

**TRIPLE TALAQ BILL: LACUNAE AND  
RECOMMENDATIONS**

MANASI CHAUDHARI\*

**ABSTRACT**

*Three words shook India in 2017- 'Talaq, talaq, talaq.' First, the Supreme Court of India, in a landmark judgment declared triple talaq illegal. Following this, the Lok Sabha passed the Muslim Women Protection of Rights on Marriage Bill, 2017 ("Bill"). This paper critically analyses the Bill and its consequences. Part I explains the ratio of the Triple Talaq judgment. In Part II, the author analyses the provisions of the proposed Bill. In Part III, the author identifies the lacunae in the Bill, in its present form. Finally, in Part IV the author makes recommendations to amend the Bill, to make it more effective and inclusive.*

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\* The author is a third-year law student at O.P. Jindal Global University and may be contacted at [advmanasichaudhari@gmail.com](mailto:advmanasichaudhari@gmail.com).

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## I. INTRODUCTION

Triple Talaq or Talaq-ul-Biddat is a method of divorce available to the husband among Muslims. It is relatively new and considered improper.<sup>122</sup> It consists of a single pronouncement of Talaq between two menstrual cycles.<sup>123</sup> Triple talaq is instant, irrevocable, and becomes effective immediately upon pronouncement.<sup>124</sup> It is now the most common form of divorce in India.<sup>125</sup> A study conducted by the Bharatiya Muslim Mahila Andolan ((hereinafter “**BMMA**”)) found that 59% of the Muslim women surveyed had been divorced through Triple Talaq.<sup>126</sup> In most cases, the pronouncement was oral.<sup>127</sup> Muslim women have been fighting for the abolition of Triple Talaq for decades now.<sup>128</sup> However, this campaign picked up steam only in 2016. It was triggered by Shayara Bano’s petition in the apex court against the practice of Triple Talaq.<sup>129</sup> This has been discussed in Part II.

## II. THE TRIPLE TALAQ JUDGMENT

In 2002, the Supreme Court, in *Shamim Ara*<sup>130</sup> held that talaq had to be for a reasonable cause, and preceded by attempts at reconciliation

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<sup>122</sup> MULLA, PRINCIPLES OF MOHAMMEDAN LAW 338 (22nd ed. 2017).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Amir-ud-din v. Khatun Bibi*, (1917) 39 All 371, 375 (India).

<sup>126</sup> ZAKIA SOMAN & DR. NOORJEHAN NIAZ, NO MORE “TALAQ TALAQ TALAQ” 11–20 (2017).

<sup>127</sup> *Id.*

<sup>128</sup> *Triple talaq: How Indian Muslim women fought, and won, the divorce battle*, BBC NEWS (2017), <http://www.bbc.com/news/world-asia-india-40484276> (last visited May 21, 2018).

<sup>129</sup> *Shayara Bano and others v. Union of India and others*, (2017) 9 SCC 1 (India).

<sup>130</sup> *Shamim Ara v. State of Uttar Pradesh and another*, AIR 2002 SC 3551 (India) [hereinafter *Shamim Ara*].

between the couple.<sup>131</sup> The court also held that Talaq had to be ‘pronounced.’<sup>132</sup> In effect, Shamim Ara made Triple Talaq illegal.<sup>133</sup>

Fast forward to 2016. Shayara Bano filed a writ petition in the Supreme Court questioning the constitutionality of Triple Talaq.<sup>134</sup> She sought a declaration that the Triple Talaq pronounced by her husband be declared void *ab initio*.<sup>135</sup> She contended that it violated her fundamental rights under Articles 14 (right to equality),<sup>136</sup> 15 (right against discrimination),<sup>137</sup> and 21 (right to life)<sup>138</sup> of the Indian Constitution.<sup>139</sup> She also challenged Triple Talaq as not being a part of Muslim Personal Law (Shariat).<sup>140</sup> Therefore, according to her, it cannot be protected under Articles 25(1)<sup>141</sup>, 26<sup>142</sup> and 29(1)<sup>143</sup> (rights of religious denominations) of the Indian Constitution.<sup>144</sup> After Shayara Bano’s petition, other Muslim

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<sup>131</sup> *Id.* § 15.

<sup>132</sup> *Id.* § 18, the court defined ‘pronounced’ as - “to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate.”

<sup>133</sup> Following Shamim Ara, the Kerala High Court in *Kunhimohammed v. Ayishakutty*, ILR 2010 (2) Kerala 140 (India), held that attempts at reconciliation are a non-negotiable pre-requisite to divorce; see *Nur Ali v. Thambal Sana Bibi*, 2007 (1) GLT 508 (India); *Musarat Jahan and another v. State of Bihar and another*, AIR 2008 Pat 69 (India); *Smt Shahana v. State of Uttar Pradesh*, 2011 (1) ACR 918 (India); *Mohammed Naseem Bhat v. Bilquees Akhter*, 2016 (1) JKJ 312 (India); *Hina v. State of Uttar Pradesh and others*, 2017 (2) ALL MR 1 (India).

<sup>134</sup> W.P. (Civil) 118 of 2016, Supreme Court of India, (2016) (India).

<sup>135</sup> Shamim Ara, *supra* note 130, § 106.

<sup>136</sup> INDIA CONST. art. 14.

<sup>137</sup> *Id.* art. 15, cl. 1.

<sup>138</sup> *Id.* art. 21,

<sup>139</sup> Shamim Ara, *supra* note 130, § 106.

<sup>140</sup> *Id.*

<sup>141</sup> INDIA CONST. art. 25, cl. 1.

<sup>142</sup> *Id.* art. 26.

<sup>143</sup> *Id.* art. 29,

<sup>144</sup> Shamim Ara, *supra* note 130, § 106.

women also filed similar petitions in the Supreme Court. These were clubbed and decided together under the mammoth landmark judgment in *Shayara Bano v Union of India*.<sup>145</sup>

The Supreme Court constituted a five- judge multi-faith bench, comprised of- then Chief Justice Khehar (Sikh), and Justices Rohinton Nariman (Zoroastrian), U.U. Lalit (Hindu), Kurien Joseph (Christian) and Abdul Nazeer (Muslim). By a narrow majority of 3:2, the five-judge bench struck down the practice of Triple Talaq. Justices Nariman, Lalit and Joseph delivered the two majority judgements. Chief Justice Khehar and Justice Nazeer were dissenting. Although the majority opined that Triple Talaq is legally invalid, their reasoning was different- and partly conflicting.

The author discusses the individual opinions of the five judges below.

#### **A. JUSTICE KURIEN JOSEPH**

Justice Joseph delivered the majority opinion for himself. He struck down the practice of Triple Talaq on the ground that it is not an ‘essential religious practice.’<sup>146</sup> Therefore, it cannot be protected under

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<sup>145</sup> Shamim Ara, *supra* note 130.

<sup>146</sup> An essential religious practice is that which is fundamental to follow a religious belief. Without this practice, the core of the religion will be altered, *supra* note 9, § 53.2.

Under this test, the courts are required to examine whether the practice in question is essential to the religion. A practice will be immune from a challenge under Part III of the Constitution only if it is an essential religious practice. To determine what is essential, the courts have to look at religious doctrines and tenets, *Adi Saiva Sivachariyargal Nala Sangam and others v. The Government of Tamil Nadu and another*, AIR 2016 SC 209 (India).

Articles 25 and 26 of the Indian Constitution. Justice Joseph's main question was- "whether what is Quranically wrong can be legally right."<sup>147</sup>

To answer this question, Justice Joseph first examined whether Triple Talaq is governed by any law. According to him, the Muslim Personal Law Shariat Application Act, 1937 (hereinafter "**Shariat Act**"), was enacted to declare Shariat (muslim personal law) as the law applicable to Muslims. But, it does not regulate Talaq. It only makes the Shariat Act applicable to the subject-matters covered in Section 2.<sup>148</sup> Therefore, although Talaq is governed by Shariat law, it has not been codified in the Shariat Act. The principles of Talaq are actually laid down in the Quran.

Justice Joseph examined the relevant verses of the Quran- Sura LXV, Sura IV (Verse 35) and Sura II on Talaq.<sup>149</sup> According to his Lordship, these verses clearly show that the Quran considers marriage as sacramental and permanent.<sup>150</sup> Talaq should be resorted to only in extremely unavoidable situations.<sup>151</sup> It must always be preceded by an

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<sup>147</sup> Shamim Ara, *supra* note 130, § 1.

<sup>148</sup> The Muslim Personal Law Shariat (Application) Act § 2 (1937) (India), Application of Personal Law to Muslims- Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ıla, zihar, lian, khula and mubaraat, maintenance, dower guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Shariat).

<sup>149</sup> Shamim Ara, *supra* note 130, § 9-11.

<sup>150</sup> *Id.* § 12.

<sup>151</sup> *Id.*

attempt for reconciliation.<sup>152</sup> If reconciliation succeeds, the Quran demands that the Talaq must be revoked.<sup>153</sup> In Triple Talaq, there is no scope for reconciliation.<sup>154</sup> This is against the basic tenets of Quran, and therefore, violates Shariat law.<sup>155</sup>

His Lordship finally held that Triple Talaq is not an essential religious practice under Shariat law, as it violates the Quran.<sup>156</sup> Beyond this, his Lordship did not find the need to examine the constitutionality of Triple Talaq. Although Justice Joseph's holding was in the majority, in his reasoning he supports the dissent- that the Shariat Act does not regulate Talaq. It is said that Justice Joseph's was the swing vote in this case.<sup>157</sup> It helped strike down Triple Talaq by a narrow majority.

## **B. JUSTICES NARIMAN AND LALIT**

Justices Nariman and Lalit struck down Triple Talaq as unconstitutional, making it the majority opinion. Before striking it down, Justices Nariman and Lalit examined whether Triple Talaq can be tested under Article 13(1) of the Constitution. An existing precedent, *Narasu Appa Mali*<sup>158</sup>, had laid down that personal law falls outside the realm of

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<sup>152</sup> Shamim Ara, *supra* note 130.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* § 25.

<sup>157</sup> Indira Jaising, *SC Strikes Down Triple Talaq, But Does Little for Gender Justice*, THE QUINT (2017), <https://www.thequint.com/voices/opinion/indira-jaising-triple-talaq-gender-justice-judgement> (last updated on August 24, 2017).

<sup>158</sup> *The State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 84 (India).

Article 13(1).<sup>159</sup> According to Narasu Appa, only codified personal law can be scrutinised for violation of Part III of the Constitution. Applying this principle, Triple Talaq would fall under Article 13(1) only if it is codified personal law (under Section 2 of the Shariat Act). If not, it could not be reviewed.

According to Justices Nariman and Lalit, Triple Talaq is enforced and recognised by the Shariat Act.<sup>160</sup> Therefore, “it would fall squarely within the expression ‘laws in force’ in Article 13(1)(b) and would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency.”<sup>161</sup>

Justices Nariman and Lalit then tested the constitutionality of Section 2 of the Shariat Act (with respect to Triple Talaq) under Article 14 of the Constitution. They determined that manifest arbitrariness is a ground for judicial review under Article 14.<sup>162</sup> According to them, manifest arbitrariness is an act of the Legislature done “capriciously, irrationally and/or without adequate determining principle.”<sup>163</sup> It is also something which is “excessive and disproportionate.”<sup>164</sup> Hence, Justices Nariman and Lalit held that:

*“It is clear that this form of Talaq [Triple Talaq] is manifestly arbitrary in the sense that the marital tie can be broken*

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<sup>159</sup> *Id.* § 13.

<sup>160</sup> *Shamim Ara*, *supra* note 130, § 47.

<sup>161</sup> *Id.* § 48.

<sup>162</sup> *Id.* § 101.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

*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. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognise and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognises and enforces Triple Talaq.*"<sup>165</sup> (Emphasis supplied)

Since they found Triple Talaq violative of Article 14, Justices Nariman and Lalit did not delve into the aspect of discrimination against women.<sup>166</sup> It is argued that this was a lost opportunity for the apex court to deliver a powerful precedent on women's rights. The bench could have also used this case to examine whether the Narasu Appa principle is good in law.

### **C. JUSTICES KHEHAR AND NAZEER**

In their dissent, Chief Justice Khehar and Justice Nazeer upheld the practice of Triple Talaq. The opinion was delivered by Justice Khehar for himself and Justice Nazeer. Their Lordships held that Triple Talaq neither violates Article 25 nor any other fundamental rights. Hence, it cannot be struck down.

To arrive at this conclusion, Justice Khehar traced the history of triple talaq.<sup>167</sup> His Lordship noted that Triple Talaq is widely practised by the majority Muslim population in India.<sup>168</sup> Due to its popularity, his

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<sup>165</sup> Shamim Ara, *supra* note 130, § 104.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* § 317.

<sup>168</sup> *Id.* § 320.

Lordship held that Triple Talaq has the sanction and approval of the Muslims.<sup>169</sup> Hence, it has to be considered an integral part of their religious practice.<sup>170</sup> Even if it considered bad in theology, it is good in law.<sup>171</sup>

His Lordship then examined the purpose of the Shariat Act. According to him, the Shariat Act was enacted for a limited purpose- to make Shariat as the law applicable to all Muslims.<sup>172</sup> Its aim was to override existing customs and usages which violated Shariat law.<sup>173</sup> The Shariat Act only establishes Shariat law as a rule of decision.<sup>174</sup> It does not codify Shariat law.<sup>175</sup> Therefore, Shariat law cannot be considered statutory law. It is an uncodified personal law.<sup>176</sup>

On this ground, Justice Khehar held that Shariat law cannot be reviewed under Article 13(1) of the Constitution.<sup>177</sup> Justice Khehar upheld the principle in *Narasu Appa*.<sup>178</sup> He held that personal laws can be reviewed only against the parameters in Article 25- public order, morality, health, any other provision of Part III of the Constitution.<sup>179</sup> Justice Khehar then examined Triple Talaq against each of the above exceptions.

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<sup>169</sup> Shamim Ara, *supra* note 130, § 321.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* § 332.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* § 383.

<sup>178</sup> *Id.* § 335-337.

<sup>179</sup> *Id.* § 337-339.

He held that Triple Talaq has no nexus to public order, health or morality.<sup>180</sup> Also, it does not breach any other fundamental rights, because these are only available against state action.<sup>181</sup> However, Triple Talaq is not a state action.<sup>182</sup> Justice Khehar concluded that Triple Talaq is a personal law and has the protection of Article 25 of the Constitution. It does not warrant any interference from the judiciary. Since Triple Talaq has constitutional protection, Justice Khehar found it unnecessary to examine whether the Quran and Hadiths validate Triple Talaq.<sup>183</sup>

It would be unfair to conclude that the Chief Justice was not in favour of Muslim women's rights. His only objection to striking down Triple Talaq was that the judiciary is not the appropriate forum.<sup>184</sup> He believed that this is the Legislature's prerogative.<sup>185</sup> Quoting the abolishment of social evils like sati, devdasi, and polygamy, Justice Khehar observed that none of these practices was challenged in any court of law.<sup>186</sup> They were discontinued through legislative enactments.<sup>187</sup> Therefore, exercising the Supreme Court's extraordinary powers under Article 142 of the Indian Constitution, the Chief Justice directed the Union of India "to consider appropriate legislation, particularly with

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<sup>180</sup> Shamim Ara, *supra* note 130, § 340.

<sup>181</sup> *Id.* § 341.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* § 313.

<sup>184</sup> *Id.* § 392.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* § 297-300.

<sup>187</sup> *Id.*

reference to Talaq-e-Biddat (Triple Talaq).”<sup>188</sup> In the interim, the Chief Justice granted a six-month injunction against divorce by Triple Talaq.<sup>189</sup>

### **III. TRIPLE TALAQ BILL**

The Parliament is empowered to pass laws on matters of marriage and divorce. It draws this authority from Articles 25(2) and 44, read with Entry 5 of the Concurrent List (Seventh Schedule) of the Indian Constitution. On 28 December, 2017, Mr. Ravi Shankar Prasad, Minister of Law and Justice, introduced a historic bill in the Lok Sabha- the Muslim Women (Protection of Rights on Marriage) Bill, 2017 (hereinafter “**the Bill**”).<sup>190</sup> The Bill was passed by the Lok Sabha on the same day.<sup>191</sup> It was advanced in its original form, without any amendments. The Bill is currently pending before the Rajya Sabha.<sup>192</sup>

The statement of objects and reasons of the Bill states that the Bill is a consequence of the Shayara Bano judgment. The State felt the need to end the practice of Triple Talaq immediately. Neither the Shayara Bano judgment nor the All India Muslim Personal Law Board’s (hereinafter “**AIMPLB**”) assurance of issuing directives, served as adequate deterrents

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<sup>188</sup> Shamim Ara, *supra* note 130, § 393.

<sup>189</sup> *Id.*

<sup>190</sup> The Muslim Women (Protection of Rights on Marriage) Bill, 2017, No. 247-C, Bills of Parliament, 2017, <http://164.100.47.194/Loksabha/Legislation/billintroduce.aspx> (last visited: 21 May, 2018) (India).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

against Triple Talaq.<sup>193</sup> It was still widely being practised.<sup>194</sup> Therefore, the State needed to give legal effect to the verdict.

The Bill makes the pronouncement of instantaneous and irrevocable Talaq illegal and void.<sup>195</sup> It defines ‘Talaq’ as Talaq-i-biddat or any other form of Talaq which is instantaneous and irrevocable (hereinafter “**Unapproved Talaq**”). The Unapproved Talaq may be declared in any form- spoken, written, electronic or in any other manner.<sup>196</sup>

The Bill criminalizes the practice of Unapproved Talaq. It makes the pronouncement of Unapproved Talaq punishable with imprisonment upto 3 years, and fine.<sup>197</sup> The Bill goes one step further and makes the offence cognizable<sup>198</sup> and non-bailable.<sup>199</sup> This means that a police officer may arrest the husband without a warrant.

The Bill also legislates on aspects ancillary to Unapproved Talaq such as- subsistence allowance and child custody. Every Muslim woman divorced through Unapproved Talaq, is entitled to subsistence allowance for herself and her dependent children.<sup>200</sup> The subsistence allowance is over and above maintenance under other laws. This is clear from the

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<sup>193</sup> See *supra* note 190, Statement of Objects and Reasons.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* § 2.

<sup>196</sup> *Id.* § 3.

<sup>197</sup> *Id.* § 4.

<sup>198</sup> The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 2, cl. (c) (India).

<sup>199</sup> *Id.*, § 2 cl. (a).

<sup>200</sup> *Id.* § 5.

opening phrase of Section 5- “Without prejudice to the generality of the provisions contained in any other law for the time being in force...”<sup>201</sup>

Further, the Muslim woman is also granted default custody of her minor children<sup>202</sup>, notwithstanding any other law in force. The terms of the custody may be determined by the Magistrate.<sup>203</sup> This provision appears to be a natural consequence of Section 7 of the Bill- under which the husband may be arrested without a warrant, and will not be granted bail. Therefore, the custody of the children must lie with the mother.

The Bill is a short legislation. It is divided into three chapters, spread out over seven sections. In fact, the statement of objects and reasons is longer than the provisions of the Bill. Although the Bill covers the major facets incidental to divorce, it fails on many aspects. These have been discussed in Part III.

#### **IV. LACUNAE IN THE BILL**

A noble cause with a hollow scheme-

The Bill was passed in the Lok Sabha on the same day it was introduced, without much debate. Naturally, it has several lacunae that need to be rectified. The author has discussed the shortcomings of the Bill below.

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<sup>201</sup> The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 2, cl. (c) (India).

<sup>202</sup> *Id.* § 6.

<sup>203</sup> *Id.*

**A. AMBIGUITY IN MARITAL STATUS ON PRONOUNCEMENT OF TRIPLE TALAQ:**

The Bill merely makes pronouncement of Unapproved Talaq illegal and void. However, the Bill does not clarify the status of the marriage on pronouncement of Unapproved Talaq. It is unclear whether the marriage would subsist or dissolve.

It may be assumed that the marriage survives the Unapproved Triple Talaq, since the Legislature's intention was to end instantaneous divorce.<sup>204</sup> However, the Bill also provides for subsistence allowance and custody of children, which are typically enacted in divorce law.<sup>205</sup> Herein lies the inherent contradiction in the Bill.

The consequences of Unapproved Talaq prescribed in the Bill- such as immediate arrest and imprisonment up to 3 years- do not make for continuity of a marriage. The husband's imprisonment is likely to negatively impact the family's financial stability.<sup>206</sup> This will, in fact, create more hardship on the Muslim wife, than solve her problems. The Bill

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<sup>204</sup> See *supra* note 190, Statement of Objects and Reasons.

<sup>205</sup> Editorial, on triple talaq bill: Re-examine the Bill, THE HINDU (2018), <http://www.thehindu.com/opinion/editorial/re-examine-the-bill/article22392015.ece> (last updated Jan. 7, 2018).

<sup>206</sup> Faizan Mustafa, *Legal excess The triple talaq bill is a textbook case of overcriminalisation*, THE INDIAN EXPRESS (2017), <http://indianexpress.com/article/opinion/columns/triple-talaq-bill-passed-parliament-lok-sabha-legal-excess-5002913/> (last updated Dec. 29, 2017) [hereinafter Faizan]

does not consider how intricately imprisonment is linked with livelihood and maintenance.<sup>207</sup>

It is also unclear what recourse the Muslim wife may take while her husband is in prison. Her husband's imprisonment will force the wife to live as a single woman while he is in jail.<sup>208</sup> She can neither divorce him nor can she remarry. The Dissolution of Muslim Marriages Act, 1939 (hereinafter "**Dissolution Act**"), permits divorce upon imprisonment only if the sentence is for 7 years or more.<sup>209</sup> Under the Bill, the maximum sentence is for 3 years. Therefore, the wife will not be able to divorce her husband on this ground. The other grounds for dissolution of marriage may also not be applicable to her in this case. As a consequence, the Muslim wife will be left alone in an empty marriage, with possibly no steady source of income, and no way out.

Further, even though the Bill declares Unapproved Talaq void, it cannot compel the husband to have a loving marriage with his wife.<sup>210</sup> Thus, the Muslim wife is forced to remain married to a man who attempted to divorce her instantaneously and irrevocably. She is not

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<sup>207</sup> Esita Sur, *Triple Talaq Bill in India: Muslim Women as Political Subjects or Victims?*, 5 SPACE AND CULTURE, INDIA 5–12 at 7 (2018).

<sup>208</sup> Aravind Kurian Abraham, *Bill Criminalising Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking*, THE WIRE (Dec. 30, 2017), <https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking>.

<sup>209</sup> Dissolution of Muslim Marriages Act, 1939, No. 8, Acts of Parliament, 1939, § 2 cl. (iii) (India).

<sup>210</sup> Faizan, *supra* note 206.

granted any say on her marriage, despite being an equal stakeholder. This seriously subverts her “individual choice and autonomy.”<sup>211</sup>

### **B. CRIMINALISATION OF A CIVIL WRONG AND OVER-CRIMINALISATION**

Muslim marriage and divorce are both civil acts, just like marriage and divorce in other religions. However, the Bill makes Unapproved Talaq a criminal act. The statement of objects and reasons of the Bill justifies the criminalisation of Unapproved Talaq on the ground that it is essential to prevent Triple Talaq.<sup>212</sup>

In Shayara Bano, the Supreme Court anyway set aside the practice of Triple Talaq.<sup>213</sup> As a result, Triple Talaq is no longer a valid form of divorcing a Muslim wife. Even if pronounced by the Muslim husband, it will not dissolve the marriage. As a result, the ‘harm’ that is sought to be remedied by Section 4 of the Bill, has already been rendered inconsequential. Further, mere criminalisation of Unapproved Talaq will not serve as an effective deterrent against it. For example, even cruelty by husbands is a crime punishable with three years of imprisonment.<sup>214</sup> However, statistics show that as many as 110,434 cases of cruelty by husbands/relatives were registered in India in a single year 2016.<sup>215</sup> Hence,

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<sup>211</sup> Faizan, *supra* note 206.

<sup>212</sup> See *supra* note 190, Statement of Objects and Reasons, § 4.

<sup>213</sup> INDIA CONST. art. 141.

<sup>214</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 498A (India),

<sup>215</sup> National Crime Records Bureau, Ministry Of Home Affairs, Crimes In India (2016), 135, [http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime in India - 2016 Complete PDF 291117.pdf](http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf) (last visited May 22, 2018).

the efficacy of the three year imprisonment for Unapproved Talaq is questionable.

Moreover, the Bill does not just criminalise Unapproved Talaq- it over-criminalises Unapproved Talaq. There is no justification or rationale given for prescribing 3 years imprisonment for Unapproved Talaq. Three years imprisonment is reserved for crimes which have the potential to threaten public peace and security of the country. Examples of these crimes are- sedition,<sup>216</sup> rioting with deadly weapon,<sup>217</sup> counterfeiting Indian coins,<sup>218</sup> promoting enmity between classes of people,<sup>219</sup> etc. Other serious crimes, such as, causing death by rash and negligent act,<sup>220</sup> rioting,<sup>221</sup> bribery,<sup>222</sup> wrongfully restraining a person,<sup>223</sup> etc., have a maximum of two years imprisonment. Therefore, the 3 years for Unapproved Talaq do not fit into the scheme of the Indian Penal Code, 1860 (IPC).

### **C. DIFFICULTY IN IMPLEMENTATION**

The thumb rule in criminal law is that the burden of proof lies on the prosecution.<sup>224</sup> The accused is considered innocent until proven guilty beyond all reasonable doubt.<sup>225</sup> Proving Unapproved Talaq may become extremely difficult. Since Triple Talaq may be declared orally without any

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<sup>216</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 124A (India).

<sup>217</sup> *Id.* § 148 (India).

<sup>218</sup> *Id.* § 233.

<sup>219</sup> *Id.* § 153A.

<sup>220</sup> *Id.* § 304A.

<sup>221</sup> *Id.* § 147.

<sup>222</sup> *Id.* § 171E.

<sup>223</sup> *Id.* § 341.

<sup>224</sup> *Id.* § 101.

<sup>225</sup> *Vijayee Singh v. State of Uttar Pradesh*, (1990) 3 SCC 190 (India).

witnesses, it may not always be supported by evidence. At least if it is documented, in the form of email, text message, hand written, etc., it can serve as documentary evidence.<sup>226</sup> Consequently, conviction rate may become very low. This may serve as a disincentive for the Muslim wife to report the act of Unapproved Talaq by her husband.<sup>227</sup>

### **i. Mens Rea or Strict Liability:**

It is also unclear whether the Bill requires mens rea or seeks to impose strict liability (that is, mens rea is not required). The essential ingredients of a crime are actus reus- wrongful act and mens rea- wrongful intention.<sup>228</sup> Actus reus is the physical action of the person.<sup>229</sup> Mens rea is his mental condition.<sup>230</sup> Mens rea is a necessary ingredient of a crime because the objective of criminal law is to punish a person only if he has a guilty mind.<sup>231</sup> The IPC, in most cases, describes the kind of mens rea that is required for a crime.<sup>232</sup> It uses terms like- dishonestly,<sup>233</sup> voluntarily,<sup>234</sup>

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<sup>226</sup> The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, § 61 (India).

<sup>227</sup> Prमित Bhattacharya, *An epidemic of crimes against women?*, LIVE MINT (2013), <https://www.livemint.com/Opinion/xvSrDvJQWT5Qd2KrhMRLgK/An-epidemic-of-crimes-against-women.html> (last updated September 12, 2013).

<sup>228</sup> PSA PILLAI, CRIMINAL LAW 22 (9 ed. 2000).

<sup>229</sup> *Id.*, ch. 4 at 22.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*, ch. 5 at 39.

<sup>232</sup> *Id.* at 40.

<sup>233</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 24 (India).

<sup>234</sup> *Id.* § 39.

“Voluntarily”— A person is said to cause an effect “volun-tarily” when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it. Illustration A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, A may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

has reason to believe,<sup>235</sup> criminal knowledge,<sup>236</sup> etc. to show mens rea. However, for certain crimes, the Indian Penal Code, 1860 (IPC) by-passes the element of mens rea and imposes strict liability. That is, the person may be considered guilty even without intention to perform the crime. Strict liability can be gathered from the words used in the statute. For example, Section 292 of the IPC makes sale of obscene books, etc. a punishable offence, irrespective of knowledge or intention.<sup>237</sup> Courts have interpreted this section as imposing strict liability.

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<sup>235</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 26 (India), “Reason to believe”—A person is said to have “reason to believe” a thing, if he has sufficient cause to believe that thing but not otherwise.

<sup>236</sup> *Id.* § 35 (India),

When such an act is criminal by reason of its being done with a criminal knowledge or intention- Wherever an act, which is criminal only by reason of its being done by several persons, each of such persons who joins in the act with such knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manners as if the act were done by him alone with that knowledge or intention.

<sup>237</sup> *Id.* § 292 (India),

Whoever—

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and,

Section 3 of the Bill does not prescribe mens rea for the husband pronouncing Unapproved Talaq. It merely states that- “Whoever pronounces Talaq...shall be punished with imprisonment.”<sup>238</sup> This would mean that, even if the husband does not intend to divorce his wife, utterance of ‘Talaq’ thrice will be held as pronouncement of Unapproved Talaq.<sup>239</sup> The Bill does not consider that sometimes, such utterances could be made in the heat of the moment.<sup>240</sup> Under extreme anger, the husband may not realise what he is saying.<sup>241</sup> It is argued that imposing strict liability for Unapproved Talaq is excessive and unnecessary.

Further, criminalisation may prevent Muslim women from reporting Unapproved Talaq.<sup>242</sup> This is because her disclosure could land her husband in prison.<sup>243</sup> Most Muslim women would not want this, especially due to their socio-economic backwardness.<sup>244</sup> This will defeat the very purpose of the Bill.

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in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

<sup>238</sup> The Muslim Women (Protection of Rights on Marriage) Bill, 2017, No. 247-C, Bills of Parliament, 2017 § 3 (India).

<sup>239</sup> Faizan Mustafa, *Why Criminalising Triple Talaq Is Unnecessary Overkill*, THE WIRE (December 15, 2017), <https://thewire.in/gender/why-criminalising-triple-talaq-is-unnecessary-overkill>.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Aravind Kurian Abraham, *Bill Criminalising Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking*, THE WIRE (December 30, 2017), <https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking>.

<sup>243</sup> *Id.*

<sup>244</sup> Aravind Kurian Abraham, *Bill Criminalising Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking*, THE WIRE (December 30, 2017), <https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking>.

#### **D. VAGUE PROVISION FOR SUBSISTENCE ALLOWANCE**

The provision of subsistence allowance in Section 5 is also vague and arbitrary. The Bill does not define subsistence allowance. No guidelines are laid down for the Magistrates for determining subsistence allowance.<sup>245</sup> Basic factors such as, the amount of subsistence to be given, schedule of payment, which law will this subsistence fall under, etc, are left to the Magistrate's discretion.<sup>246</sup> Since Muslim personal laws (including property and inheritance) are not codified, the Bill should have prioritised determination of the subsistence allowance. This would have helped to safeguard the Muslim woman's right to receive an allowance.

Further, the Bill is unclear about payment of subsistence allowance when the husband is incarcerated. Upon imprisonment, the husband's income will discontinue.<sup>247</sup> There is no provision about how the husband will pay the subsistence allowance without any recurring income. Further, the Muslim wife will also be deprived of day-to-day sustenance, without a constant source of income.<sup>248</sup> This anomaly will especially affect the lower strata of society, which depends on daily income for survival.<sup>249</sup> The Bill is thus, indirectly placing additional hardship on the already 'hapless married Muslim woman.' By imprisoning her husband instantly, it

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<sup>245</sup> Deva Bhattacharya, *Triple talaq bill: Draft law is more focused on victimising Muslim women rather than empowering them*, FIRSTPOST (2018), <https://www.firstpost.com/india/triple-talaq-bill-draft-law-is-more-focused-on-victimising-muslim-women-rather-than-empowering-them-4281477.html> (last modified Dec. 30, 2017).

<sup>246</sup> *Id.*

<sup>247</sup> See *supra* note 122.

<sup>248</sup> MULLA, PRINCIPLES OF MOHAMMEDAN LAW 338 (22nd ed. 2017)

<sup>249</sup> *Id.*

is depriving her of sustenance and income. This seems too harsh a repercussion for three inconsequential words.

The Bill is also silent about when the subsistence allowance is to be paid- whether as an interim relief or only upon the husband's conviction.<sup>250</sup> Since this is left to the Magistrate's discretion, it could swing either way. If the allowance is permitted only after the husband's conviction, it would mean a long waiting period for the Muslim wife.<sup>251</sup> Without laying a framework for these basic issues on subsistence allowance, the Bill leaves too much scope for the Magistrate's discretion.

#### **E. ARBITRARINESS- CUSTODY**

In the Shayara Bano case, Justice Nariman reiterated that arbitrariness has always been a premise to strike down a law as unconstitutional. The Bill, in its present form, may not pass this test of arbitrariness. It is liable to be struck down for the exact reason for which the Supreme Court set aside Triple Talaq- manifest arbitrariness.

For instance, Section 6 gives automatic child custody to the Muslim wife if her husband pronounces Unapproved Talaq on her.<sup>252</sup> It is unclear whether this custody is provided in the interim (when the husband is incarcerated), or permanently. Unless criminal proceedings are initiated against the husband, there is no need to determine custody. Moreover, if the husband is incarcerated, the custody of the child will anyway lie with

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *See supra* note 69, § 6.

the mother, as the natural guardian.<sup>253</sup> These are questions of fact, which courts determine on case-to-case basis. However, a blanket provision for custody to the mother, in all cases, seems arbitrary and excessive. This may set problematic precedents for further laws.

#### **F. PREVENTS RECONCILIATION**

The Bill suffers from the same problem which the Supreme Court had with Triple Talaq- there is no scope for reconciliation. This is because of the long 3 year imprisonment period, and classification of the offence as non-bailable. With the husband forcibly incarcerated, the door for a possible reunion is shut.

An attempt at reconciliation is a fundamental requirement for divorce under the Quran.<sup>254</sup> Divorce laws of other religions, such as the Hindu Marriage Act, 1955 (hereinafter referred to as “HMA”), also prioritise reconciliation before seeking a divorce. For example, even in a divorce by mutual consent, the couple should have lived separately for at least a year.<sup>255</sup> Further, the court can decree a divorce only after a 6 months waiting period.<sup>256</sup> This period is intended to “allow the parties to do some re-thinking because dissolution of a marriage is a serious matter

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<sup>253</sup> Ms. Gita Hariharan and another v. Reserve Bank of India and another, AIR 1999 SC 1149 (India).

<sup>254</sup> See *supra* note 9, § 12.

<sup>255</sup> The Hindu Marriage Act, 1955, No. 2, Acts of Parliament, 1955 § 13B (India).

<sup>256</sup> *Id.*; the Supreme Court recently held in Amardeep Singh v. Harveen Kaur, (2017) 8 SCC 746 (India) that the 6 months’ waiting period is directory and not mandatory. It can be waived by the courts.

and has serious consequences for the parties and the children.”<sup>257</sup> Unlike other divorce laws, the Bill has prioritised criminalisation over reconciliation. This deprives the Muslim couple from the opportunity to save their marriage.

Further, it also victimizes the Muslim wife. Divorce is heavily stigmatised in Indian society. The taboo against divorce is higher on women.<sup>258</sup> The Bill, with limited scope for reconciliation, sets up the Muslim woman to live the life of a divorcee. If she has children from the marriage, her situation as a single mother will be even more precarious.

## V. POLICY RECOMMENDATIONS

Despite the various lacunae in the Bill, it cannot be denied that the ends that the Bill seeks to achieve are noble. It is important to understand the socio-political context in which it was passed. However, before being enacted as a law, the Bill requires certain amendments. The author would like to make the following recommendations to make the Bill more inclusive and empowering for Muslim women.

### A. CLARITY IN STATUS OF MARRIAGE

The Bill needs to indicate the status of the marriage upon pronouncement of Unapproved Talaq. In *Shayara Bano*, the Supreme Court had set aside the practice of Triple Talaq by declaring it invalid.

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<sup>257</sup> *Smt. Suman v. Surendra Kumar*, AIR 2003 Raj 155 (India); see also *Sureshta Devi v. Om Prakash*, AIR 1992 SC 1904 (India).

<sup>258</sup> Vandana Shah, *Divorce Is A Special Type Of Hell For Indian Women*, HUFFPOST (2016), [https://www.huffingtonpost.in/vandana-shah-/divorcenoun-the-legal\\_dis\\_b\\_7077904.html](https://www.huffingtonpost.in/vandana-shah-/divorcenoun-the-legal_dis_b_7077904.html) (last updated July 15, 2016).

When the pronouncement itself is invalid, it cannot have any consequence on the marriage.

The author recommends that the Bill should clearly state that Unapproved Talaq will not affect the marriage in any manner. Further, if either partner seeks a divorce, they may do so through any of the legally approved methods of divorce under Muslim personal law.<sup>259</sup> Alternatively, the Bill could also state that pronouncement of Unapproved Talaq will count as a single pronouncement towards divorce by Talaq Ahsan or Talaq Hasan. This will take away the immediate and irrevocable character of the Unapproved Talaq.

On pronouncement of Unapproved Talaq, any of the following situations may arise:

- The couple sets aside the pronouncement and continues with the marriage
- The Muslim husband seeks divorce through other approved methods
- The Muslim wife seeks divorce either on the ground of pronouncement of Unapproved Talaq by her husband, or other ground/method available to her. She may also seek civil penalties from her husband, like- Mehr, damages, or any other civil penalty prescribed by law
- Both husband and wife seek divorce mutually

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<sup>259</sup> These have been discussed in detail in Part II of this paper.

In the first situation, the law need not interfere. However, in the remaining situations, the questions of subsistence allowance and custody of minor children, during the pendency of the divorce proceedings, will arise. Therefore, the Bill needs to clarify that the provisions for subsistence allowance and custody of minor children in the Bill are interim measures until the courts finally decree the divorce.

### **B. AGENCY TO MUSLIM WIFE TO SEEK DIVORCE**

There is a dire need to empower Muslim wives. The Bill should entitle them to divorce their husband if he pronounces Unapproved Talaq upon them.

The author recommends that for divorce on this ground, the preponderance of probability should lie in favour of the Muslim woman. It could be argued that such this provision is unfair. However, we must keep in mind the socio-economic position of Muslim women in the society. Due to the Muslim woman's dependence on her husband for sustenance, and the stigma around divorce, it is unlikely that Muslim women will irrationally seek divorce under this provision on false grounds. It is more likely that she will try to safeguard her marriage and neither report the pronouncement of Unapproved Talaq, nor seek divorce for its pronouncement. However, in case she wishes to end her marriage, she should have the right to seek divorce on such ground.

### **C. DE-CRIMINALISE THE PRONOUNCEMENT OF UNAPPROVED TALAQ**

The criminalisation of Triple Talaq has been the main criticism of the Bill. Scholars like Faizan Mustafa have repeatedly censured the lack of justification for criminalisation and its excessiveness.<sup>260</sup>

#### **i. Criminal Wrong to Civil Wrong:**

The author recommends that the state should maintain its distance from the private (family) sphere and de-couple criminal law from family law. Instead of punitive measures, the Bill should focus on reformation and reconciliation in the marriage. A Muslim husband's failure to perform his marital obligations or to maintain his wife is unlawful. However, the above two acts only attract civil consequences, in the form of divorce. Similarly, Unapproved Talaq should also be treated as a civil wrong and not made a criminal offence. There is no need to single out and give undue importance to Unapproved Talaq, especially when it has no consequence on the marriage.

Instead, the Parliament should make it compulsory for the couple to lay down the terms and conditions of marriage and divorce in the nikah-nama. The nikah-nama may stipulate the following conditions, inter alia:

- Prohibition of divorce by Triple Talaq

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<sup>260</sup> Faizan, *supra* note 206.

- Permitted reasons for divorce (other than what is already stipulated in law)
- Consequences for unilateral divorce by husband, such as increasing the Mehr amount by five times<sup>261</sup>
- Wife will be permitted to seek punitive damages, like in breach of contract.<sup>262</sup>

Introducing heavy penalties for pronouncement of Unapproved Talaq may be an effective way to prevent it. The Mehr should be high enough to deter the husband from divorcing his wife. If he pronounces divorce, he will have to pay the stipulated amount.<sup>263</sup>

#### ii. **Change in Nature of Offence:**

If the Parliament insists on criminalising Unapproved Talaq, it should at least remove the strict liability on it. The provision should require intention or knowledge of the husband while pronouncing Unapproved Talaq. It should criminalise Unapprove Talaq only if the husband clearly and unambiguously intends to pronounce it. The Parliament could also create certain exceptions when pronouncement of Unapproved Talaq will be ineffective. For example, if the husband is inebriated, mentally unsound, insane, provoked, uncontrollably angry, etc.

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<sup>261</sup> Faizan, *supra* note 206.

<sup>262</sup> *Id.*

<sup>263</sup> *See supra* note 122, Ch. 15 at 383.

Countries like Egypt, Morocco, Iraq, Kuwait, Sudan, Jordan, and Syria have carved out such exceptions via reform legislations.<sup>264</sup>

Moreover, the nature of the offence should be changed from cognizable and non-bailable to non-cognizable and bailable. This will make the offence more proportionate to the harm it seeks to remedy. It will reduce the severity of the offence and give the Muslim couple scope to reconcile their marriage.

#### **D. PROVISION AGAINST UNAPPROVED TALAQ IN THE NIKAH-NAMA**

The nikah-nama is like a civil contract entered into between the husband and wife. In modern terms, it may be understood as a prenuptial agreement. It lays down all the terms and conditions of the marriage, including the amount of Mehr payable. If the Bill really seeks to uplift Muslim women, it should make it compulsory for the nikah-nama to have a provision against Unapproved Talaq.<sup>265</sup> This will make pronouncement of Unapproved Talaq a civil wrong. The wife will become entitled to civil remedies.

#### **E. COMPULSORY RECONCILIATION PERIOD**

The Bill could draw inspiration from the compulsory ‘cooling-off’ period under the HMA. On similar lines, the Bill should provide a reasonable amount of time before which the Court, cannot decree divorce. This should apply equally for divorce proceedings by either party-

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<sup>264</sup> TAHIR MAHMOOD, *MUSLIM LAW IN INDIA AND ABROAD* 145 (2 ed. 2016).

<sup>265</sup> Apoorva Mandhani, *Triple Talaq: Women’s Rights Activist Flavia Agnes Submits Model Nikahnama Before SC*, *LIVELAW* (June 3, 2017), <http://www.livelaw.in/triple-Talaq-womens-rights-activist-flavia-agnes-submits-model-nikahnama-sc/>.

the husband or the wife. In the interim, it should be the couple's discretion whether to live together or separately. After the reconciliation period, the courts should not hesitate to look into the question of divorce.

It is, however, important to carve out an exception to the compulsory cooling off period, like in instances of- domestic violence, rape, sexual assault, cruelty, etc. against the wife. Determining the existence of these circumstances should be left to the discretion of the court. The Parliament may choose to create a presumption about their existence in favour of the wife, for the purpose of this exception.

#### **F. STAKEHOLDER CONSULTATION**

The two individual stakeholders in this Bill are the Muslim wife and her husband. To get an overarching understanding of the needs of the average Muslim, the Parliament should consult their representative groups like AIMPLB, AIMWPLB, BMMA, etc. Representative groups have the power to influence the masses because they have large support in the community.<sup>266</sup>

If the Bill is revised by considering the recommendations of representative organisations, it is more likely that they will support the Bill. Only if they are in favour of the Bill will they spread awareness about it within the Muslim community. Creating mass-awareness of the change in law and policy is the first step towards implementing the Bill. Further,

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<sup>266</sup> Bharatiya Muslim Mahila Andolan organisation, <https://bmmaindia.com/about/> (last visited May 23, 2018).

the approval of the Bill by representative groups sets an example for individual families to follow.

The Bill cannot be implemented in a vacuum by alienating the Muslim community. The Parliament should, therefore, strive to bridge the gap between the Bill and the community.

### **G. PROVISIONS ABOUT SUBSISTENCE ALLOWANCE**

The author recommends that the Parliament should make provisions on the following details of subsistence allowance. These details will serve as guidelines for the Magistrate while determining the allowance:

- Subsistence allowance as an interim measure- The Muslim wife is already entitled to Mehr amount upon divorce, along with maintenance under Section 125 of the Criminal Procedure Code, 1973 (CrPC). Therefore, the legislative intent behind the subsistence allowance provision would have been to provide for the woman (and child's) sustenance during the pendency of legal proceedings. The Bill must clarify this so that the husband does not take advantage of the ambiguity in law to deny the Muslim wife her interim rights.
- Schedule of payment- The Bill must provide for the schedule for paying the subsistence allowance- whether it is to be paid as a lump-sum, or recurring periodically. Alternately, the Bill could also leave the determination of schedule to the Magistrate on a case-to-case basis, considering the preference of the parties. But, the Bill must at least lay down these two options.

- Amount of allowance- whether a minimum amount (such as that equivalent to Mehr amount) should be set. The amount should be determined keeping in mind the husband's standard of living. It should enable the wife and children to maintain the status quo.
- Payment when the husband is incarcerated- If the husband is imprisoned under the current provisions of the Bill, he may lose his steady income. The Bill should make alternate provisions for the wife and child(ren) to receive subsistence allowance. This could be through the husband's personal property, other sources of income like rent, interest, etc., or through the other heirs and immediate family members of the husband. If Unapproved Talaq is de-criminalised, the need for this provision will not arise.

#### **H. DETERMINATION OF CUSTODY**

The current Bill gives the child's custody automatically to the mother. Also, it is vague about whether the custody is given for the interim period, during the pendency of criminal proceedings against the husband, or permanently. The author recommends that the child's custody should be given to the mother during the pendency of the criminal proceedings against the husband. However, if the proceedings are merely civil in nature, then custody may be determined on a case-to-case basis. The law cannot turn a blind eye to the possibility of misuse of the Bill, especially if Unapproved Talaq continues to be a cognizable and non-bailable offence. In case of misuse of the Bill, the father will be wrongly deprived of his child's company. The author recommends that, after the

interim period, the custody should be determined by the appropriate court.

## **I. POLICY MEASURES FOR SUBSTANTIVE UPLIFTMENT OF MUSLIM WOMEN**

Merely giving Muslim women rights on paper will not improve their socio-economic position in society. Even if they have the right to seek divorce, they may be restrained by financial and social considerations. This will render their rights hollow.

The problem of lack of education and employment of Muslim women must be solved at the grassroot level. This needs a shift in policy from punishing the husband to empowering the Muslim woman. The author proposes the following policy guidelines to take substantive equality to Muslim women:

- The government should tie-up with Muslim women's organisations, such as BMMA, AIMPLB and Awaaz-e-Niswaan, to help spread awareness about Muslim women's rights.
- The government could come up with a scheme to encourage Muslim families to educate their girl child. Similarly, the government could also incentivise Muslim families to marry their girl child only after she completes her education. This will empower the Muslim woman. The scheme could be modelled

after the 'Prerna Scheme' of the Ministry of Health and Family Welfare.<sup>267</sup>

- The government should take the help of NGOs and social welfare organisations to make Muslim women employable. This can be done by imparting skill-training and vocational learning to Muslim women.

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<sup>267</sup> This scheme incentivises increasing the age of marriage of the girl, and also spacing out childbirth in the marriage. Couples who marry late, or have children after minimum 2 years of marriage are given monetary rewards. This scheme focuses on seven states, namely, Bihar, Uttar Pradesh, Madhya Pradesh, Chhattisgarh, Jharkhand, Odisha, and Rajasthan.

SCHEME FOR INCENTIVE TO PARENTS OF GIRL CHILD, Press Information Bureau, Govt. of India, Ministry of Health and Family Welfare, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=117479> (last visited May 23, 2018).