

TRIPLE TALAQ AND CONSTITUTIONAL MORALITY: REIMAGINING GENDER JUSTICE IN MUSLIM PERSONAL LAW

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ABSTRACT

When the Supreme Court struck down talaq-e-biddat in 2017, it wasn't just invalidating a controversial practice, it was confronting centuries of patriarchal interpretation masquerading as religious mandate. But here's the uncomfortable question nobody wants to ask: has the subsequent criminalisation actually helped Muslim women, or did Parliament simply create another weapon that hurts the very people it claims to protect? This paper digs into that paradox. By comparing how Hindus and Muslims navigate divorce and maintenance in India's fragmented personal law system, I argue that banning triple talaq was necessary but wholly insufficient. Real change demands comprehensive codification, not piecemeal prohibition. The 2019 Act treats symptoms while ignoring the disease, systemic gender inequity embedded in uncodified Muslim personal law.

Keywords – Triple Talaq, Muslim Personal Law, Gender Justice, Constitutional Morality, Shayara Bano, Matrimonial Rights, Personal Law Reform, Talaq-e-Biddat, Hanafi Jurisprudence, Uniform Civil Code.

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I. INTRODUCTION

Personal law in India sits uncomfortably between faith and fundamental rights. Article 44 talks about a Uniform Civil Code, but we're nowhere close.¹ Muslims follow Shariat principles given statutory backing through the 1937 Act,² while Hindus got comprehensive codification in the 1950s. The gap between these systems isn't just procedural, it's philosophical. And nowhere did that gap hurt more than in *talaq-e-biddat*, where a husband could destroy a marriage by uttering "talaq" three times. Done. Over. No questions asked. The Quran never sanctioned this. Islamic scholars across schools, Shia, Maliki, Hanbali, rejected it outright.³ Even Hanafi jurists who recognised its legal validity called it sinful.⁴ Yet it persisted in India until 2017, when Shayara Bano's petition finally forced the Court to confront what everyone knew: this practice was arbitrary, unconstitutional, and had nothing to do with actual Islamic teachings.⁵

Then came the 2019 Act making triple talaq a criminal offence.⁶ Three years imprisonment for utterance. Sounds progressive, right? Except consider this: when you jail the husband, you're often eliminating the family's sole income source. The wife loses both marriage and maintenance. Children suffer. So, who exactly benefits from criminalisation? That's the question this paper grapples with, whether legal reform actually delivers justice or just performs it. I'll examine three things here. First, what Islamic law actually says about divorce versus what got practiced in India. Second, how courts moved from rubber-stamping triple talaq to striking it down. Third, how Hindu law's codified framework contrasts with Muslim law's fragmented approach, and why that matters for women's rights. My core argument: you can't fix structural inequality with criminal prohibition alone. You need comprehensive reform.

II. WHAT ISLAM ACTUALLY SAYS ABOUT DIVORCE (VERSUS WHAT HANAFIS PRACTICED)

A. The Quranic Blueprint

Muslim marriage isn't sacramental, it's contractual.⁷ Both parties agree to specific terms, including mahr (dower). Divorce is allowed but discouraged. There's a famous hadith where

¹ Constitution of India, 1950, art. 44, available at <https://www.india.gov.in/my-government/constitution-india>

² Muslim Personal Law (Shariat) Application Act, 1937, available at <https://legislative.gov.in>

³ D.F. Mulla, *PRINCIPLES OF MAHOMEDAN LAW* 321 (22nd ed., LexisNexis, New Delhi, 2016).

⁴ *Id.* at 318-320.

⁵ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, available at <https://www.sci.gov.in>

⁶ Muslim Women (Protection of Rights on Marriage) Act, 2019, s. 4, available at <https://egazette.nic.in>

⁷ A.A.A. Fyzee, *OUTLINES OF MUHAMMADAN LAW* 88-92 (5th ed., Oxford University Press, New Delhi, 2008).

the Prophet calls it "the most hateful of lawful things to Allah."⁸ The Quran lays out clear procedures: pronounce talaq during tuhr (when the wife isn't menstruating), don't touch her during iddat (waiting period), and appoint arbitrators from both families to attempt reconciliation.⁹

Talaq-e-ahsan follows this, single pronouncement, three-month waiting period, chance to reconcile.¹⁰ Talaq-e-hasan spreads three pronouncements across three tuhr periods, again with withdrawal options.¹¹ Both methods build in cooling-off periods. They're designed to prevent impulsive decisions that destroy families. The Quran's pretty explicit: "retain with kindness or release with grace."¹² Nothing about instant, irrevocable termination.

B. How Talaq-e-Biddat Became "Valid" Despite Being Wrong

Here's where things get weird. During the Umayyad period, some jurists supposedly introduced triple talaq as a deterrent, make rash divorces irrevocable so men think twice.¹³ But this contradicted Quranic procedure. Hanafi scholars acknowledged it was makruh (detestable), yet called it legally effective.¹⁴ Think about that inconsistency: we condemn this ethically but enforce it legally.

Meanwhile, other Islamic schools rejected it entirely. Shias, Malikis, Hanbalis all said repeated utterances count as one revocable talaq.¹⁵ Countries like Egypt (1929), Tunisia (1956), and Pakistan (1961) abolished it decades before India.¹⁶ So this wasn't some universal Islamic practice, it was specific to Hanafi interpretation that most Muslim-majority nations had already reformed. India's retention reflected political unwillingness to touch personal law, not religious necessity.

C. Why Women Got Shortchanged

Husbands could divorce unilaterally. Wives? They had limited, burdensome options:

⁸ SUNAN ABU DAWOOD, Book 13, Hadith 2177, available at <https://sunnah.com>

⁹ THE HOLY QURAN 2:229-232, 65:1-2, available at <https://quran.com>

¹⁰ Fyzee, supra note 7, at 139-142.

¹¹ Id.

¹² THE HOLY QURAN 2:229, available at <https://quran.com>

¹³ Tahir Mahmood, MUSLIM LAW IN INDIA AND ABROAD 187 (LexisNexis, New Delhi, 2016).

¹⁴ Mulla, supra note 3, at 318-320.

¹⁵ Id. at 321.

¹⁶ Mahmood, supra note 13, at 189-193.

- Khula requires husband's consent and usually returning mahr, essentially buying your freedom.¹⁷
- Talaq-e-tafweez works only if your husband agreed to delegate divorce rights in the nikahnama, which most don't.¹⁸
- Judicial divorce under the 1939 Act requires proving cruelty, desertion, impotency, or maintenance failure through lengthy court proceedings.¹⁹

Notice the pattern? Every avenue for women involves either getting male permission, giving up money, or proving fault. Men faced none of these barriers. They just said "talaq" three times. This asymmetry didn't emerge from Quranic principles; it came from patriarchal legal interpretation that prioritized male prerogatives over marital equity. The structure itself was discriminatory, regardless of how individual men used it.

III. HOW COURTS WENT FROM ENDORSING TRIPLE TALAQ TO KILLING IT

A. Early Cases: When Courts Just Enforced Doctrine

Initially, courts treated triple talaq as technically valid even when obviously unjust. The Privy Council in *Saiyid Rashid Ahmad v. Anisa Khatun* enforced a triple talaq from 1905 despite the couple living together for decades and having children afterward.²⁰ The wife claimed the marriage continued. The Court said nope, talaq was effective immediately regardless of your subsequent conduct. That's formalism taken to absurd extremes, prioritizing doctrinal purity over common sense and justice.

But cracks appeared. In *Jiauddin Ahmed v. Anwara Begum*, the Gauhati High Court said hold on, triple talaq isn't valid unless there's reasonable cause and you tried arbitration first.²¹ That was 1981. Then *Shamim Ara v. State of U.P.* in 2002 required proof that arbitrators were actually appointed, and reconciliation attempted.²² These courts were essentially rewriting Muslim law through constitutional interpretation, reading in procedural safeguards that

¹⁷ Dissolution of Muslim Marriages Act, 1939, s. 2(ix), available at <https://legislative.gov.in>

¹⁸ Mulla, *supra* note 3, at 330-332.

¹⁹ Dissolution of Muslim Marriages Act, 1939, s. 2, available at <https://legislative.gov.in>

²⁰ *Saiyid Rashid Ahmad v. Anisa Khatun*, AIR 1932 PC 25

²¹ *Jiauddin Ahmed v. Anwara Begum*, (1981) 1 Gau LR 358.

²² *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518, available at <https://www.sci.gov.in>

traditional jurisprudence ignored. The judiciary was doing what Parliament wouldn't, reforming discriminatory personal law.

B. Shayara Bano: When Constitutional Morality Finally Mattered

Shayara Bano challenged triple talaq, polygamy, and nikah halala in 2017.²³ The Court only addressed triple talaq, but that was enough. What made this case fascinating was the judicial split. Justice Nariman held that triple talaq wasn't mandated by the Quran and couldn't be an essential religious practice under Article 25, so it failed the arbitrariness test under Article 14.²⁴ Chief Justice Khehar agreed it should go but wanted Parliament to act, not courts.²⁵

Justice Chandrachud's dissent went further; he argued personal law must conform to constitutional morality even if it's not state action under Article 13.²⁶ That's huge. It means religious practices violating gender equality can't hide behind religious freedom regardless of their source. This debate continues: how far can courts push personal law reform when religious communities claim autonomy? What's clear is Shayara Bano represented constitutional supremacy over regressive custom. But it only declared triple talaq void. It didn't criminalize it. That came later, and that's where things got complicated.

C. The 2019 Act: Good Intentions, Questionable Execution

Parliament's response was the Muslim Women (Protection of Rights on Marriage) Act, 2019.²⁷ Section 3 voids triple talaq. Section 4 makes it criminal, up to three years imprisonment. Sections 5-6 mandate subsistence allowance and custody for the wife. Sounds protective, right?

Here's the problem. Criminalization helps who exactly? When you imprison the husband, you're often jailing the family's breadwinner. The wife might get custody but loses financial support. Kids suffer. And here's what really happens on the ground: women don't report triple talaq because they can't afford to lose their husband's income.²⁸ The law becomes symbolic rather than functional.

²³ Shayara Bano, *supra* note 5, at paras 2-8.

²⁴ *Id.* at paras 85-102 (Nariman, J.).

²⁵ *Id.* at paras 24-46 (Khehar, C.J.).

²⁶ *Id.* at paras 159-189 (Chandrachud, J., dissenting).

²⁷ Muslim Women (Protection of Rights on Marriage) Act, 2019, ss. 3-6, available at <https://egazette.nic.in>

²⁸ National Crime Records Bureau, CRIME IN INDIA 2020 (Government of India, New Delhi, 2021), available at <https://ncrb.gov.in>

Flavia Agnes and other feminist legal scholars have argued this point extensively.²⁹ Criminal law isn't the right tool for family disputes. Civil remedies, maintenance orders, property division, injunctions, actually help women rebuild their lives. Prison just creates new problems. And there's the constitutional question: does targeting only Muslims violate Article 14?³⁰ Is three years imprisonment for utterance proportionate under Article 21?³¹

The Act's compoundable nature reveals legislative confusion, if it's serious enough to be cognizable, why is it compoundable at the victim's request? That inconsistency suggests even Parliament wasn't sure whether this belonged in criminal law. Limited enforcement data we have suggests women aren't using it much,³² probably because the costs outweigh benefits. That's the paradox: legislation designed to empower women might actually leave them worse off.

IV. WHY HINDU LAW'S STRUCTURE MATTERS FOR THIS COMPARISON

Looking at Hindu law reveals how legal architecture shapes outcomes beyond specific provisions.

A. Marriage under Hindu law

Traditional Hindu thought treated marriage as *sanskara*, spiritually indissoluble.³³ The Hindu Marriage Act 1955 kept that philosophy but added statutory requirements: formalities for valid marriage (Sections 5-7), grounds for nullity (Sections 11-13), divorce procedures.³⁴ Crucially, Hindu marriages can't be dissolved privately. You need court involvement, which means procedural safeguards, property division, maintenance orders, everything adjudicated together.

Muslim *nikah* is contractual, theoretically allowing extrajudicial dissolution. But *Shamim Ara* and subsequent cases increasingly require judicial oversight anyway.³⁵ So we're converging on

²⁹ Flavia Agnes, "Triple Talaq Legislation: Victimisation of Women Continues", 54(15) ECONOMIC AND POLITICAL WEEKLY 12-15 (2019), available at <https://www.epw.in>

³⁰ Constitution of India, 1950, art. 14, available at <https://www.india.gov.in/my-government/constitution-india>

³¹ *Id.* at art. 21.

³² National Crime Records Bureau, *supra* note 28.

³³ *Smt Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav*, AIR 1988 SC 644, available at <https://indiankanoon.org>

³⁴ Hindu Marriage Act, 1955, ss. 5-13, available at <https://legislative.gov.in>

³⁵ *Shamim Ara*, *supra* note 22.

mandatory court involvement, which protects vulnerable parties. The difference is Hindu law built that in from the start through comprehensive codification.

B. Divorce: Role of courts

Hindu divorce requires judicial decree, either through mutual consent (Section 13B) or contested proceedings on fault grounds, adultery, cruelty, desertion, conversion, mental disorder, and so on (Section 13).³⁶ Mutual consent needs six months' separation plus a cooling-off period.³⁷ You can't wake up and destroy a marriage. There's deliberate delay built in.

Contested divorces require evidence, full hearings, both parties represented. Courts can impose conditions protecting economically dependent spouses. Compare that to triple talaq's unilateralism where wives had zero procedural standing until Shayara Bano. Even now, questions remain about enforcement and practical access to remedies for Muslim women.

C. Maintenance: Clear Entitlements Versus Interpretive Battles

Hindu law stacks maintenance provisions:

- Section 24 of Hindu Marriage Act gives interim maintenance during proceedings.³⁸
- Section 25 authorizes permanent alimony based on means, conduct, circumstances.³⁹
- Section 18 of Hindu Adoptions and Maintenance Act covers wives, children, parents.⁴⁰
- Section 125 CrPC applies universally across religions.⁴¹

These create predictable, enforceable rights. Muslim women historically relied on mahr (often token amounts) and goodwill. The Muslim Women (Protection of Rights on Divorce) Act 1986 supposedly limited maintenance to iddat, until *Danial Latifi v. Union of India* reinterpreted "reasonable and fair provision" to cover post-iddat needs.⁴²

Notice the difference? Hindu women enforce clear statutory rights. Muslim women litigate statutory interpretation. That imposes extra burdens, legal costs, time, uncertainty. Even

³⁶ Hindu Marriage Act, 1955, s. 13, available at <https://legislative.gov.in>

³⁷ Id. at s. 13B.

³⁸ Id. at s. 24.

³⁹ Id. at s. 25.

⁴⁰ Hindu Adoptions and Maintenance Act, 1956, s. 18, available at <https://legislative.gov.in>

⁴¹ Code of Criminal Procedure, 1973, s. 125, available at <https://legislative.gov.in>

⁴² *Danial Latifi v. Union of India*, (2001) 7 SCC 740, at paras 28-35, available at <https://www.sci.gov.in>

progressive judicial interpretation can't substitute for clear codification. Women shouldn't need Supreme Court intervention to establish basic maintenance rights.

V. WHAT ACTUAL REFORM LOOKS LIKE

Shayara Bano and the 2019 Act addressed one symptom. The underlying disease, systemic gender inequity, remains. Here's what comprehensive reform might involve:

A. Codification (Because Clarity Matters)

Draft a Muslim Marriage and Divorce Act modelled on the Hindu Marriage Act. Standardize nikah procedures. Enumerate divorce grounds for both spouses equally. Mandate arbitration before dissolution. Establish maintenance formulae. Make custody determinations based on children's welfare, not gender presumptions.

The 1939 Dissolution Act proves codification works without violating Islamic principles.⁴³ It gave women judicial divorce grounds using Islamic jurisprudence. We just need to extend that logic to marriage formation, dissolution procedures, property rights. Codification doesn't erase religious identity; it translates theological principles into administrable legal standards.

B. Enforceable Nikahnamas (Contracts Should Mean Something)

Muslim marriage is contractual, so strengthen that. Require mandatory clauses in nikahnama: talaq-e-tafweez delegating divorce authority to wives, substantial mahr linked to current asset values, maintenance terms, custody preferences. Make these judicially enforceable with presumptions favoring vulnerable parties in ambiguous cases.⁴⁴

Courts already recognize nikahnama's binding nature, but enforcement is inconsistent. Statutory requirements would transform theoretical rights into practical safeguards. Use Islam's contractual marriage concept for gender equity instead of male privilege.

C. Community Mediation (Done Right)

Establish mediation panels with trained counselors and jurists for culturally sensitive dispute resolution. But build in safeguards: transparent procedures, equal female representation,

⁴³ Dissolution of Muslim Marriages Act, 1939, available at <https://legislative.gov.in>

⁴⁴ Shamim Ara, *supra* note 22 (emphasizing nikahnama's contractual binding nature).

documentation requirements, unconditional judicial review availability. Mediation should complement, never substitute, court access.

This respects religious sensibilities while maintaining constitutional protections. Women must retain unqualified court access with mediation outcomes challengeable if unfair. Balance is possible, we just haven't seriously tried.

D. Legal Literacy (Rights Mean Nothing If Nobody Knows Them)

Most Muslim women don't know their rights under the 1939 Act, Section 125 CrPC, or 2019 Act. Community outreach programs explaining these protections could enhance effective access. Partner with civil society and progressive religious voices to destigmatize legal recourse while challenging patriarchal interpretations.

Address socioeconomic barriers too: legal aid availability, simplified procedures, protection against social ostracism. Technical reform fails without accompanying measures enabling vulnerable individuals to actually use available remedies.

E. Evidence-Based Policy (Not Ideological Posturing)

We need systematic research on the 2019 Act's implementation: prosecution rates, conviction patterns, actual impact on women's lives. Study Tunisia and Morocco, which modernized family laws while keeping Islamic character.⁴⁵ Learn from their experiences.

Policy should emerge from empirical understanding of Muslim women's lived experiences, not abstract doctrinal debates or political grandstanding. That requires investment in sociolegal research documenting implementation gaps and best practices from comparative contexts.

VI. CONCLUSION

Triple talaq's abolition matters. Constitutional supremacy over regressive custom matters. But let's not pretend this solves structural problems Muslim women face accessing divorce, securing maintenance, asserting custody rights. These challenges stem from uncoded personal law, socioeconomic marginalization, and patriarchal norms that cross religious boundaries.

⁴⁵ Mahmood, *supra* note 13, at 189-193.

Real empowerment isn't just prohibiting discriminatory practices, it's building equitable legal frameworks. That requires balancing religious identity with constitutional values, which is delicate but achievable through inclusive dialogue, incremental codification, and judicial vigilance.

Hindu law shows it's possible. Comprehensive statutory frameworks and judicial supervision coexist with religious identity. Muslim personal law reform doesn't require erasing Islamic principles, just actualizing their egalitarian potential. Align Quranic ideals with contemporary human rights standards.

The triple talaq episode reveals law reform's possibilities and limits. Courts and legislatures can catalyze change, but lasting transformation requires societal commitment to gender justice beyond religious divides. Harmonizing personal laws with constitutional morality remains unfinished work, an ongoing obligation for anyone who believes equality should be substantive, not just formal. The path forward isn't choosing between religious tradition and constitutional modernity. It's recognizing their complementarity when both prioritize human dignity and gender justice over patriarchal control.

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