

TRIPLE-ṬALĀQ AND THE POLITICAL CONTEXT OF ISLAMIC LAW IN INDIA

Sohaira Siddiqui
Georgetown University

Abstract

The 2019 passage of the ‘The Muslim Women Protection of Rights on Marriage Act’ criminalizing the practice of triple-ṭalāq has been actively debated in both political and academic spheres. For some, the act signals a much-awaited victory for the Muslim women of India who have suffered the consequences of instantaneous and irrevocable divorces; while for others, it signals the continued marginalization of the Muslim community and the willingness of the Indian government to encroach upon their rights as a distinct religious community. To understand the passage of this Act in context, this article explores the larger context surrounding debates over Islamic Law in India, prior watershed Supreme Court decisions, and the recent political agenda of the BJP. These explorations reveal that ‘The Muslim Women Protection of Rights on Marriage Act’ is a red herring that, if fully enacted, can exacerbate the social and legal challenges women face when seeking divorce while also encroaching upon the rights of the increasingly politically marginalized Muslim community.

INTRODUCTION

The recent passing of ‘The Muslim Women Protection of Rights on Marriage Act 2019’ in India’s two houses of Parliament—the Lok Sabha and the Rajya Sabha—has been actively debated both in India and abroad. Is the Act a much-awaited victory for the Muslim women of India who have suffered the consequences of instantaneous and irrevocable divorces? Or is the Act another sign of the increasing marginalization of the Muslim community and the willingness of the Indian government to encroach upon their rights as a distinct religious community? In order to understand the current controversy over the passing of the Act, one must understand the status of Muslims in India and the longstanding debates surrounding triple-*ṭalāq*.¹

1 Triple-*ṭalāq* is a specific form of divorce in Islamic law. It is based on Quran 2:229–30 which states, “The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness...And if he has divorced her (a third time), then she is not lawful unto him thereafter until she has married another husband. Then, if the other husband divorces her, it is no sin on both of them that they reunite, provided they feel that they can keep the limits ordained by Allah.” Based on this Quranic verse, all four Sunni legal schools agree that the pronouncement of a third divorce by the husband is final and irrevocable. However, there was a scholarly discussion on whether pronouncing three divorces in one sitting constitutes a single divorce, or three separate divorces. Before turning to this discussion, it is important to understand the various forms of divorce in Islam and how the debate on triple-*ṭalāq* developed historically. There are two types of divorces in Islam: *ṭalāq al-sunnah* (the recommended form of divorce) and *ṭalāq al-bid’ā* (the innovated divorce—in South Asia it is referred to as *ṭalāq-e-biddat*). In the first form, the husband divorces the wife outside of her menstrual period, considered the time of ritual purity (*ṭuhr*), with a single divorce, without having had sexual relations. This form of divorce is then further subdivided into *aḥsān* (the best form) and *ḥasan* (the good form). In the *aḥsān ṭalāq al-sunnah*, after the husband pronounces the first divorce, he abstains from sexual intercourse until the completion of two additional menstrual cycles, or until the wife has reached her third cycle of *ṭuhr*. If the husband does not revoke the divorce in this time period or engage in sexual intercourse, the divorce is complete. In the *ḥasan ṭalāq al-sunnah*, the husband pronounces divorce a second time, in the next cycle of *ṭuhr*; and a third divorce, in the third cycle of *ṭuhr*—making the divorce irrevocable at this point. The husband is not *required* to pronounce divorces in successive periods of ritual purity as reconciliation is always recommended. In *ṭalāq al-bid’ā*, the husband pronounces divorce when the woman is menstruating, or when she is in her time of ritual purity, but the spouses have engaged in sexual activity. Jurists agree

This article will provide an overview of (1) the place of Muslim Personal Law in India; (2) the various Muslim institutions and players that have historically shaped the Law; (3) the debates on Muslim Personal Law by Muslim and non-Muslim activists in the past decade; and (4) the circumstances behind the passing of the Muslim Women (Protection of Rights on Marriage) Act 2019 that has outlawed triple-ṭalāq. Though the Indian Muslim community has not yet felt the social and legal ramifications of the Act, given that it does not provide women with any additional rights that many have been advocating for, and it criminalizes men for pronouncing triple-ṭalāq, the Act has the potential of leaving Muslim women even more vulnerable.

that triple-ṭalāq, when it is pronounced three separate times, in three periods of ritual purity, results in an irrevocable divorce (*ṭalāq rajʿī*); however, they questioned the consequences of pronouncing three divorces simultaneously, or using a phrase that indicates three divorces such as, “I divorce you three times.” Eventually all four of the Sunni legal schools agreed that although this form of divorce is classified as *ṭalāq al-bidʿa*, it is valid and results in an irrevocable divorce. It is this form of triple-ṭalāq in a single-sitting that is the source of the legal debates in India. The relative consensus amongst the four legal schools on the efficacy of this form of divorce remained until Ibn Taymiyya (d. 728/1328) and Ibn al-Qayyim (d. 751/1350). Both scholars argued that three divorces simultaneously, or a single phrase indicating three divorces, do not effectuate an irrevocable divorce. Despite the near unanimous consensus of jurists, modern states when codifying Islamic family law, have adopted the position of Ibn Taymiyya and Ibn al-Qayyim, either outlawing triple-ṭalāq entirely or treating it as a singular pronouncement. In 1929, Egypt became the first country to count three simultaneous divorce pronouncements as one. This was quickly followed by Sudan (1935), Sri Lanka (1951), Syria (1953), Tunisia (1956), Morocco (1957), Iraq (1959), Pakistan (1961), Bangladesh (1961), Jordan (1976), Afghanistan (1977), Libya (1984), Kuwait (1984), and Yemen (1992). Since 1992, almost all other countries that apply Islamic law to issues of marriage and divorce have legislated against the efficacy of triple-ṭalāq. For an overview of the classical legal discussion on triple-ṭalāq, see Muhammad Munir, “Triple ‘Talāq’ in One Session: An Analysis of the Opinions of the Classical Medieval and Modern Muslim Jurists under Islamic law,” *Arab Law Quarterly* 27, no. 1 (2013): 29–49; Khaled al-Azri, “One or Three? Exploring Scholarly Conflict over the Question of Triple Talāq (Divorce) in Islamic Law with Particular Emphasis on Oman,” *Arab Law Quarterly* 23, no. 3 (2011): 277–96. For more contemporary developments, see Nehaluddin Ahmad, “A Critical Appraisal of ‘Triple Divorce’ in Islamic Law,” *International Journal of Law, Policy and the Family* (2009): 53–61 and Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007).

CURRENT STATUS OF MUSLIMS IN INDIA

Based on the 2001 Indian Census, the 140 million Muslims living in India comprise 13.4% of India's population.² According to more recent data, India's Muslim population has increased to 14% and is only expected to grow further. Indeed, Pew Research Center estimates that by 2050 India will have the largest population of Muslims in the world, surpassing Indonesia, with a projected 311 million Indian Muslims.³ Despite steady growth of the Indian Muslim population, Muslim representation in government has declined. In the 2019 election, only 27 Muslims were elected representatives into the 545 seat lower house of parliament, the Lok Sabha, an increase of only five since the last election in 2014. As such, there is mounting concern that India's largest minority population is not adequately represented in Parliament.⁴ This concern is further exacerbated by Hindu nationalist policies and rhetoric of the ruling party, the Bharatiya Janata Party (BJP), and the Prime Minister, Narendra Modi.⁵

2 "2001 Indian Census Data: Distribution of Population by Religion," *Office of the Registrar General & Census Commissioner*, Accessed August 10, 2019, http://censusindia.gov.in/Census_And_You/religion.aspx.

3 "By 2050, India to have world's largest populations of Hindus and Muslims," *Pew Research Center*, Accessed August 10, 2019, <https://www.pewresearch.org/fact-tank/2015/04/21/by-2050-india-to-have-worlds-largest-populations-of-hindus-and-muslims/>.

4 In addition to disproportionate Muslim representation in the legislature, the Centre for Research and Debates in Development Policy in India has analyzed electoral data which reveals that large portions of eligible Muslim voting population are excluded from voting. The report states, "the empirical analysis presented in this article brings to light a dimension which has hitherto only been vaguely suspected. It is likely that over 15% of all adults are either left out or excluded from voting lists in India. There is a strong empirical indication, as described below, that this percentage is much higher among Muslims." Abusaleh Shariff and Khalid Saifullah, "Electoral Exclusion of Muslims Continues to Plague Indian Democracy," *Economic & Political Weekly* 53, no. 20 (2018).

5 See generally Angana Chatterji, Thomas Blom Hansen and Chirstophe Jaffrelot (eds), *Majoritarian State: How Hindu Nationalism is Changing India* (London: Hurst, 2018); Lars Tore Flåten, *Hindu Nationalism, History and Identity in India: Narrating a Hindu past under the BJP* (New York: Routledge, 2018); Nitasha Kaul, "Rise of the Political Right in India: Hindutva-Development Mix, Modi Myth and Dualities," *Journal of Labor and Society* 20, no. 4 (2017): 523–28.

Saloni Bhogale, a Research Fellow at Ashoka University in Delhi, examined the extent to which issues directly affecting the welfare of Muslims were addressed in parliament. She analyzed a set of 276,000 parliamentary questions raised in the Lok Sabha from 1999 to 2007.⁶ Her findings reveal that Muslim MPs asked far more questions about the Indian Muslim population as compared to the non-Muslim MPs. However, when Muslim MPs raised concerns, they focused on specific issues such as the Hajj and Muslim education. On the other hand, when non-Muslim MPs raised concerns related to the Muslim population, they focused on questions related to domestic terrorism. What Bhogale's research reveals is that not only are Muslims under-represented in Parliament, but issues related to their welfare are not adequately addressed. Furthermore, when questions about Muslims do arise, they concentrate on a narrow subset of issues of concern to the national government. Bhogale's research also reveals something particularly illuminating for the current debate of triple-ṭalāq. She finds that over the eight-year period, only 1.5% of all questions about Indian Muslims surveyed pertain to Muslim women. If historically both Muslim and non-Muslim MPs in the Lok Sabha paid little attention to questions of gender and the welfare of women, then why was the triple-ṭalāq Act the first bill to be passed in the new parliamentary session?

The urgency in passing the Bill would suggest that triple-ṭalāq is a widespread practice afflicting Muslim women, but data provided by the Center for Research and Debates in Development Policy (CRDDP) in Delhi seems to suggest otherwise. Before the 2017 landmark Supreme Court decision—discussed below—the CRDDP reported the results of its survey on triple-ṭalāq. The Center surveyed 20,671 Muslims (16,860 men and 3,811 women). From the 20,671 respondents, 311 divorces were

6 Saloni Bhogale, "Querying the Indian Parliament: What can the Question Hour tell us about Muslim Representation in India," *Trivedi Center for Political Data at Ashoka University*, Working Paper No. 2018-1, Accessed August 1, 2019, http://tcpd.ashoka.edu.in/wp-content/uploads/2018/10/Bhogale_WP_QH-1.pdf. Also see Saloni Bhogale, "What can Question Hour tell us about representation in the Indian Parliament?" *Ideas for India*, Accessed March 23, 2021, <https://www.ideasforindia.in/topics/social-identity/what-can-question-hour-tell-us-about-representation-in-the-indian-parliament.html>.

reported, and only 1 of the 311 noted an oral triple-*ṭalāq* was used.⁷ If this sample is reflective of the population, why has the government made triple-*ṭalāq* its signature legislation to enhance the welfare of Muslim women? And why has it dominated the public and legislative discourse about the Muslim community in India? To answer these questions, we must understand the complex history of Islamic family law in India.

THE INTRODUCTION OF ISLAMIC FAMILY LAW IN INDIA

The current architecture of Islamic family law in India is often assumed to be a vestige of India's colonial past wherein the British recognized the personal religious laws of Muslims, Hindus, Christians, and other minority religious groups. Generally, post-colonial states supported legal monism as opposed to legal plurality, overseen by centralized organs of state, the legislature and the judiciary. However, normative unification failed in certain post-colonial states such as India. Some scholars have attributed this failure to the inability to disinherit the colonial legacy, but others have noted that for certain post-colonial states, it was politically exigent to continue to accommodate the legal needs of minorities.⁸ In the case of India, it was likely a combination of both—the colonial legacy established the foundation for legal pluralism, but the bloody

7 Seema Chishti, "Triple Talaq Exception Rather than Rule: Survey," *Indian Express*, Accessed August 15, 2019, <https://indianexpress.com/article/india/triple-talaq-exception-rather-than-rule-survey-muslim-divorce-4659358/>. See also Abusaleh Shariff and Syed Khalid, "Abandoned Women Vastly Outnumber Victims of Triple Talaq and It's Time Modi Spoke Up for Them," *The Wire*, Accessed August 15, 2019, <https://thewire.in/gender/abandoned-women-triple-talaq>.

8 Mirjam Kunkler and Yüksel Sezgin, "The Unification of Law and Postcolonial State: The Limits of State Monism in India and Indonesia," *American Behavioral Scientist* 60, no. 8 (2016): 987–1012; Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2013); Yüksel Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India* (Cambridge: Cambridge University Press, 2013). For the specific case of family law in India, see Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford: Stanford University Press, 2014); Gopika Solanki, *Adjudication in Religious Family Law: Cultural Accommodation, Legal Pluralism and Gender Equality in India* (Cambridge: Cambridge University Press, 2011).

partition of 1947, with its heavy evocation of religious sentiment, made religious accommodation of Indian Muslims a political necessity.

Accommodation of certain Islamic laws were enshrined in the constitution by Articles 13 and 372.⁹ Article 13 states, “All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.”¹⁰ Though the constitution ensured the legal validity of the religious laws of Muslims prior to independence, Article 13 added an important qualification—laws were only recognized to the extent that they did not violate the Fundamental Rights of the constitution as outlined in Article 15. These rights include: the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, the right of culture and education, and the right to constitutional remedies.

The constitutional recognition that religious laws could be restricted on the basis of their violation of Fundamental Rights provided an important legal opening for activists to argue against certain religious laws. However, in reality, courts

9 Article 372 of the constitution does not directly address Islamic law, but similar to Article 13, it notes that all laws prior to the establishment of the constitution remain in effect unless expressly changed. This means that many of the laws established by the British continue to be effective post-independence. This includes Islamic family law. Article 372 states, “Continuance in force of existing laws and their adaptation: (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority; (2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.” “Constitution of India,” *National Portal of India*, Accessed August 1, 2019, <https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text>.

10 Ibid.

unevenly exercised this authority. In 1952, in the *State of Bombay v. Narasu Appa* decision,¹¹ the Bombay High Court ruled that the personal laws of religious communities are *not* subject to the Fundamental Rights enshrined in the constitution. This decision was challenged in 1956 in the Bhopal High Court in *Abdullah Khan v. Chandi Bi*,¹² and again in 1991 in the Bombay High Court in *Smt. Amina v. Unknown*.¹³ In both cases, the courts ruled that personal laws *were* subject to the Fundamental Rights, however the judiciary was always keen to note that the ultimate redress should be legislative and not judicial.¹⁴ In addition to qualifying personal laws on the basis of the Fundamental Rights, personal laws could also be qualified by the Constitution's 'Directive Principles of State Policy.' One of these principles, stated in Article 44, is that "The State shall endeavor to secure for the citizens a uniform code throughout the territory of India."¹⁵ While a Uniform Civil Code (UCC) was supported by many during constitutional discussions and debates, it was vehemently opposed by minority groups, with Muslims being especially vocal.¹⁶ As a result, instead of enforcing the establishment of a UCC as a justiciable article, drafters of the constitution made it a non-justiciable aspirational clause, demonstrating that despite the adoption of legal pluralism, the aspirational intent during the drafting of the constitution was a uniform code, regardless of religious affiliation. This means Articles 13 and 372,¹⁷ which recognize the religious laws of communities, were qualified both by the Fundamental Rights of each individual, and by the desire to eventually have a uniform civil code. Those opposing the legal accommodation of religious minorities, or advocating

11 *All India Reporter* (AIR) 1952, Bombay, p. 84. <https://indiankanoon.org/doc/54613/>

12 *Criminal Law Journal* 1956, p. 1395. <https://indiankanoon.org/doc/392646/>.

13 AIR 1992, Bombay, p. 214. <https://indiankanoon.org/doc/1580596/>.

14 See Vrinda Narain, *Reclaiming the Nation: Muslim Women and Law in India* (Toronto: University of Toronto Press, 2008): 100–03.

15 *Ibid.*

16 For more on these debates, see Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992).

17 See *supra* note 9.

for the reform of religious laws, were therefore given two constitutional grounds for their arguments.

Muslim religious laws governing marriage, divorce and property are preserved in the Muslim Personal (Shariat) Application Act of 1937, passed during British rule. This act, which is recognized under Articles 13 and 372 of the constitution, continues to form the basis of Muslim personal law today. In an attempt to move towards a more uniform code, the government passed a series of laws that citizens can opt into that circumvent religious laws on personal matters. For example, the Special Marriage Act of 1954 is a civil code for citizens to register their marriages voluntarily at civil registries. While this and other acts give a nod towards the Directive Principle of fashioning a uniform civil code, Muslim personal status laws continue to function. This creates a tension between certain laws that attempt to harmonize and unify the existing laws, and the constitutional legitimacy of pluralism which facilitates the creation of legal precedents compelling the judiciary to recognize multiple legal groups. Important questions arise regarding interpretation—is it the secular government of India that has the final word on the interpretation and adjudication of Islamic laws, or are certain Muslim institutions also legally sanctioned to operate in this space? And if there is a desire to change certain religious laws, what is the process whereby these changes are legally recognized?

MUSLIM INSTITUTIONS AND MUSLIM PERSONAL STATUS LAW

Though the constitution recognized the Muslim Personal (Shariat) Application Act of 1937, no additional provisions were made with regards to the interpretation and adjudication of the laws preserved in the act. It was assumed that the secular judiciary of India would assume the responsibility of interpreting and adjudicating matters of Muslim personal law just as British judges adjudicated Muslim personal status law during the colonial period. Though this was accepted by Muslim groups, Muslims set up institutions that could provide legal and religious

guidance for individuals *outside* the formal organs of the state. The State of India *did not* expressly sanction any of these institutions or bodies; the government nevertheless encouraged and conferred protection to them under the Fundamental Rights of the Constitution which states “All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.”¹⁸ Notwithstanding that these educational institutions were subject to the same laws governing all other institutions, the right to establish such institutions was enshrined by the constitution.

The most lasting institution connected to Muslim personal status law in India has been the All India Muslim Personal Law Board (AIMPLB).¹⁹ Though it has *never* received formal state recognition, and its power has been increasingly contested with the rise of new institutions representing the Muslim community, it has played a crucial role in the history of triple-*talāq*. The AIMPLB was founded in 1972 by Muhammad Tayyab, the then director of the *madrasa* at Deoband (Darul Uloom Deoband), in response to growing lobbying in parliament for a uniform civil code and an adoption bill that would override certain Islamic laws.²⁰ Though the AIMPLB never received formal status or authority as representative of the will of Indian Muslims, their vocal outrage at the attempt to override Muslim personal law with a uniform civil code quickly generated support and endorsement by Indian Muslims, especially more conservative ones. The group was thrust into public debates surrounding the Shah Bano case between 1985-6, where they resisted changing elements of Islamic personal status law, in this case spousal maintenance and

18 Ibid., “Article 30: Cultural and Educational Rights.”

19 For more on the development of the AIMPLB, see Justin Jones, “‘Signs of Churning’: Muslim Personal Law and Public Contestation in Twenty-First Century India” *Modern Asian Studies* 44, no. 1 (2010): 175–200; Salima Elizabeth Burke, *Sharia Uncodified: India’s Muslim Women, the Supreme Court and the All India Muslim Personal Law Board, 1993-2006* (Unpublished Dissertation, Georgetown University, 2007).

20 For the history of the Deoband *madrasa* and the various social roles it undertook, see Barbara Metcalf, *Islamic Revival in British India, Deoband 1860-1900* (Princeton: Princeton University Press, 2014), 87-137; Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 17-37.

divorce laws. In the decision, the Supreme Court ruled in favor of Shah Bano, extending her spousal maintenance beyond the period required by Islamic law.²¹ This upset the AIMPLB and other conservative groups who saw it as judicial encroachment on the personal laws of Muslims. In response, the AIMPLB staged protests, increasing pressure on the government to promulgate legislation that would annul the Supreme Court decision.

Eventually, the government passed the Muslim Women's Protection of Rights on Divorce Act²² which exempted Muslim women from maintenance rights. The Act was instrumental in cementing the position of the AIMPLB; the government had succumbed to the lobbying of a non-state group that was not considered entirely representative of Indian Muslims. In the late 80s and 90s, the AIMPLB, recognizing the social and religious power they held, commentated on various legal issues related to Indian Muslims and facilitated the creation of the Islamic Fiqh Academy, a council of legal scholars devoted to discussing and reaching consensus on various legal issues. Though the AIMPLB made some attempts at inclusivity, their scholars remain primarily affiliated with the Deoband *madrasa*. Further, they adopt rigid and conservative opinions on most matters of Islamic personal status law. Consequently, resistance to the AIMPLB persists through the creation of parallel Muslim institutions that challenge their authority as the de facto representatives of the Muslim voice.

21 For more on the Shah Bano case and the efforts of commissions and committees to reform Islamic law prior to the Supreme Court case, see Sylvia Vatuk, "A Rallying Cry for Muslim Personal Law: The Shah Bano Case and Its Aftermath," in *Islam in South Asian in Practice*, ed. Barbara Metcalf (New Jersey: Princeton University Press, 2009), 352–67. Her section on 'further reading' has additional articles and books focused on the Shah Bano case. See also Saumya Saxena, "Commissions, Committees and Custodians of Muslim Personal Law in Postindependence India," *Comparative Studies of South Asia, Africa and the Middle East* 38, no. 3 (2018): 423–38; Asghar Ali Engineer, *The Shah Bano Controversy* (Bombay: Sangam Books, 1987).

22 The newly-passed triple-*ṭalāq* bill echoes the name of the 1986 Muslim Women's Protection of Rights on Divorce Bill. It is titled the Muslim Women's Protection of Rights on Marriage Bill 2019.

CHALLENGES TO THE AUTHORITY OF THE AIMPLB

The greatest challenge to the status of the AIMPLB came in 2005 when a private attorney, Vishwa Madan, petitioned the Supreme Court to shut down the network of Muslim dispute resolution centers, *dār ul qazas*,²³ which were established by the AIMPLB.²⁴ Madan argued that these alternative ‘courts’ undermined the legislative sovereignty of the state and thus, the rule of law. Beyond issues of state power and rights, Madan also took umbrage with a series of *fatwas* that had been issued, arguing that they violated the Fundamental Rights of women and subverted the broad constitutional commitment to justice. Central to his complaint was the *fatwa* issued in the Imrana rape case of 2005. The case involved a young woman, Imrana, who was raped by her father-in-law. After filing a police report, the *madrasa* at Deoband released a *fatwa* stating that Imrana’s marriage to her husband was no longer valid. The AIMPLB, supported the *fatwa*. In addition to outrage at the *fatwa*, many were angered because the litigants involved in the case did not actually request a *fatwa* either from the *madrasa* or from

23 For more on these *dār ul qazas*, their utility for Muslim women and the manner in which they interact with the secular rule of law, see Jeffrey Redding, *A Secular Need: Islamic Law and State Governance in Contemporary India* (Seattle: University of Washington Press, 2020); Ibid., “The Case of Ayesha, Muslim ‘Courts,’ and the Rule of law: Some Ethnographic Lessons for Legal Theory,” *Modern Asian Studies*, 48, no. 4 (2014): 940–85; Sabiha Hussain, “Shariat Courts and the Question of Women’s Rights in India,” *Pakistan Journal of Women’s Studies: Alam-e-Niswam*, 14, no. 2 (2007): 73–102. In addition to *dār ul qazas*, there are other alternative dispute institutions present in India for Muslim women seeking divorce. Katherine Lemon’s recent monograph, *Divorcing Traditions*, provides a rich ethnography of these institutions and details how these institutions function alongside state law and Indian secularism. See Katharine Lemons, *Divorcing Traditions: Islamic Marriage Law and the Making of Indian Secularism* (New York: Cornell University Press, 2019); idem, “Sharia Courts and Muslim Personal Law in India: Intersecting Legal Regimes,” *Law & Society Review* 52, no. 3(2018): 603–29. See also Ebrahim Moosa, “Shari’at Governance in Colonial and Postcolonial India,” *Islam in South Asian in Practice*, ed. Barbara Metcalf (Princeton: Princeton University Press, 2009): 317–25.

24 For more on the specifics of the case, see Jeffrey Redding “Secularism, The Rule of Law, and ‘Shari’a Courts’: An Ethnographic Examination of a Constitutional Controversy” *St. Louis University Law Journal* 57 (2013): 339–76. The full decision, *Vishwa Lochan Madan v. Union of India*, is accessible at, <https://beta.shariasource.com/documents/2246>.

the AIMPLB. Both institutions chose to intervene despite the absence of a request from the litigants. Madan saw the social and legal power of the AIMPLB and other institutions as encroaching on the sovereignty of the state and interfering in the rights of individuals to pursue legal recourse as they saw fit. To address both of these concerns, he demanded that all *dār ul qazas* be closed.

In 2014, the court finally ruled, dismissing Madan’s plea to formally ban all *dār ul qazas*. Speaking directly to the verdicts of *dār ul qazas*, the court judgement refers to them as “an informal justice delivery system with an objective of bringing about an amicable settlement of matrimonial disputes between the parties.... It is within the discretion of the persons or the parties who obtain Fatwas to abide by it or not.”²⁵ The judgement classifies the *dār ul qazas* as an informal ‘alternative dispute resolution’ mechanism whose judgements are non-enforceable and non-binding—emphasizing that individuals always have recourse to the formal judicial system if they desire. Then speaking of the *fatwas* directly, the Justices state, “We would like to advise the *dār ul-qaza* or for that matter anybody not to give any response or issue *fatwa* concerning an individual, unless asked for by the person involved or the person having direct interest in the matter.”²⁶ The Court did not challenge the authority of the *dār ul qazas* or the AIMPLB, but it emphasized that neither had any formal legal status.

As for the practice of triple-*ṭalāq*, the perspective of many legislators and members of the judiciary is that it primarily disadvantages women, violating their Fundamental Rights enshrined in Article 15 of the constitution. However, given the constitutional recognition of the personal laws of Muslims, of which triple-*ṭalāq* is considered a part, the most that the judiciary and legislators can do is exert pressure on Muslim organizations, such as the AIMPLB, to undertake the task of reforming these laws. The most widely-cited case of *ṭalāq* heard before the Supreme Court of India after the Shah Bano case involved

25 *Vishwa Lochan Madan v. Union of India*, paragraph 7 and 8.

26 *Ibid.*, paragraph 15.

Shahmim Ara.²⁷ She and her husband, Abrar Ahmed, were married in 1968. In 1979 she filed a complaint against him in the Family Court in Allahabad under Section 125 of the Criminal Procedure Code on the basis that he failed to provide her with financial marital support.²⁸ Mr. Ahmed rebutted her claim in a response in 1990 by arguing that he divorced her in 1987. He further produced a written court affidavit attesting to the divorce. The Allahabad Family Court ruled in 1993, fourteen years after Ms. Ara filed her complaint, and dismissed her demand for maintenance on the grounds that she had been divorced. Ms. Ara contested the divorce and appealed the subsequent higher court rulings, which only gave her partial maintenance, until her case landed before the Supreme Court.²⁹

According to Jeffrey Redding, the Supreme Court eventually had to rule on the very narrow question of “whether or not a Muslim husband’s written submissions to a state court indicating his clear desire to be divorced can—from the date of their filing in the state court—effectuate a *talaq*.”³⁰ If the Court ruled in the affirmative, it would mean that Mr. Ahmed’s court affidavit would be considered a formal divorce and Ms. Ara could not claim financial marital support. The court, however, ruled in the negative, effectively leaving the practice of *ṭalāq* as a non-state matter that should be resolved using the religious

27 The case is cited as “Shahmin Ara. V. State of Uttar Pradesh, 2002, S.C. 3551.” The judgement is accessible at, <https://beta.shariasource.com/documents/309>.

28 Under Section 125 of the Criminal Procedure Code, if for the “order of maintenance of wives, children and parents” for individuals of “sufficient means.” Clause 3 notes, “If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month’s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.” From “The Code of Criminal Procedure, 1973.” Accessed August 15, 2019, <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814340.pdf>.

29 For a full overview of the case, see Jeffrey Redding, *Shamim Ara and the Divorce Politics of a Secular and Modern India*, SHARIASOURCE, Harvard Law School. Accessed August 1, 2019, https://islamiclaw.blog/2016/10/28/case-commentary-shamim-ara-and-the-divorce-politics-of-a-secular-and-modern-india/#_ftn1.

30 Ibid.

institutions available to Muslims. The court did, however, make certain clear suggestions about *ṭalāq*, stating, “The correct law of *ṭalāq* as ordained by the Holy Quran is that *ṭalāq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters—one from the wife’s family and the other from the husband’s; [only] if the attempts fail, *ṭalāq* may be effected.”³¹ Beyond this, in the *obiter dicta*, the judges noted that triple-*ṭalāq* was commonly referred to as *ṭalāq-e-biddat* (an innovated divorce)—indicating that the practice was an aberration.³² If the name of the *ṭalāq* itself acknowledges that it is an aberration, then it can be assumed to be antithetical to the Sharī’a and should not be upheld by courts. However, because the discussion on triple-*ṭalāq* was *obiter dicta* and the primary matter of the case was of maintenance and court petitions for divorce, the critique of triple-*ṭalāq* had no legal consequence. The judgement was careful not to pronounce certain forms of *ṭalāq* legal and others illegal while still laying down parameters for ‘correct *ṭalāq*.’ On Redding’s reading, this is because any interference by the government or courts would have been seen as contravening the image of a secular and modern state that the Indian government wished to project.³³

A few years later, in 2005, the AIMPLB adopted a model marriage contract (*nikahnama*) that echoed the court’s recommendations in the Shamim Ara decision. The model marriage contract contained a clause that made it *mandatory* to approach a *qazi* or *dār ul qaza* in the case of marital discord before pronouncing divorce.³⁴ However, this did not stop men from pronouncing a triple-*ṭalāq* in contravention to the recommendations of the AIMPLB. In 2007, a high-profile case on triple-*ṭalāq* surfaced, this time in the High Court of Delhi. In this case, *Masroor Ahmed v. State* (NCT of Delhi) 2007, Masroor Ahmed claimed to have thrice-divorced his wife in the presence

31 Ibid.

32 For overview of the types of divorce in Islamic law, *see supra* note 1.

33 Ibid.

34 The model *nikahnama* is readily available on the AIMPLB website.

Accessed August 15, 2019, <http://www.aimplboard.in/images/book/pdf/Nikah%20Nama.pdf>.

of his brother-in-law and another man. In the ruling, the High Court of Delhi relied upon the *obiter dicta* in Shahmim Ara noting that the pronouncement of *ṭalāq* is not sufficient to effectuate a divorce and both reasonable cause and attempts at reconciliation must be demonstrated. The court also went further to rule that the utterance of a triple-*ṭalāq* is considered one revocable *ṭalāq* and allows for spousal reconciliation. Though the judgement directly addressed the triple-*ṭalāq* pronounced by Masroor Ahmed, the judgement was limited to the case and did not go further to challenge the legality or constitutionality of triple-*ṭalāq*. As cases continued to emerge in the courtrooms, activist groups called for legislative intervention and pointed to other countries that outlawed triple-*ṭalāq*, especially neighboring South Asian countries such as Pakistan and Bangladesh. Throughout this time, the judiciary remained reticent to encroach on the personal laws of Muslims; the Parliament deemed passing legislation on the matter unnecessary; and the most powerful Muslim legal institution, the AIMPLB, hesitated to speak directly on immediate triple-*ṭalāq*.

Given that the model *nikahnama* was not effective in reducing the cases of triple-*ṭalāq*, these cases continued to find themselves in the courtroom. Zubair Abbasi has noted that in 2016 alone, at least ten judgements were issued by the High Courts in which they rejected the validity of triple-*ṭalāq*.³⁵ The mounting pressure on the AIMPLB led them to issue a series of statements regarding triple-*ṭalāq*. In April 2017, the most emphatic of these statements, stated:

The stand of the Shariat is clear about divorce, that the pronouncement of divorce without any reason, and that three divorces in one go, are not the correct methods of pronouncing divorce. Such a practice is strongly condemned by the Shariat. That is why the All India Muslim Personal Board will start a grand public

35 Zubair Abbasi, "In Response to the Indian Supreme Court's Recent Decision on Triple Ṭalāq: A Legislative Proposal," SHARIAsource at Harvard Law School, Accessed August 1, 2019, <https://beta.shariasource.com/documents/2984>.

movement desisting the people from pronouncing divorce without any reason and that in case of necessity only one divorce should be resorted to and in any case three divorces in one go should not be resorted to.³⁶

AIMPLB continued on to claim that those who are discovered to have invoked the triple-*ṭalāq* will be ‘socially boycotted.’ For some, the statement did not go far enough to actually establish that this method of divorcing was invalid. For others, though they were satisfied with the wording of the statement by the AIMPLB, they recognized that the lack of the Board’s formal legal status meant that their censure of triple-*ṭalāq* had little legal consequence. And the social consequence of ‘boycotting’ would not act as a sufficient deterrent for men who wished to pronounce the triple-*ṭalāq*.

This complex history formed the backdrop for the decision by the Supreme Court in 2017 in *Shayara Bano v. Union of India*. At the time of adjudication, numerous courts had already ruled on the invalidity of the triple-*ṭalāq* and the AIMPLB recognized it as a detrimental practice; yet the legislature remained conspicuously silent, attempting to balance between the fundamental rights enshrined in the constitution and the legal autonomy given to religious groups by that same constitution. The task of the court was to somehow navigate these competing needs and put an end to the longstanding stalemate regarding the issue of triple-*ṭalāq*. The first question the court had to address was whether triple-*ṭalāq* was considered codified into statutory law by the 1937 Shariat Act. If it was codified, then it was subject to the fundamental rights enshrined in the constitution. If it was not considered codified as statutory law, then the judges had to rule on whether uncoded law was subject to the same constitutional texts, namely the Fundamental Rights, as codified law.

On August 22nd, 2017, the Supreme Court published its

36 Ananthkrishnan G, “Muslim Board Calls for Social Boycott of Those Who Resort to Triple Ṭalāq,” *Indian Express*, 23rd May 2017, <http://indianexpress.com/article/india/muslim-board-aimplb-calls-for-social-boycott-of-those-who-resort-to-triple-ṭalāq-4668986/>

judgements. The court was divided—two of the Justices upheld the validity of triple-*ṭalāq*, and the other three argued for its unconstitutionality. The dissenting judges, Chief Kehar and Justice Nazeer argued that triple-*ṭalāq* was not codified by the 1937 Act and is classified as uncodified Muslim personal law. As a result, it *cannot* be measured against the Fundamental Rights and moreover, it is protected by Article 25. Justices Nariman and Lalit argued that triple-*ṭalāq* is considered codified and *can* thus be measured against the Fundamental Rights. Moreover, because it is not an essential religious practice, and not Quranically sanctioned, it is not protected under Article 25. The final Justice, Justice Joseph, agreed with Justices Kehar and Nazeer that triple-*ṭalāq* was not codified by the 1937 Act, but agreed with Justices Nariman and Lalit that it was a non-essential law that *can* be measured against the Fundamental Rights enshrined in the constitution. As a result, in the final account, he voted with Justices Nariman and Lalit that triple-*ṭalāq* was justiciable according to the constitution. In the 397-page judgement, the Justices reviewed Islamic scriptural sources, the experiences of other countries in addressing triple-*ṭalāq*, and previous judicial judgments regarding triple-*ṭalāq* in India.

In the final account, the majority decision notes that the practice of triple-*ṭalāq* is in violation of the Fundamental Rights enshrined in the constitution. Speaking more directly to the 1937 Shariat Act, in the decision penned by Justices Nariman and Lalit, they state, “In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize 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 recognizes and enforces Triple Talaq.”³⁷ In the minority opinion, penned by Justices Kehar and Nazeer, they emphasize that any reform to the personal law cannot be through the judiciary but rather through the legislature. Later in their judgment they emphatically state, “Interference in matters of ‘personal law’ is clearly beyond judicial examination. The judiciary must therefore, always exercise absolute restraint, no matter how

37 Ibid., 393.

compelling and attractive the opportunity to do societal good may seem.”³⁸ Taking cue from the examples of other countries wherein Muslim personal status law is practiced, they argue that the practice of triple-*ṭalāq* was addressed ‘by way of legislation’ and therefore the parliament should ‘consider appropriate legislation, particularly with reference to ‘*ṭalāq-e-biddat*.’” Recognizing, however, that legislative changes are laborious, Justices Kehar and Nazeer suggested a six-month injunction on triple-*ṭalāq*, stating,

Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing ‘*ṭalāq-e-biddat*’ as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining ‘*ṭalāq-e-biddat*’ (three pronouncements of ‘*ṭalāq*,’ at one and the same time)—as one, or alternatively, if it is decided that the practice of ‘*ṭalāq-e-biddat*’ be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall ease to operate.³⁹

The deeply divided decisions of the Supreme Court led to the final ‘Order of the Court’ stating, “In view of the different opinions recorded, by a majority of 3:2 the practice of ‘*talaq-e-biddat*’—triple *talaq* is set aside.”⁴⁰ The final decision of the Supreme Court that the triple-*talaq* be “set aside” remains vague at best. Effectively, the Supreme Court decision placed the responsibility for legal and *permanent* change to the laws of triple-*ṭalāq* on the legislative branch. The challenge confronting the legislature was that historically Muslim institutions, like

38 Ibid., 268.

39 Ibid., 271–72.

40 Ibid., 395.

the AIMPLB and others, actively resisted legislative reforms to Muslim personal status law, and larger attempts to create a uniform civil code—exemplified best by response to the Shah Bano decision. Though the social and religious power of the AIMPLB decreased by the time of the Supreme Court decision, and other advocacy groups supported legislative reforms to Muslim personal law,⁴¹ the divided Supreme Court decision provided grounds for resistance to any attempts at reform. This left legislators in a precarious position—if they were to pass a bill that made triple-*ṭalāq* illegal, how would this change be received, and what mechanisms of enforcement would be introduced to ensure that unwilling parties assented to the law?

THE 2019 MUSLIM WOMEN PROTECTION OF RIGHTS ON MARRIAGE BILL

Almost immediately after the 2017 Supreme Court decision, the legislature began to address the issue of triple-*ṭalāq*. From 2017 until 2019, various Executive Ordinances and Bills were promulgated before the final Bill was successfully passed in both the Lok Sabha and the Rajya Sabha, making it an official Act of Parliament. In India, an Executive Ordinance is a law that is promulgated by the President when the Parliament is not in session. It allows for immediate legislative action, but still requires Parliamentary assent within six weeks of the Parliament resuming their sessions. A Bill on the other hand is a draft of a legislative proposal that is proposed in one of the two Parliamentary houses—the Lok Sabha or the Rajya Sabha. Once

41 This article has deliberately not discussed the many civil-society activist groups that are involved in the debate on triple-*ṭalāq* as it is beyond the scope of the article. However, they are key players and their role has become more prominent over time. For an overview of the organizations and their modes of lobbying, see Sylvia Vatuk, “Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law,” *Modern Asian Studies* 42, no. 2 (2008): 489–518; Nida Kirmani, “Claiming their Space: Muslim Women-led Networks and the Women’s Movement in India,” *Journal of International Women’s Studies* 11, no. 1 (2009): 72–85. For an overview of the legal status of Muslim women and the impact on Islamic family law in India, see Vrinda Narain, *Gender and Community* (Toronto: University of Toronto Press, 2001).

Triple-Ṭalāq and the Political Context of Islamic Law in India

it passes both houses, the Bill becomes an Act of Parliament.

Following is the timeline of legislative interventions after the Supreme Court decision:

Date	Bill Name	Ordinance Name	Lok Sabha	Rajya Sabha	Status
December 28 th , 2017	The Muslim Women (Protection of Rights on Marriage) Bill 2017		Introduced December 28 th 2017, Passed December 28 th , 2017	Circulated August 9 th , 2018, Amendments made	Amendments required.
September 19 th , 2018		The Muslim Women (Protection of Rights on Marriage) Ordinance 2018			Presidential Promulgation on September 19 th , 2018; subsequently withdrawn. At the time, the 2017 Bill was pending in the Rajya Sabha
December 17 th , 2018	The Muslim Women (Protection of Rights on Marriage) Bill 2018		Introduced December 17 th 2018; Passed December 27 th , 2018		
January 12 th , 2019		The Muslim Women (Protection of Rights on Marriage) Ordinance 2019			Presidential Promulgation on January 12 th , 2019; subsequently lapsed. At the time, the 2018 revised Bill was pending in the Rajya Sabha
February 21 st , 2019		The Muslim Women (Protection of Rights on Marriage), Second Ordinance 2019			Presidential Promulgation on February 21 st , 2019; subsequently Negatived on July 25 th , 2019
July 21 st , 2019	The Muslim Women (Protection of Rights on Marriage) Bill 2019		Introduced June 21 st , 2019; Passed July 25 th , 2019	Passed July 30 th , 2019	Passed as an Act of Parliament

What is evident in the legislative history of the Act is the continuous intervention of Prime Minister Modi when the bill faced resistance in the Rajya Sabha.⁴² At the time of the Supreme Court decision, the BJP party, the party of the Prime Minister, had a majority in the Lok Sabha, but in the Rajya Sabha, they were vulnerable to the opposition party. Thus, while the Muslim Women Protection of Rights on Marriage Bill easily passed the Lok Sabha, it was met with resistance in the Rajya Sabha. Opposition party members in the Rajya Sabha argued that given the gravity of the Bill, a special committee should be assembled to scrutinize it. On this basis, the Rajya Sabha would not pass the Bill and the parliamentary session would come to an end. Not wishing to remove the Bill from the legislative docket, the Prime Minister would take it upon himself to issue an Ordinance thereby pressuring the Rajya Sabha to eventually concede.

The three ordinances enacted by Prime Minister Modi were essentially stop-gap measures to address the issue of triple-*ṭalāq* until the Bill was passed by both houses of Parliament. Executive Ordinances are typically used in emergency circumstances where the Prime Minister needs to take immediate action while the Parliament is not in session. However, in the case of triple-*ṭalāq*, the Ordinances were a way to supervene the opposition's directive in the Rajya Sabha. After the 2019 election, and the sweeping mandate given to Prime Minister Modi and the BJP in the Lok Sabha, not only did opposition numbers in the Rajya Sabha decrease, but the willingness of the oppositional minority to resist the desires of the ruling party also decreased. Thus, in the first parliamentary session of the Lok Sabha after

42 Journalists have noted that in Modi's first term in office, his party faced greater opposition in the Rajya Sabha, with only 45 BJP Ministers out of the 250 member-house. This meant that BJP Ministers who sought to pass legislation had to form alliances with the opposition which often proved difficult, as was the case of the triple-*ṭalāq* bill. Modi's use of Ordinances is not unprecedented, but the consistent historical use of Presidential Ordinances to achieve political ends is increasingly being scrutinized. "Modi government passes 22nd Ordinance, still short of UPA number," *The Hindu*, Accessed August 15, 2019, <https://www.thehindu.com/news/national/Modi-govt.-passes-22nd-Ordinance-still-short-of-UPA-number/article14596574.ece>; "Why Narendra Modi government is in such a rush to issue ordinances before elections," *The Print*, Accessed August 15, 2019, <https://theprint.in/opinion/why-narendra-modi-govt-is-in-such-a-rush-to-issue-ordinances-before-elections/200956/>.

Prime Minister Modi's victory, all Executive Ordinances were ratified, including the Muslim Women Protection of Rights on Marriage Bill. The Bill then went on to the Rajya Sabha where it also passed with a narrow margin of 99 for, 88 against. Aside from the problematic politics surrounding the passing of the Act, Muslims advocating for a reform of the laws on triple-*ṭalāq* also had cause for concern owing to the substance of the Act itself.

As noted in the court cases above, both the Supreme Court and the High Courts have historically ruled against the efficacy of the triple-*ṭalāq*. This has usually led to re-establishing a marital relationship between the litigants, or at least awarding the women financial restitution. The Act, on the other hand, goes beyond declaring triple-*ṭalāq* ineffective to declaring it a criminal act that is punishable by the state with up to three years' imprisonment and a monetary fine.

By criminalizing triple-*ṭalāq* and potentially imprisoning men who pronounce it, women may be left in a situation in which their husbands are imprisoned and the women are both unable to remarry and unable to secure financial support for their family—leaving them potentially even more economically and socially vulnerable than before. Here, it is important to note that the Act does attempt to mitigate the possibility for malicious prosecution by three mechanisms: (1) limiting prosecution of the husband to the wife or a blood relative; (2) allowing for bail if the Magistrate deems it is appropriate after listening to the wife and; (3) allowing for the woman to stop legal proceedings. But, despite instating these safeguards, there is still worry that women who pursue a litigious route will be further ostracized and could find themselves in a situation where they are considered religiously divorced, but are considered married according to state law. And while advocates point towards other elements of the Act as empowering and safeguarding Muslim women, such as the clause on the custody of minors and a subsistence allowance, activists are quick to remind them that these rights are already available to Muslim women under previously passed legislation. Moreover, the Act does nothing to afford Muslim women the right to divorce, nor does it introduce procedural

mechanisms that place a check on the husband’s unilateral right to divorce. After the passing of the Act, Prime Minister Modi tweeted, “An archaic and medieval practice has finally been confined to the dustbin of history! Parliament abolishes Triple Talaq and corrects a historical wrong done to Muslim women. This is a victory of gender justice and will further equality in society.”⁴³ However, the Act does nothing to give women the equal right to divorce; in fact, it problematically equates gender justice with the criminalization of Muslim men, which can in effect leave women in a worse situation.

Long before the criminalization of triple-*ṭalāq*, the courts had enacted limitations that sought to alleviate some of the harms of both unilateral and irrevocable divorces. Importantly, in *Shahmim Ara*, the Supreme Court held that for a divorce to be valid, it needed to be reasonable and evidence of attempts at reconciliation must be presented. This decision was upheld by Lower Courts, as evidenced in *Masroor Ahmed vs. State* (NCT of Delhi). This latter case went even further to establish that triple-*ṭalāq* would be treated as a single revocable divorce. As Zubair Abbasi has noted, “the legislature should have passed a procedural law to provide an institutional mechanism for the process of reconciliation before divorce”⁴⁴ instead of passing a law criminalizing triple-*ṭalāq* without affording women any substantive rights. Furthermore, the Act does not address any of the procedural restraints that the courts had placed on divorce, regardless of whether it was an irrevocable triple-*ṭalāq* or not.

If the Act does not in fact deliver on gender justice as it was heralded to do, why is Prime Minister Modi so committed to passing the legislation? The answer lies in the manifesto of the BJP party which argues for a Uniform Civil Code (UCC) as one of its key goals. The manifesto points to Article 44 of the

43 Narendra Modi, Twitter post, July 30, 2019, 6:52 a.m., <https://twitter.com/narendramodi/status/1156200911426875393?lang=en>.

44 Zubair Abbasi, “Commentary: Criminalization of Triple-Ṭalāq in India: A Dilemma for Religiously Divorced but Legally Married Muslim Women,” *Islamic Law Blog*, Accessed August 9, 2019, <https://islamiclaw.blog/2019/08/08/commentary-criminalization-of-triple-ṭalaq-in-india-a-dilemma-for-religiously-divorced-but-legally-married-muslim-women/>.

Constitution, the Directive Principles, which notes that it is a ‘duty of the state’ to establish a Uniform Civil Code.

In 2016, under the direction of the Prime Minister, the Ministry of Law and Justice enlisted the Law Commission of India to investigate the potential of a UCC in India. The Law Commission took two years to investigate and delivered their report on the 31st of August 2018—just weeks before the Prime Minister issued his first Ordinance regarding triple-ṭalāq. In the published report, the Commission discouraged the establishment of a UCC.⁴⁵ The report states,

In the absence of any consensus on a uniform civil code the Commission felt that the best way forward may be to preserve the diversity of personal laws but at the same time ensure that personal laws do not contradict fundamental rights guaranteed under the Constitution of India. In order to achieve this, it is desirable that all personal laws relating to matters of family must first be codified to the greatest extent possible, and the inequalities that have crept into codified law, these should be remedied by amendment.⁴⁶

Addressing the reform of religious personal law, the report states,

The State is ‘an enabler of rights rather than an initiator,’ particularly in sensitive matters such as that of religious personal laws. At this stage one can conclude with conviction the Commission’s initiative towards reform of family law is driven by civil society organisations, educational institutions, and vulnerable sections of the

45 There have been other academic studies on the possible implementation of a Uniform Civil Code. See Shimon Shetreet, “Academic Blueprint for the Implementation of a Uniform Civil Code for India,” *Utah Law Review* 1(2011): 97–120; idem; Hiram E. Chodosh, *Uniform Civil Code for India* (Oxford: Oxford University Press, 2015).

46 “Government of India, Law Commission of India, Consultation paper on Reform of Family Law,” *Law Commission of India*, Accessed August 1, 2019, <http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf>, 1-2.

society themselves, rather than by legislative mandate.⁴⁷

In summarizing the position on a UCC, the report states,

While diversity of Indian culture can and should be celebrated, specific groups, or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has therefore dealt with laws that are discriminatory rather than providing a uniform civil code which is neither necessary nor desirable at this stage. Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy.⁴⁸

After these remarks, the report addressed specific issues of family law that have been the subject of sustained debate, and triple-*ṭalāq* was one such issue. The commission noted that triple-*ṭalāq* is “ALREADY OUTLAWED (emphasis in original)” and “has no effect on marriage.”⁴⁹ The report then emphasized the need for women to have the same rights and grounds for divorce as men and highlighted that unilateral divorce is already a penalizable offense under the provisions of the Protection of Women from Domestic Violence Act of 2005.⁵⁰ The report also engaged with the *nikahnama* promoted by the AIMPLB and emphasized that “THE ISSUE OF FAMILY LAW REFORM DOES NOT NEED TO BE APPROACHED AS A POLICY THAT IS AGAINST THE RELIGIOUS SENSIBILITIES OF INDIVIDUALS BUT SIMPLY AS ONE PROMOTING HARMONY BETWEEN RELIGION AND CONSTITUTIONALISM (emphasis in original).”⁵¹

However, against the advice issued by the Law Commission in August 2018, further Ordinances and Bills criminalizing triple-*ṭalāq* were promulgated. It is thus no surprise

47 Ibid., 6.

48 Ibid., 7.

49 Ibid., 49.

50 Ibid., For the discussion, see 46–50.

51 Ibid., 47-48.

that the AIMPLB and women's activists alike are questioning the motives of the legislators and pointing to the hidden BJP agenda of a uniform civil code that by all accounts, is "neither necessary nor desirable."⁵² If the data gathered by Abusaleh Shariff which reveals just 1 in 300 divorces are achieved through triple-ṭalāq is reflective of the usage of triple-ṭalāq in India, one must wonder if criminalizing triple-ṭalāq is indeed the most pressing issue affecting the welfare of Muslim women.⁵³

For many women's welfare activists, the current administration has actually failed in its efforts to improve the most pressing concerns for women such as proportional representation in Parliament,⁵⁴ adequate education and healthcare for rural women, and justice for victims of sexual violence. In fact, in the 2018 poll by the Thomson Reuters Foundation, India ranks as the world's most dangerous country to be a woman.⁵⁵ The survey notes that India is the worst when it comes to human trafficking, sexual violence and gender discrimination, and attacks based on culture and religion. In light of the general plight of women in India and the clear judicial precedent established by the courts against the efficacy of triple-ṭalāq, the fixation on the triple-ṭalāq Act and its hurried passage through Parliament is confounding at best. Especially so because the Act provides women with no additional rights or protections, and it does so while marginalizing Muslim organizations and activists, undermining directives

52 Ibid., 7. While some women's advocacy groups are heralding the Bill as a monumental step for the rights of women in India, others are pointing towards the ways in which the Bill can leave women more vulnerable, and fails to give them equal divorce rights. The AIMPLB, since the first iteration of the Bill, claims to have collected 50 million signatures of Muslims against the Bill. Since the Bill's passing, they have noted that they will challenge it, but it is unclear how. Danish Raza, "What the Criminalization of Instant Divorce Means for India's Muslims," *The Atlantic*, Accessed August 14, 2019, <https://www.theatlantic.com/international/archive/2019/08/india-triple-talaq/595414/>; Murali Krishnan, "Triple-talaq ban divides Muslims," *Qantara*, <https://en.qantara.de/content/instant-islamic-divorce-in-india-triple-talaq-ban-divides-muslims?nopaging=1>.

53 *Supra* note 7.

54 The Women's Reservation Bill which calls to reserve one-third of the legislative seats in the Lok Sabha for women has failed to pass for two decades.

55 "India: The World's Most Dangerous Country to be a Woman," *Thomson Reuters Foundation*, Accessed August 15, 2019, <http://poll2018.trust.org/country/?id=india>.

of the law commission, and pushing forward legislation that only further diminishes the rights and standing of an already vulnerable minority population. Heralding the recent Act as a victory for women, or a victory for gender justice, is to obfuscate the truth which is that the legitimate concerns of women have been manipulated to advance the political agendas of a party that is unconcerned with the plight of Muslim women and is all too ready to encroach upon the rights of its growing Muslim minority population.⁵⁶

56 After receiving the final proofs for this article, an important article was published by Ummul Fayiza in which she traces the positions of three feminist scholars in India regarding Muslim Personal Status Law. Her research reveals that between the Shah Bano case (1985) and the Shayara Bano case (2017), “feminist positions on Muslim women’s rights have shifted from a ‘women’s rights only’ framework to an entangled position that critically evaluates the politics of majoritarian Hindu nationalism in shaping the politics of MPL, women’s rights and minority rights in India.” Her findings, based on a careful reading of three feminist scholars, largely aligns with the conclusion of this article which similarly highlights the larger majoritarian Hindu politics at play in the passage of the 2019 Act. Unfortunately, given the timing of her publication, a more thorough engagement with her work in this article is not possible, but her article importantly charts the discourse of feminist scholars and other non-state organizations which have a stake in this debate. See Ummul Fayiza, “From Shah Bano to Shayara Bano (1985-2017): Changing Feminist Positions on the Politics of Muslim Personal Law, Women’s Rights and Minority Rights in India,” *Journal of Muslim Minority Affairs* 41:1 (2021): 1-19.