivalled pronouncement of Talaq in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife; Whoever contravenes the provision shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both". Similarly, Iraq, Morocco and UAE also at some step make court interference mandatory in order to provide a legality to the divorce and thereby making the other spouse totally aware about the effect of the same. Codification of Muslim personal law has been done in one form or other throughout the Muslim world but except the democratic country like India, where codification is yet to be done for divorce regarding Muslim male. And most of the countries make divorce compulsory through court only, so as to clear the air on various denominational ambiguities on divorce laws among Muslims. But due to blatant vote bank politics, the democracy like India is yet to bring a uniform (for both male and female) code on divorce for Muslim.

### The Muslim Women (Protection of Rights on Marriage) Act, 2019

After the Apex court decision in 2017 declaring talaq-e-biddat as invalid, the government come out with an ordinance which later on took shape of The Muslim Women (Protection of Rights on Marriage) Act, 2019 passed by parliament on 26<sup>th</sup> July, 2019 banning instant talaq in Muslims and penalising the person with three years' imprisonment in case of violation of the same. For the protagonists of Muslim women rights the present law is like a piece of pie. The present ordinance criminalising divorce seems to be insufficient in front of plethora of inequalities faced by Muslim women in divorce and other family matters. There was hope for an equal code on talaq, which was dismantled by this half-hearted effort on part of law makers. Though government

sees it as a win-win situation, pleasing both Muslim women, by doing the minimum needful in form of this act and men by not giving a substantial act. The latest data was tweeted by union minister Mr. Prakash Javadekar and celebrated by minorities affairs minister Mr. Mukhtar Abbas Naqvi, on the occasion of completion of one year of the enactment of The Muslim Women (Protection of Rights on Marriage) Act, 2019 act on triple talaq, he said that triple talaq cases have dropped to 82% in last one year. Though the exact data on total number of talaq through all methods, is not available, yet this figure is encouraging.

### **Under Muslim personal law, code on Talaq is required for Muslim Male**

Let's make the point clear here that it is the "male" under Muslim law who don't have a code governing them regarding divorce. Still in 21<sup>st</sup> century the whimsical, unbridled and unrestrained powers in the hand of Muslim male over female in the sensitive matter as divorce is the cause of chaos at present. To regulate the rights of Muslim women on divorce we have dissolution of Muslim marriage act, 1936, which specifies the conditions like other codified laws on which a Muslim women can go for divorce, but men are conspicuously kept out of implementation of these laws under the political pressure in the name of religion or any other lame excuse. It is interesting to note here that after even 70 years of independence, the Muslim women of our country are still struggling for an equal and uniform code for divorce among their own religion and community. It is further gripping a fact that till now there are no fixed conditions/ reasons for a Muslim male to divorce his wife i.e. it is an open and whimsical power in the hand of a Muslim male and at any point of time, on any flimsy issue or even without issue the person can leave his wife conveniently, just by pronouncing talaq in any form, which means if being Muslim male I am bored with my wife, I don't like food cooked by her etc. etc. I can get rid of her by way of talaq. It's difficult here to even imagine the mental state or the extent of fear in the mind of a Muslim women, who don't know when and on what ground she can be ousted from the life of her husband if he got displeased. This is the agony of the Muslim women in our free democracy.

### **Rate of divorce and fate of women**

There are flimsy data produced and concocted observation given by various politicians and religious leaders, just to keep the status quo in the matter, but the truth is rather ugly. The situation of female is rather bad or to be more precise the freedom of Muslim women is at stake; they are still at the mercy/ permission of their male counterpart for even the smallest decision so that it may not displease him. As per one report in where the author compared the divorce rate between Hindu and Muslim by taking data from Census 2011 and make us understand the 'Divorce stock ratio which can be defined as the total number of divorced persons in a community to the total number of married persons in that community (I don't call it divorce rate because rate is a flow, and the census only tells us stock, but analogically, it's the same as divorce rate). This ratio is 2.0 for Hindus and 3.7 for Muslims. This means that for every 1,000 married Hindus, 2 are divorced, and for every 1,000 married Muslims, 3.7 are divorced (for India, this value is 2.4). Across gender, the disparity is wider (most men remarry but women can't, hence the disparity). For every 1,000 married Hindu women, 2.6 are divorced, while for 1,000 married Muslim women, 5.6 of them are divorced. As for men, the ratio is almost the same (1.5 for Hindu men and 1.6 for Muslim men). This implies that population and marital status adjusted, Muslims are more likely to be divorced than Hindus, and Muslim women take up almost the entire burden of this difference. About 78.7% of Muslim divorcees are women; for Hindus, this figure is 64.2%' 'In other words, a higher difference suggests a larger burden of divorce borne by Muslim women as compared to Muslim men, relative to their Hindu counterparts. This means that the differential impact of divorce across gender, while higher for Muslims than Hindus, and higher for women than men, is also higher in poor regions than in rich ones'.

### **How Muslim women can stop her husband from divorcing her**

Unfortunately, till date there is no provision under which a Muslim women can stop her husband from divorcing her, as it is totally the prerogative of male. No law of land can help her in this regard as under Muslim personal law there is no codification of grounds for divorce, providing male members of Muslim community with an unrestricted power and privilege to divorce their wife any time at will.

### **Judicial viewpoint on Talaq**

In India the battle regarding women rights under Muslim personal law are mostly fought in courts as they being the only way-out available, in absence of any code. In democracy like India, law regarding divorce for male is yet to be formed, we only have court judgments in the matters giving guidelines etc. In India roughly if any, relief and consolation granted to Muslim women, it has been through long court battles only. There also, the point of view of courts have remained unclear and relief are case specific due to court's limitation of only to law interpretation, and in absence of a code, various courts throughout country has judged over numerous such matters holding distinct views. Over seven decades of independence Muslim women have been relentlessly fighting and waiting for the hearing of their unheard cries. The social and legal battles have been a nightmare and decision in the matters are on the basis of social notions, in which sometimes they win and equally lose in absence of an equal code. Muslim women have fought long battles for the abovementioned cause but till now neither their issue has been addressed or even heeded properly nor any legislation has been brought to bring equality within Muslim personal law. Disappointed on all fronts they finally took the shelter in judiciary, which

though has provided them temporary relief but yet to come with some concrete to relieve this “minority class” of their miseries.

### ***Few glaring judgments which catches people sight are***

The most famous case relating to personal laws was that of Shah Bano, who had fought long drawn legal battle seeking maintenance from her ex-husband. “In 1985, the Supreme Court had directed Shah Bano's husband to pay her alimony according to the laws applicable to other Indians. But, the apex court verdict was not received well by the conservative segment of Muslim society. In order to pacify the swelling sentiment of the community, the then Rajiv Gandhi government enacted the Muslim Women (Protection on Divorce Act), 1986. The new Act overturned the judgment of the Supreme Court providing that a man was required to pay maintenance to his divorced wife only during the period of Iddat”.

Danial Latifi, Shah Bano’s lawyer challenged the constitutional validity of the Personal law. “The Supreme Court, in 2001 held that the Muslim Women (Protection on Divorce Act), 1986 did not violate the Constitution or the fundamental rights. The Supreme Court maintained that the personal laws need not be tested on the touchstone of the provisions of the fundamental rights”.

Another recent judgment regarding Muslim personal law came on the matter of triple talaq in the case filed by Shayara Bano and Ishrat Jahan. “They and the other petitioners had challenged the constitutionality and therefore the continued validity of ‘talaq-e-biddat’ (Triple Talaq), ‘nikkah halala’ and polygamy which are allegedly permitted under the Muslim Personal Law by virtue of S.2 of Muslim Personal Law (Shariat) Act of 1937. The challenge was based on Arts.14, 15, 21 and 25. The 5 Judge Bench decided to take up only the issue of triple talaq considering the factual aspect of the case. On this, Khehar, CJI, observed that the other issues “would be dealt with separately”, leaving out the possibility of a Shayara Bano II and III. The petitioners finally got nothing out of the present judgment, though we got a majestic doctrine in the form of “setting aside” of triple talaq”.

Triple talaq case, originate from the petition filed by Shayara Bano in a case of divorce from her husband, is not the first matter relating to personal laws before the Supreme Court. The thirty eight year old women was not the first petitioner to approach the Supreme Court regarding the abovementioned issue. The apex court has dealt with several such cases before but surprisingly it has not given a consistent interpretation of the laws and provisions of Constitution. The conflict arises when personal laws are perceived to be in violation of the fundamental rights.

Article 13 of the Constitution states that any law, which goes against the provisions of fundamental rights, shall be void to the extent of contravention. The Supreme Court has held differing views in cases that involved the question of supremacy between personal law and fundamental rights. In some of the cases, the apex court held that fundamental rights could not be the touchstone to test personal laws while in others it declared basic rights as supreme. Another majestic step to relieve the Muslim women of their long standing miseries was recently taken Indian legislature in the form of an ordinance which declare talaq-e-biddat, a form of triple talaq, which was already repudiated by almost 23 countries worldwide being against the tenants of Quran itself and in a bid to codify the law relating to Muslims.

### **Legislative view**

Muslim women of our country are fighting since independence for equality with their male counterparts under their own personal law, which has deprived them of their basic fundamental rights of freedom and equality. Legislature has been mute spectator of the sufferings of millions of Muslim women, but the greed of power, make them turn a blind eye towards them, otherwise loss of a big vote bank is unbearable to any government, so everybody show their concern but till today nobody dares to bring any equal law for millions of Muslim women suffering since time immemorial.

### **Social stand**

Due to legal unawareness and the fear element created by the bigots of religion, an unbiased and neutral view on the matter seems impossible. The sufferers are still unaware about their rights and suffering mutely from centuries, even if few who tries to come forward are being socially ostracised by their own community with nobody to their rescue. Various committees have been formed to look into the problems of Muslim community in India, two such committees which brought out ground realities and suggested major reforms are Sachar committee and Kundu committee who in 2007 and 2014 resp. gave significant analysis and suggestion regarding progress of Muslim population around the country. As per Justice Rajinder Sachar committee report observation ‘The literacy rate for Muslims in 2001 was, according to the Committee’s findings, far below the national average.

The difference between the two rates was greater in urban areas than in rural areas. For women, too, the gap was greater in the urban areas. The remedy for the travails of the Muslim community can be found largely by the community’s bolder initiatives in the field of education that would empower them as nothing else would.’ In 2014, Professor Amitabh Kundu committee pointed out that ‘the Muslim community, irrespective of gender and rural-urban residence, are less likely to attain Secondary and Higher Secondary level of education. The OBC Muslims were the most deprived at all levels of education. The proportionate improvements in educational attainment during 2004-05 and 2011-12 do not alter this pattern<sup>[1]</sup>.’ So due to prevalent poverty and illiteracy the Muslim population specifically women are deprived of their rights.



### **Legislature v. Judiciary: tussle over the years**

Judiciary has been trying to sort out the miseries of Muslim women for years but the reality is too acrimonious and require stiff measures in form of an equal code, which is a far cry in absence of political will, which again is impossible due to fear of loss of vote bank. The story of tussle and vote bank politics in this matter is evident from history and still continuing. Despite the type of thought process, the government belongs to, the stand regarding Muslim women issues is still the same. The abovementioned wrangle started after the passing of Shah Bano judgment by Supreme Court of the country in 1985 that the then government under tremendous vote bank pressure from various Muslim groups and allies had to give up and finally pass an act to minimise the effect of the abovementioned case.

Later on, the Supreme Court tried to safeguard the rights of Muslim women by giving various landmark judgments, but still in absence of any act regarding the same anomalies still continue and women condition too remain more or less vulnerable. Again, the supreme court of India in 2017, invalidated the practice of triple talaq in Shayara Bano case and recommend the government for bringing a uniform code to do away with the anomalies regarding situation of women. But again, the government came up with an ordinance that later on take form of act 2019, making the practice of triple talaq as unlawful and also made it a criminal offence. Again, it was a blow to the expectations of long struggling muslim women and they sort of felt cheated by the lawmakers by not addressing their all major issues of divorce in totality, principle of Halala and various other related issues of this long battle, again under vote bank pressure. It's imperative to note here that women too are equal citizens of Indian democracy and these millions of women are fighting for their equal rights as provided to them by the constitution since independence and yet their cries are of no avail.

### **Epilogue and suggestions**

Under the patriarchal system of Indian democracy, women, regardless of religion, race, caste creed have always been devoid of equal status and power under the garb of family values, customs, traditions etc. etc., and Muslim women are worst affected due to more dogmatic views towards their free movement. The effect is exaggerated by illiteracy, fear and other customary practices. After more than seven decades of freedom of the country now it's high time that these equal human beings get their equal dues. Though we still have a long way to go but now it's high time that the story of these mute sufferers be taken into account and their condition finally should improve. These are few suggestions for the same.

### ***Need of uniform code for Muslim male and female***

The need of the hour is a uniform, equal and complete code for Muslim male and female regarding personal law issues of marriage, divorce, succession, adoption and other related issues and nothing less. Without this the long drawn battle of seventy four years will be futile for millions of Muslim women forming 6.9% population of the country.

### ***Equal rights to Muslim women under personal law, in all walks of life***

The constitution provides equality to the citizens of the country but till now millions of women of this country specially those belonging to Muslim community are doubly condemned and are being treated unequally by their own counterparts and well-wishers, under the garb of religion, caste and customs, keeping them at back footing and treating them as a second-grade citizen. Women are first of all human beings, citizens of a free democratic country and later belongs to any religion, race, caste or other social divides. So, these equal citizens of the country, now, need to be provided with equal rights with their male counterparts.

### ***Need to strengthen socio- economic, fundamental and constitutional rights of Muslim female***

The improvement in condition of Muslim women is possible only through an overall overhauling of the existing situation by empowering them at every front i.e. social recognition of equality, economic independence by providing them among other factors with equal property rights, treating them as equal citizen and right to have a dignified life of equality under fundamental rights as provided by the constitution of the country.

### ***Collective efforts by judiciary as well as Legislature***

A combined effort of judiciary and legislature is required to improve the condition of Muslim women in this country. The inhuman treatment for decades must stop now with the combined efforts of two important pillars of democracy, first by giving a complete equal code and then by strictly implementing and interpreting the same.

### ***Need for bring literacy to Muslim women***

Categorically there is need of bringing literacy to Muslim women so as to make them aware about their rights and to improve their conditions.

Due to lack of education and awareness, their opinion is misused against them only by befooling them by showing them false religious fears etc. and their decision for rights is shadowed by scruple statements by the so called free-lancers of the society. The decision making must lie with the person effected and that also by providing them proper comparative insight in the issue. The recommendations of Sachar and kundu committees need to implement in true spirit <sup>[2]</sup>.

**Representation in decision making bodies**

It's difficult for the fate of women to improve unless laws are framed and decision are taken on their behalf and for them by their male counterparts. Muslim women have only 0.7% representation in the highest law-making body of the country i.e. Lok Sabha. In the present tenure only four Muslim women are members of this highest body i.e. a minority small view, so this percentage should be increased to have a substantial say in law making specifically on topics effecting women belonging to Muslim community.

**Awareness about legal and constitutional rights**

Due to lack of awareness about their right and continuous detestation from social set up for those asking for equal rights combined together with fear element, at mass level has created a non- conducive environment for Muslim women to come forward and seek equality. This nowhere means that Muslim women are weak. Long protest against NRC shows that Muslim women can sought, demand and fight for their constitutional rights. Saheen bagh, has been a well organised public movement by Muslim women in recent times. It shows the great potential of Muslim women to stand for their constitutional rights, just a right platform and direction is the need of hour.

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