

# CRIMINALISATION WITHOUT AN OBJECT: CRITICAL REFLECTIONS ON THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

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*The invalidation of triple talaq by the Supreme Court of India triggered the enactment of the Muslim Women (Protection of Rights on Marriage) Act, 2019. The paper demonstrates the superfluous and arbitrary nature of the Act in light of the Supreme Court's decision to strip triple talaq of its power to repudiate a marriage. Drawing from the rich and varied theories of criminal law in Anglo-American legal discourse, the paper argues that the criminalisation of triple talaq lacks theoretical foundation and is wholly unjustified. Finally, the paper sets the criminalisation of triple talaq within the context of the social and material vulnerabilities of Muslim women, and the political dominance of the right-wing Hindutva in India, arguing that it is likely to cause significant harm by exposing India's Muslim minority further to the State's coercive powers. For these reasons, the criminalisation of triple talaq requires urgent reconsideration.*

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## I. INTRODUCTION

*Talaq-e-biddat*, also known as triple *talaq*, is a practice under Muslim Personal Law that allows Muslim husbands to divorce their wives unilaterally, instantly, and irrevocably without fault. The practice of triple *talaq* was invalidated by the Supreme Court of India in 2017. Following this, the government of India enacted The Muslim Women Protection of Rights on Marriage Act ('2019 Act'), which criminalised the practice of triple *talaq*.

Considering the apparent anti-Muslim bias in the Indian legal system<sup>1</sup> and police force,<sup>2</sup> legislation that targets India's Muslim minority can easily become a tool for rampant state persecution. This socio-political reality necessitates an analysis of the criminalisation of triple *talaq*. What is being criminalised? Is

<sup>1</sup> A recent study of decisions by district court judges in India found no in-group bias in the lower judiciary on the axes of religion or gender. See, Ash, Asher et al, 'India's District Court Judges Don't Show In-group Bias Against Women, Muslims: Study' (*The Print*, 13 January 2021) <<https://theprint.in/opinion/indias-district-court-judges-dont-show-in-group-bias-against-women-muslims-study/584424/>> accessed 5 October 2021.

However, as the study itself notes, this does not indicate that these groups do not suffer bias in the legal system. "For example, it is possible that both Muslim and non-Muslim judges discriminate against Muslims... It is also possible that arrests and/or charges disproportionately target Muslims, or that judges exhibit bias based on defendant caste or income". This latter concern is especially relevant, given that deep structural inequalities expose minority communities to ghettoisation, poverty, and increased policing. On this, see: Roshan Kishore, 'Do Muslims in India Suffer a Bias when it Comes to Imprisonment, Conviction?' (*Livemint*, 23 November 2021) <<https://www.livemint.com/Opinion/93JZlySuxiVURtuqbA61TN/Do-Muslims-in-India-suffer-a-bias-when-it-comes-to-imprisonm.html>> accessed 5 October 2021;

For a discussion on judicial complicity in encouraging religious stereotypes and favouring majoritarian tendencies, see: Sara Ahmed, 'Judicial Complicity with Communal Violence in India' (1996) 17(1) *Northwestern Journal of International Law and Business* 320.

It should be noted, however, that since this article is now more than two decades old, it cannot be taken to reflect the present situation entirely accurately.

For a more recent account (specific to victims of rioting, but talking primarily about the treatment of Muslims), see "Victims of Rioting in India are Bashed by Police and Courts, too" (*The Economist*, 12 March 2020) <<https://www.economist.com/asia/2020/03/12/victims-of-rioting-in-india-are-bashed-by-the-police-and-courts-too>> accessed 5 October 2021.

<sup>2</sup> Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police* (August 2009); Common Cause and Centre for the Study of Developing Societies, *Status of Policing in India Report, 2019: Police Adequacy and Working Conditions* (2019) 119. In its section on police attitudes towards particular communities, the study notes, "About half of the police personnel reported that Muslims are likely to be naturally prone towards committing violence ('very much' and 'somewhat' combined)."

See also, S Mandal, 'Out of Shah Bano's Shadow: Muslim Women's Rights and the Supreme Court's Triple Talaq Verdict' (2018) 2(1) *Indian Law Review* 89.

the criminalisation justified? What might be the likely repercussions of this for India's Muslim minority?

The paper is structured as follows. Part I provides a brief historical overview of Indian personal laws, focussing on the evolution of divorce law. The Supreme Court verdict of 2017 is discussed in Part II to argue that it invalidated triple *talaq* for the wrong reasons and to demonstrate that the misplaced focus of the verdict became the conceptual framework for the criminalisation of triple *talaq*. The paper does not seek to demonstrate the different constitutional paths that could have been taken to invalidate triple *talaq*, nor to offer arguments on the alternative foundations on which the constitutionality of the practice could have been challenged. Its purpose is to demonstrate merely that the judgement's focus on the 'arbitrariness' of triple *talaq* in view of the tenets of the *Quran* and *Sunna*, instead of the discriminatory nature of the practice, allowed the government to criminalise the pronouncement of triple *talaq* per se without addressing any of the inequalities and structural disadvantages arising from it. Part III analyses the 2019 Act from the perspective of the philosophy of criminal law, drawing on the most prominent and relevant theories of criminalisation to demonstrate that the invocation of criminal sanction for triple *talaq* lacks a theoretical foundation, and will, in fact, cause further harm to Muslim women. Cumulatively, the paper aims to show that the criminalisation of triple *talaq* is arbitrary, unjustified, and deeply harmful.

## II. INDIAN PERSONAL LAWS: A BRIEF OVERVIEW

### A. The Birth of Religious Personal Laws

British colonial policy of purported non-interference in the laws and customs of the Indian subcontinent made way for the eventual contraction of the sphere of traditional customary laws. The codification of secular laws of criminal procedure and evidence, as well as those governing economic transactions, restricted religious law to essentially personal matters such as marriage and inheritance.<sup>3</sup> The preference of the colonial administrators for text-based, uniform personal law led to the homogenisation of diverse customs, and the subordination of regional or caste-based differences to the dominant discourse of each religious community.<sup>4</sup> As a result, religious identity was privileged over all others, giving birth to 'religious' personal laws.<sup>5</sup>

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<sup>3</sup> R V Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (OUP India 2006), 69.

<sup>4</sup> M Galanter, 'The Displacement of Traditional Law in Modern India' (1968) 24(4) *Journal of Social Issues* 65, 69-70.

<sup>5</sup> Williams (n 3) 66.

In the early 20<sup>th</sup> century, these homogenised rules of administration were formally codified. The Muslim Personal Law (Shariat) Application Act came into force in 1937 ('1937 Act'), with the aim of making provisions of the *Shariat* (Islamic law drawn from the *Quran*) applicable to all Muslims in India.<sup>6</sup> The Hindu Code Bill, a uniform Code governing solemnisation and dissolution of marriage, inheritance and succession, guardianship and adoption, had also begun to be debated afresh in the 1940s.<sup>7</sup> The government of independent India, favouring continuity, enacted the Hindu Code Bill in the form of 4 separate pieces of legislation in 1956.<sup>8</sup>

## B. Divorce Law in Independent India

The framework of religious personal laws inherited from the British colonial government remains in force to this day. Aside from the Special Marriage Act, 1956, which provides a 'secular' (on closer scrutiny, modelled on the Hindu Marriage Act, 1956)<sup>9</sup> framework for marriage and divorce,<sup>10</sup> most issues of family law are determined based on the religion of the parties concerned. The dominant mode of dissolution of marriages, regardless of the law applied, is fault-based divorce, granted on proof of certain 'grounds' of fault, such as adultery, cruelty, desertion, impotence, etc. The only alternative is mutual consent divorce, which requires the consent of both partners, and a year-long separation before the application for dissolution can be filed.<sup>11</sup> In most cases, the finalisation of divorce is done by courts of law, even when it is governed by religious personal law.

However, certain forms of divorce, known as *talaq* (repudiation) available to Muslim husbands, allow unilateral, no-fault divorce, finalised outside court once the conditions of repudiation as laid down in the *Shariat* are met. One such condition is a waiting period (the duration of which may vary depending on the specific form of *talaq*) meant to encourage reflection, reconsideration and reconciliation after the pronouncement of *talaq*.<sup>12</sup> This period was considered essential by the Prophet Mohammad because it could act as a check on capricious divorce by affording an opportunity to revoke the pronouncement of *talaq* upon further reflection.<sup>13</sup> An exceptional form of unilateral repudiation, however, was *talaq-e-biddat*, popularly known in India as triple *talaq*. It

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<sup>6</sup> The Muslim Personal Law (Shariat) Application Act, 1937, s 2.

<sup>7</sup> Williams, (n 3) 83.

<sup>8</sup> Williams, (n 3) 96-97.

<sup>9</sup> P Dommaraju, 'Divorce and Separation in India' (2016) 42 Population and Development Review 195, 198.

<sup>10</sup> Special Marriage Act, 1956, Statement of Objects and Reasons.

<sup>11</sup> Dommaraju, (n 9).

<sup>12</sup> *Shayara Bano v Union of India*, (2017) 9 SCC 1 [118-119] (*Shayara Bano*).

<sup>13</sup> *ibid* [12].

resulted in instantaneous, irrevocable, no-fault divorce once a Muslim husband had pronounced it, without any waiting period or scope for revocation.

### C. Challenges to Instant Triple Talaq

In *Shayara Bano v Union of India*,<sup>14</sup> ('*Shayara Bano*') a 5-judge bench of the Supreme Court of India, by a majority of 3:2 declared this form of triple *talaq* unconstitutional and void. However, the voices against triple *talaq* had been building for a long time before the 5-judge bench finally adjudicated upon it. Unsurprisingly, this practice had been the subject of litigation for several decades. While it had not expressly been declared unconstitutional, judges had frequently held that the *Quran* did not, in fact, give unbridled, arbitrary power to enforce instant divorce.<sup>15</sup> The position that triple *talaq* lacks legal sanctity by virtue of being contrary to the *Quran* and the *Shariat* was approved by a division bench of the Supreme Court of India in *Shamim Ara v. State of U.P.*,<sup>16</sup> which added a further condition that triple *talaq*, to be valid, needs to have been appropriately pronounced and communicated to the wife.

Alongside these legal developments, Muslim women's groups in India held public hearings and consultations, chronicled the experiences of Muslim women upon divorce, and even attempted to lobby with the government to legislatively ban instant triple *talaq*.<sup>17</sup> The grievances of Muslim women against instant triple *talaq* are not difficult to appreciate, given the intersecting axes of discrimination and privation to which they are subject. The Global Multidimensional Poverty Index, 2018 observed that every third Muslim in India is multi-dimensionally poor,<sup>18</sup> implying that 33.33% of Muslims live with lack of education, poor health and nutrition, unsafe housing, unsanitary water and living conditions, in addition to having a low income.<sup>19</sup> This multi-dimensional poverty when coupled with the widespread gender discrimination that marks Indian society,<sup>20</sup> frequently means that Muslim women lack the

<sup>14</sup> *Shayara Bano* (n 12).

<sup>15</sup> *A Yusuf Rowther v Sowramma* 1970 SCC OnLine Ker 49 : AIR 1971 Ker 261; *Jiauddin Ahmed v Anwara Begum* (1981) 1 Gau LR 358; *Masroor Ahmed v State (NCT of Delhi)* 2007 SCC OnLine Del 1357 : (2008) 103 DRJ 137.

<sup>16</sup> *Shamim Ara v State of UP*, (2002) 7 SCC 518 (*Shamim Ara*).

<sup>17</sup> G Panday, 'Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle' (*BBC News*, 22 August 2017) <<https://www.bbc.com/news/world-asia-india-40484276>> accessed 15 April 2020.

<sup>18</sup> Oxford Poverty and Human Development Initiative, *Global Multidimensional Poverty Index* (2nd ed, 2018) 24.

<sup>19</sup> *ibid* 1.

This was also recognised by the Report of the High Level Committee (established by the Government of India) on the Status of Women in India, *Executive Summary* (2015) 37.

<sup>20</sup> V Doshi, 'Why India's Modern Women Say it's a "Burden" to be Female' (*The Washington Post*, 12 March 2018) <<https://www.washingtonpost.com/news/worldviews/wp/2018/03/12/why-indias-modern-women-say-its-a-burden-to-be-female/>> (accessed 15 April 2020).

social and economic capabilities required for ‘self-sufficiency’ in the traditional sense of being able to secure a living wage in the market.<sup>21</sup> Therefore, there is a significant likelihood that the main source of maintenance and support for a married Muslim woman (though certainly not for all married Muslim women) is her husband. Unless such support is continued through judicial intervention, instant triple *talaq* exposes Muslim women to significant hardship because neither society, due to its stigmatisation of divorced women,<sup>22</sup> nor the state, due to its poor social security,<sup>23</sup> can act as a safety net for them.

### III. SHAYARA BANO: THE RIGHT DECISION FOR THE WRONG REASONS

#### A. The Judgement

The petitioner in *Shayara Bano*<sup>24</sup> had contended that the practice of triple *talaq* was unconstitutional, by virtue of infringing on the fundamental rights of Muslim women to dignity (Article 21) and equality (Article 14), and on their fundamental right against discrimination (Article 15) guaranteed by the Constitution of India, 1950 (‘the Constitution’). While instant triple *talaq* was, indeed, declared unconstitutional by the majority, the routes taken to arrive at the decision were so divergent that, it has rightly been argued, no clear ratio emerges from the judgement.<sup>25</sup> Three of the five judges (Khehar C.J., Nazeer J., and Joseph J.) held that the practice of triple *talaq* had not been codified by the 1937 Act,<sup>26</sup> and of these, two judges (Khehar C.J. and Nazeer J.) then went on to hold that the practice was part of uncodified Muslim Personal law which could not be tested under the Constitution.<sup>27</sup> The third judge (Joseph J.) did not agree that that the practice was part of uncodified Muslim Personal law. He reasoned, instead, that the 1937 Act simply made the *Shariat* the rule of decision in matters concerning Muslims, and since *Shamim Ara*<sup>28</sup> had already found instant triple *talaq* to be contrary to the *Shariat* (I.B), the practice would

<sup>21</sup> Less than 10% of Muslim Women are part of the Indian workforce (therefore doing paid work). See Report of the High-Level Committee (n 19)18.

<sup>22</sup> PR Amato, ‘The Impact of Divorce on Men and Women in India and the United States’ (1994) 25 *Journal of Comparative Family Studies* 207, 210-211.

<sup>23</sup> A Yadav, ‘How Effective are Social Security and Welfare in India’ (*The Hindu*, 26 January 2015) <<https://www.thehindu.com/news/national/how-effective-are-social-security-and-welfare-in-india/article6823320.ece>> accessed 15 April 2020.

<sup>24</sup> *Shayara Bano* (n 12).

<sup>25</sup> G Bhatia, ‘The Supreme Court’s Triple Talaq Judgment’ (*Indian Constitutional Law and Philosophy*, 22 August 2017) <<https://indconlawphil.wordpress.com/2017/08/22/the-supreme-courts-triple-talaq-judgement/>> accessed 15 April 2020.

<sup>26</sup> *Shayara Bano* (n 12) [5].

<sup>27</sup> *Shayara Bano* (n 12) [385-386].

<sup>28</sup> *Shamim Ara* (n 16).

also not be protected by the Constitution.<sup>29</sup> In that sense, the decision of these three judges seems to be based more in theology than in the tenets of the Constitution. While religious freedom *was* one of the points of contention in the judgement, its discussion would be outside the scope of this paper.

Instead, I shall focus on the propriety of the reasoning of the remaining two judges (Nariman J. and Lalit J.), who, along with Joseph J., formed the majority in the final decision of the case. Nariman and Lalit JJ. concluded that the 1937 Act codified the practice of instant triple *talaq*, and therefore, could be tested on the anvil of fundamental rights.<sup>30</sup> They then went on to hold that since triple *talaq* was instant, irrevocable and without ‘cause’ (read, fault), leaving no scope for reconciliation, it allowed Muslim men to ‘capriciously’ break the marital tie. Thus, triple *talaq* was held to be violative of Article 14 (the right to equality) of the Constitution on the ground that it was disproportionate and excessive, and, in that sense, manifestly arbitrary.<sup>31</sup>

## B. An Opportunity Missed

Manifest arbitrariness, as a standard to assess statutes against the right to equality under Article 14, emerged with the Supreme Court’s decision in *EP Royappa v State of TN*,<sup>32</sup> and was reiterated and fleshed out by *Maneka Gandhi v Union of India*.<sup>33</sup>

Nariman J. explained the standard in *Shayara Bano*<sup>34</sup> in the following terms, “Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.”<sup>35</sup> Manifest arbitrariness may be a valuable addition to the jurisprudence of Article 14, but its use in *Shayara Bano*<sup>36</sup> raises a number of questions.

Prima facie, it appears that the ‘manifest arbitrariness’ of instant triple *talaq* lay in its nature as an ‘irregular’ or ‘heretical’ form of *talaq* that is incompatible with the preferred manner laid down in the *Quran* and the *Shariat*.<sup>37</sup> While not made explicit in the judgement, a possible rationale, perhaps, was that if S.2 of the 1937 Act codified the *Shariat*, it would be manifestly arbitrary to

<sup>29</sup> *Shayara Bano* (n 12) [4].

<sup>30</sup> *Shayara Bano* (n 12) [47].

<sup>31</sup> *ibid* [104].

<sup>32</sup> *EP Royappa v State of TN* (1974) 4 SCC 3, [85].

<sup>33</sup> *Maneka Gandhi v Union of India* (1978) 1 SCC 248, [7].

<sup>34</sup> *Shayara Bano* (n 12).

<sup>35</sup> *Shayara Bano* (n 12) [101].

<sup>36</sup> *ibid*.

<sup>37</sup> *ibid* [102].

the extent that it codified a practice that was contrary to the *Shariat* and the *Quran*. In my opinion, this rationale was inappropriate because the examination of triple *talaq* on the anvil of the principles of the *Quran* or *Sunna* (a body of literature that prescribes the social and legal practices of the Muslim community) is essentially a theological exercise, outside the expertise or domain of a secular, constitutional court. More importantly, as Farrah Ahmed has astutely argued, the 1937 Act did *not* in fact codify Islamic religious doctrine, but a hybrid notion of 'Anglo-Muhammadan Law'.<sup>38</sup> If this is true, then the Court's assumption that S.2 of the 1937 Act codified the *Shariat* is not borne out. It is unclear, therefore, whether the Court picked the correct frame of reference to assess whether the 1937 Act was manifestly arbitrary insofar as it codified triple *talaq*.

Beyond this, the application of the standard of manifest arbitrariness to triple *talaq*, discussed in II.A, appears to be little more than a description of the elements of the practice. That is, triple *talaq* was found to be manifestly arbitrary *because*: it is capricious and whimsical (which, in turn, is because it is instant, without cause, and irrevocable), can be practiced by a Muslim man, and is finalised without any attempt at, or scope for, reconciliation. In the absence of any explanation as to *why* these characteristics make triple *talaq* manifestly arbitrary, the application of the standard remains ambiguous.

In taking the route of manifest arbitrariness, therefore, Nariman and Lalit JJ. chose a somewhat enigmatic and elusive ground to test the constitutionality of triple *talaq*. Since triple *talaq* had been found not to be an essential religious practice protected by Articles 25 and 26 of the Constitution,<sup>39</sup> it could have been tested, instead, on the anvil of the fundamental right against discrimination.<sup>40</sup> Article 15(1), of the Constitution prohibits the State from discriminating against any citizen on certain protected markers, including sex.<sup>41</sup> While it is beyond the scope of this paper to lay out how this would have played out, it is possible to say that evaluating triple *talaq* against Article 15 would have been the more appropriate route to determine its constitutionality. This is for two reasons. First, it would clearly have been within the mandate and expertise of the Supreme Court. Secondly, it would have focused the issue on the predicament of Muslim women upon the pronouncement of triple *talaq* rather than the abstraction of religious propriety.<sup>42</sup>

<sup>38</sup> F Ahmed, *Religious Freedom under the Personal Law System* (OUP 2015) 28.

<sup>39</sup> *Shayara Bano* (n 12) [55].

<sup>40</sup> T Khaitan, 'Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are' (*Indian Constitutional Law and Philosophy*, 9 July 2018) <<https://indconlawphil.wordpress.com/2018/07/09/inclusive-pluralism-or-majoritarian-nationalism-article-15-section-377-and-who-we-really-are/>> accessed 15 April 2020.

<sup>41</sup> Constitution of India 1950, art 15 (Constitution).

<sup>42</sup> The judgement's lack of focus on feminist jurisprudence, or the question of gender justice, has been lamented and critiqued. See:

### C. The ‘Wrong’ of Triple Talaq

It appears from the judgement of the Supreme Court that the ‘wrong’ of triple *talaq* was coextensive with its very nature: instantaneousness, absence of fault, irrevocability, and the absence of any scope for reconciliation. In other words, the problem was *framed* to be that a Muslim man could divorce his wife without ‘cause’ (or fault) and without any attempt at reconciliation, That is *-talaq* could be affected ‘arbitrarily’ or ‘capriciously’.<sup>43</sup> It is my opinion that this was a mischaracterisation of the problem, caused by focusing on whether this form of *talaq* was in tune with the *Quran* and the *Shariat*, instead of on the discrimination experienced by Muslim women consequent to its pronouncement (which could have been dealt with by taking the route of non-discrimination under Art. 15(1), as mentioned in II.B).

The nature of triple *talaq* as, essentially, an iteration of unilateral no-fault divorce on demand was not inherently problematic even though it did contradict most of Indian divorce law and policy which favours fault-based divorce finalised in a Court of law (I.B). I contend that the problem arose from the manner in which this form of *talaq* was practised.<sup>44</sup> For one, it was an option available only to men, meaning that its consequences only befell Muslim women. It is worth noting that Muslim personal law does provide for a method of divorce at the instance of the wife, called *khula*. The formulation of *khula*, however, is that the wife pays consideration to the husband (such as the relinquishment of her dower or other arrangement) for him to release her from the marriage tie, or to repudiate her. Moreover, a wife’s offer of *khula* may be rejected by the husband,<sup>45</sup> and in that sense, Muslim women do not have an equivalent right to unilateral, no fault-divorce. The formulation of *khula*, however, is that the wife pays consideration to the husband (such as the relinquishment of her dower or other arrangement) for him to release her from the marriage tie, or to repudiate her.<sup>46</sup> However, the strengthening of this right to seek divorce has never been at the forefront of Muslim’s women’s

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Ratna Kapur, ‘Gender and the “Faith” in Law: Equality, Secularism, and the Rise of the Hindu Nation’ (2020) 35(3) *Journal of Law and Religion* 407, 417-419.

RatnaKapur, ‘Triple Talaq Verdict: Wherein Lies the Much Hailed Victory?’ (*The Wire*, 28 August 2017) <<https://thewire.in/gender/triple-talaq-verdict-wherein-lies-the-much-hailed-victory>> accessed 5 October 2021.

<sup>43</sup> *Shayara Bano* (n 12) [104].

<sup>44</sup> S Chaudhary and S Kale, ‘The Right to Love and the Right to Leave- Recognising Autonomy through Unilateral No-Fault Divorce’ (*Indian Constitutional Law and Philosophy*, 6 April 2020) <<https://indconlawphil.wordpress.com/2020/04/06/guest-post-the-right-to-love-and-the-right-to-leave-recognising-autonomy-through-unilateral-no-fault-divorce/>> accessed 15 April 2020.

<sup>45</sup> Submissions of the Amicus Curiae, Mr Salman Khurshid in *Shayara Bano* [67-68] <[https://scoobserver-production.s3.amazonaws.com/uploads/case\\_document/document\\_upload/643/W.S.\\_by\\_Salman\\_Khurshid\\_\\_Amicus\\_Curiae\\_.pdf](https://scoobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/643/W.S._by_Salman_Khurshid__Amicus_Curiae_.pdf)> accessed 5 October 2021).

<sup>46</sup> Asaf AA Fyze, *Outlines of Muhammadan Law* (3rd ed, 1964), 156.

demands regarding divorce law. The report of the National Commission for Women, *Voice of the Voiceless* (2000),<sup>47</sup> which was based on the testimony of Muslim women who spoke at public hearings across the country, describes and explains the situation succinctly,

Muslim women too have the right to seek dissolution of marriage under the system of *khula*, but this right is very rarely invoked for the simple reason that her seeking divorce would completely deprive her of whatever she may get from her husband, most importantly, a place to live. This in itself is a great disincentive. It is significant that during the Public Hearings not a single woman raised the question of *khula*, its usefulness or the need to improve upon it and the right of women to seek it. The deponents only expressed their anguish at the tyranny of the triple *talaq*, which was the single most potent cause of their devastation.

Secondly, while all forms of *talaq* under Muslim personal law are finalised privately (as between the husband and the wife, without the involvement of the Court), triple *talaq* in particular would frequently be pronounced over the telephone, over text messages, or over Skype or Facebook. This, in combination with the fact that triple *talaq* can be pronounced and finalised at once (without a waiting period or scope for reconciliation), meant that *talaq* pronounced in a fit of rage or a drunken stupor could become irrevocably final. Furthermore, once triple *talaq* had been pronounced, there was no scope for revocation. This meant that if the husband changed his mind and decided to take his (divorced) wife back, she would have to go through the practice of *nikah halala* (marriage with another man, and repudiation by him) before she could remarry the first husband. This combination of circumstances (which, I stress, were not only aided by the nature of triple *talaq* but arose because it had been adapted, using technology and the lenience and patriarchal orthodoxy of the All India Muslim Personal Law Board, to maximise the dominance and convenience of men) was experienced by Muslim women as an assault on their dignity because of the constant threat and fear of triple *talaq*.<sup>48</sup>

This threat and fear is underlined and exacerbated by the third reason why the practice of triple *talaq* was especially problematic for women: the fact that Muslim Personal Law laid down no obligation on the husband for maintenance

<sup>47</sup> Syeda Saiyidain Hameed, The National Commission for Women (India), *Voice of the Voiceless: Status of Muslim Women in India* (Pt 2, 2000) Ch 3.

<sup>48</sup> Writ Petition submitted by the petitioner, Shayara Bano in *Shayara Bano*, [7-8] <[https://scob-server-production.s3.amazonaws.com/uploads/case\\_document/document\\_upload/106/Shayara-Bano-Writ-Petition-FINAL-VERSION.pdf](https://scob-server-production.s3.amazonaws.com/uploads/case_document/document_upload/106/Shayara-Bano-Writ-Petition-FINAL-VERSION.pdf)> accessed 5 October 2021.

(except payment of dower),<sup>49</sup> meant that the divorced woman was left without any safeguards against the financial hardships that accompanied being removed from her matrimonial home (I.C), possibly with children to care for.<sup>50</sup>

The only option available to a divorced Muslim woman, in these circumstances, is to claim maintenance under S. 125, Code of Criminal Procedure, 1973 (Cr.P.C.), which empowers a Magistrate to order a monthly allowance upon proof of neglect or refusal to maintain on the part of the man.<sup>51</sup> However, this would require her to petition the Magistrate's Court and establish neglect or refusal. This pre-supposes a great deal of social and economic capital as well as a certain degree of legal awareness and access. As discussed in I.C, the intersectional disadvantage of belonging to a multi-dimensionally poor minority, and pervasive gender discrimination and violence, means that most Muslim women are not financially independent. They are unlikely, then, to possess such social and economic capital, or have the information or support required to access legal remedies. Depending on the length of the marriage, moreover, the divorced woman may have spent a vast majority of her life taking care of the home and raising children.<sup>52</sup> Alternatively, when *talaq* is pronounced in the early years of marriage, the divorced woman may have young children for whose care she would be primarily responsible, given the gendered patterns of child-rearing in India.<sup>53</sup> These circumstances, would severely limit her employment options. It is no wonder, then, that divorced Indian women who do enter the workforce are disproportionately clustered in relatively poorly-paid employment with few benefits and little security.<sup>54</sup>

Therefore, privation is a likely consequence of triple *talaq* for Muslim women. This is exacerbated by the isolation that accompanies the loss of family life, relatively poor chances of remarriage,<sup>55</sup> and the absence of community support that follows the stigmatisation of divorced women.<sup>56</sup> While nothing can replace the family and community as anchors of individual identity and sources of affection and connection with other human beings, it is

<sup>49</sup> *Mohd. Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 556; *Danial Latifi v Union of India* (2001) 7 SCC 740 (*Danial Latifi*); See *Tyabji's Muslim Law* (4th ed) 304; See *Mulla's Principles of Mahomedan Law* (18th ed) 308.

<sup>50</sup> See the observations on *mehr* or dower in the report of The National Commission for Women (n 47) 29-30.

<sup>51</sup> Code of Criminal Procedure, 1973, s 125. (CrPC)

<sup>52</sup> The petitioner in *Mohd Ahmed Khan* (n 49) for instance, had been married to her husband for over forty years, had managed the matrimonial home, and had borne and raised five children.

<sup>53</sup> M Tuli, 'Beliefs on Parenting and Childhood in India' (2012) 43 *Journal of Comparative Family Studies* 81, 86.

<sup>54</sup> Amato (n 22) 211.

<sup>55</sup> Dommaraju (n 9) 205.

<sup>56</sup> PC McKenry and SJ Price, 'International Divorce' in Ingoldsby and Smith (eds), *Families in Global and Multicultural Perspective* (SAGE Publications, 2005) 168, 178-179; See Amato (n 22).

possible for the State to at least provide financial support to women who have been divorced, or have child-care responsibilities. In England and Wales, for instance, a person raising a child under the age of 16, or a child under the age of 20 if they remain in approved education or training, can claim child benefit at a fixed weekly rate.<sup>57</sup> A variation of this kind of child benefit is paid by a number of other countries such as Australia, Canada, Denmark, Germany, France, Luxemburg, Finland, Ireland, Sweden, Norway and the Netherlands.<sup>58</sup> The situation in India, however, is marked by the absence of social security provided by the State, leaving women without a safety net.<sup>59</sup> Not only does this mean that women's quality of life (both emotional and material) decreases, their capacity to care for and raise their children is also impacted.

From the discussion in the previous paragraphs, it is clear that triple *talaq* could not affect men in the same way, or to the same degree, that it affected women, for a number of reasons. The wrong of triple *talaq*, therefore, would more appropriately be framed as the excessive and disproportionate impact it had on women compared to men, instead of its inherent nature as instantaneous, no-fault, or unilateral, but the excessive and disproportionate *impact* it had on women compared to men.<sup>60</sup> While this disproportionate impact, for the most part a consequence of wider gender inequalities, is not special to triple *talaq* and is likely to follow from any form of divorce, regardless of the religion of the parties,<sup>61</sup> it is important to view it in conjunction with the other reasons (discussed above) which make the practice triple *talaq* particularly problematic for women. Had the Supreme Court taken the Article 15 route to determine the constitutionality of the practice, this 'wrong' of triple *talaq* could have been identified and given primacy over the incompatibility of the practice with the *Quran* and the *Shariat*.

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<sup>57</sup> Government of the United Kingdom, 'Claim Child Benefit', <<https://www.gov.uk/child-benefit>> accessed 15 April 2020.

<sup>58</sup> HL Shaefer, S Collyer et al, 'A Universal Child Allowance: A Plan to Reduce Poverty and Income Instability among Children in the United States' (2018) 4 The Russell Sage Foundation Journal of the Social Sciences 22, 25.

<sup>59</sup> Amato (n 22) 210.

<sup>60</sup> Mandal (n 2) 105.

<sup>61</sup> This was acknowledged by the Supreme Court in *Danial Latifi* (n 49) [20], "In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life - a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money."

## D. Misidentified Wrongs as the Driver of Criminalisation

The Supreme Court's judgement in *Shayara Bano*, and in particular, its misidentification of the 'wrong' of triple *talaq* has had consequences more severe than the loss of an opportunity to highlight and engage with the discrimination wrought by the practice. It has become the driver of misguided State action. The minority judgement of Khehar and Nazeer JJ., while refusing to declare the practice unconstitutional, had directed 'the Union of India to consider appropriate legislation with reference to triple *talaq*'.<sup>62</sup> This direction lent moral authority to a Hindu-nationalist party's attempt to cast themselves as protectors of Muslim women and legislate upon the practice of a minority community.<sup>63</sup> Since the 'wrong' of triple *talaq*, according to the Supreme Court, was located in its very nature and characteristics, the State sought to "prohibit divorce by pronouncing *talaq*"<sup>64</sup> through the 2019 Act.

Much like the judgement that inspired it, the 2019 Act subordinates the discriminatory impact of triple *talaq*, its 'wrongs' as identified in I.C, to the pronouncement of triple *talaq* itself. While the 2019 Act does purport to "protect the rights of Muslim women",<sup>65</sup> its provisions do little to substantiate that claim. S. 5 of the Act, for instance, provides for a 'subsistence allowance', but in fact merely reiterates the remedy already available in S. 125, Cr.P.C, which was minimal to begin with.<sup>66</sup> As discussed in I.C, such a remedy pre-supposes a degree of independence, awareness, power, and financial capability that is not the privilege of most Muslim women consequent to repudiation. Moreover, while S. 5 of the 2019 Act does not explicitly make the responsibility for maintenance contingent on the capacity to pay unlike S. 125, Cr.P.C., such a contingency would necessarily be implicit in any order for maintenance. It is plainly impossible for a person to pay money that she does not have. Similarly, in providing that upon the pronouncement of triple *talaq* Muslim women would be "entitled to custody of her minor children",<sup>67</sup> the 2019 Act sidelines the

<sup>62</sup> *Shayara Bano*(n 12) [392].

<sup>63</sup> IANS, 'Bill to Ban, Punish Triple Talaq Passed by Lok Sabha' (*Outlook*, 25 July 2019) <<https://www.outlookindia.com/newscroll/bill-to-ban-punish-triple-talaq-passed-by-lok-sabha/1583011>> accessed 10th July 2020; J Punwani, 'Triple Talaq Judgement and After' (2018) 53(17) *Economic and Political Weekly* 12; F Agnes, 'The Politics behind Criminalising Triple Talaq' (2018) 53(1) *Economic and Political Weekly* 12; S Mandal, 'Instant Triple Talaq Bill: Tabling Legislation in Parliament is Political Move, BJP's Attempt to Play Protector of Muslims' (*Firstpost*, 22 December 2017) <<https://www.firstpost.com/india/instant-triple-talaq-bill-tabling-legislation-in-parliament-is-political-move-bjps-attempt-to-play-protector-of-muslims-4270807.html>> accessed 5 October 2021.

<sup>64</sup> Muslim Women (Protection of Rights on Marriage) Act 2019, Preamble. (2019 Act)

<sup>65</sup> *ibid.*

<sup>66</sup> 2019 Act, s 5: "Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate."

<sup>67</sup> 2019 Act, s 6.

principle of ‘best interest of the child’, which would otherwise have determined custody.<sup>68</sup> In a context where her former husband is in custody or in prison, and therefore unable to pay (sufficient) maintenance, such an immutable provision would be able to serve potentially to increase her burden.

By taking the route of criminalisation instead of welfare legislation, the State, like the Supreme Court, has failed to address the real ‘wrong’ of triple *talaq*. At present, it is unclear what the prohibition and criminalisation of the pronouncement of triple *talaq* is meant to achieve, other than discouraging the use of this mode of repudiation (see III. B). It might be argued that the implicit purpose is to discourage divorce in general. If so, the legislation is doomed to fail on two counts. First, because as family law scholars and policy-makers increasingly contend,<sup>69</sup> laws which seek to prolong marriages where one or both parties want to leave the marriage only constrain individual autonomy and intensify conflict within the relationship.<sup>70</sup> Secondly, as rightly argued by the Attorney General of India,<sup>71</sup> other forms of unilateral, no-fault divorce available to Muslim men, such as *talaq-i-ahsan* and *talaq-i-hasan*,<sup>72</sup> though finalised after a waiting period, would still bring the marriage to an end without ‘cause’. Increasing the time taken to finalise divorce would not prevent divorce.<sup>73</sup> It would be far more prudent, therefore, to focus on addressing the vulnerabilities of Muslim women upon *talaq*.

The judgement of the Supreme Court, in declaring triple *talaq* void, had already stripped it of its ability to affect divorce. The focus of the government, then, should have been on addressing the financial and material vulnerabilities

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<sup>68</sup> Law Commission of India, 257 *Report on Reforms in Guardianship and Custody Laws in India* (Law Comm Report No. 257, 2015) [1.1].

<sup>69</sup> I Ellman, ‘The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute’ (1997) 11 *International Journal of Law, Policy and the Family* 216; Bridge, ‘Marriage and Divorce: The Regulation of Intimacy’ in Herring (ed), *Family Law- Issues, Debates, Policy* (Cornwall 2001) 8; Ministry of Justice (England and Wales), *Reducing Family Conflict: Reform of the Legal Requirements for Divorce* (September 2018).

<sup>70</sup> In *Joseph Shine v Union of India* (2019) 3 SCC 39, a 5-judge bench of the Supreme Court of India considered whether s 497, IPC, which criminalised adultery was constitutional. The judgement acknowledged the futility of enforcing marital fidelity and commitment through criminal sanction for default. While the case was concerned with adultery, it is clear that the principle applies to the criminalisation of triple *talaq* as well. Just as punishment is unlikely to establish commitment (either through deterrence, or sanction) in cases of infidelity, so it is that punishing one form of divorce is a poor and likely ineffective way to ensure that the couple stays together. [64, 211, 281.1-281.4].

<sup>71</sup> *Shayara Bano* [237].

<sup>72</sup> *Mulla's Principles of Mahomedan Law* (20 ed, LexisNexis) 393-395.

<sup>73</sup> Analysis of the rates of marriage and divorce in England and Wales has shown that the law of divorce has little to no impact on social behaviour regarding marriage and divorce. See J Eekelaar, ‘Legal Events and Social Behaviour’ (2010) *Family Law* 1094; J Eekelaar, *Regulating Divorce* (OUP 1991) ch 3.

of Muslim women on divorce through welfare legislation. What the government has done, instead, is criminalise the pronouncement of triple *talaq*.

#### IV. CRIMINALISATION OF TRIPLE TALAQ: UNJUSTIFIED, EXCESSIVE AND COUNTERPRODUCTIVE

At the broadest level, legal ‘regulation’ of any conduct may be beholden to justification because of its likely effect on the rights of individuals.<sup>74</sup> An iteration of this idea is the test of the constitutionality of legislations in India.<sup>75</sup> Criminal law deserves scrutiny more than any other form of legal regulation because of the wide-ranging powers granted to the State to ‘deal with’ conduct defined as ‘criminal’. These powers range from the coercive force deployed by the police to prevent offences<sup>76</sup> to the significantly punitive consequences that follow conviction.<sup>77</sup> Michael Moore justifies a special focus on the limits of criminal law on the ground that its coercive nature ‘threatens to restrain all citizens subject to it’, and in that sense, takes away their liberty.<sup>78</sup>

Even disconnected from these powers and consequences, criminal law calls for justification because of its very nature as the conveyor of social opprobrium. For some scholars, in fact, *this* precisely sets criminal sanction apart.<sup>79</sup> H.M. Hart, for instance, observed, “What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition”.<sup>80</sup> Joel Feinberg nuanced this position, stating that the punitive consequences of criminal actions, such as imprisonment and its physical hardships and privations, are *expressive* of social condemnation, “It would be more accurate in many cases to say that the unpleasant treatment itself expresses the condemnation, and that this expressive aspect of his incarceration is precisely the element by reason of which it is properly characterized as punishment and not mere penalty.”<sup>81</sup> Even Antony Duff characterises criminal law, and in particular the criminal

<sup>74</sup> JS Mill, *On Liberty* (1859).

<sup>75</sup> *NALSA v Union of India*, (2014) 5 SCC 438 [129].

<sup>76</sup> For a comprehensive overview of preventive powers of the police in India, see C Arzt, ‘Police Reform and Preventive Powers of Police in India – Observations on an Unnoticed Problem’ (2016) 49 *Law and Politics in Africa, Asia and Latin America* 53.

<sup>77</sup> A Ashworth and J Horder, *Principles of Criminal Law* (7th ed OUP 2013) 1. In India, these consequences may range from fines to simple or rigorous imprisonment for varying terms, or even to death.

<sup>78</sup> M Moore, ‘Liberty’s Constraints on What Should be Made Criminal’ in Duff, Farmer et al (eds), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) 182, 184.

<sup>79</sup> *ibid.*

<sup>80</sup> HM Hart, ‘The Aims of Criminal Law’ (1958) 23 *Law and Contemporary Problems* 401, 404.

<sup>81</sup> J Feinberg, ‘The Expressive Function of Punishment’ (1965) 49 *The Monist* 387, 402.

justice process, as a system through which citizens are called to account for their wrongdoing.<sup>82</sup>

The nature of criminal law, and the extent and impact of criminal sanction are strong reasons to limit the scope of criminalisation, for these powers and sanctions, when deployed inappropriately, infringe on the cherished values of individual liberty, privacy, and the rule of law.<sup>83</sup> The question then arises, when *is* the use of criminal law justified? A universally agreed upon answer, broadly applicable to the exhaustive range of human conduct has yet to be made,<sup>84</sup> but fortunately, that is not the mandate of this paper. The Indian Parliament's decision to criminalise the pronouncement of triple *talaq* after it had been rendered void and powerless by the decision of the Supreme Court begs the question- what purpose was sought to be achieved by Parliament and does it justify the heavy hand of criminal law? Parliamentary debates on the 2019 Act,<sup>85</sup> saw repeated questions and objections on the religious motivations behind the legislation, its effect on Muslim women, and the (im)propriety of criminalising what ought to remain a civil issue. Other than deterrence (on which, see III.B), however, the principles or motivations underlying the criminalisation were never discussed. Therefore, in the absence of a clear mandate for legislation from the Parliament, I shall evaluate the criminalisation of triple *talaq* against a cross-section of principles or standards of criminalisation, to determine whether there is *any* justification for it.

### A. 2019 Act: Criminalisation without Justification

S. 3, 2019 Act declares that the pronouncement of triple *talaq* by a Muslim man upon his wife shall be void and 'illegal.' S. 4 of the 2019 Act, then provides: "Any Muslim husband who pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine."<sup>86</sup> I shall argue that the Legislature's choice to criminalise triple *talaq*, stripped of its power to effect divorce by the judgement of the Supreme Court,<sup>87</sup> cannot appropriately be justified against any of the standard principles of criminalisation.

<sup>82</sup> RA Duff, *The Realm of Criminal Law* (OUP 2018) 196.

<sup>83</sup> *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1 (*Navtej Johar*); D Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2007) 13.

<sup>84</sup> RA Duff, L Farmer, S Marshall, M Renzo and V Tadros, 'Introduction: Towards a Theory of Criminalization?' in Duff, Farmer *et al* (eds), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) 1, 2.

<sup>85</sup> Parliamentary Debates (Lok Sabha) XVII Series, Volume 3, First Session 2019 No. 29, Debate on 25 July 2019, 115-310 <[http://loksabhadocs.nic.in/debatestextmk/17/1/25.7.2019\(f\).pdf](http://loksabhadocs.nic.in/debatestextmk/17/1/25.7.2019(f).pdf)> (accessed 11 June 2021); Parliamentary Debates (Rajya Sabha) Volume 249, No. 29, Floor Version of Debate on 30 July 2019, 31-156 <[https://rajyasabha.nic.in/Documents/Official\\_Debate\\_Nhindi/Floor/249/F30.07.2019.pdf](https://rajyasabha.nic.in/Documents/Official_Debate_Nhindi/Floor/249/F30.07.2019.pdf)> (accessed 11 June 2021).

<sup>86</sup> 2019 Act, s 4.

<sup>87</sup> *Shayara Bano* (n 12).

## 1. *The 'Harm' Principle(s) and Triple Talaq*

The 'harm' principle was originally articulated by John Stuart Mill, who argued, "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."<sup>88</sup> This principle has been rearticulated in different forms, leading James Edwards to argue that there is not one, but several harm principles.<sup>89</sup> Feinberg's version of the principle, for instance, states that the possible prevention of harm is a good reason to criminalise conduct,<sup>90</sup> although it is neither a justification, nor a *sufficient* reason, for criminalisation. For Feinberg, in contrast to Mill, the prevention of harm is not the only good reason for the criminalisation of conduct, but one of many.<sup>91</sup> It is, moreover, a positive reason for criminalisation, and not merely a negative constraint on it. Whatever its form, the harm principle, as rightly argued by Andreas von Hirsch and Andrew Simester, is essentially consequentialist.<sup>92</sup> Its meaning and application are entirely dependent on the established harmfulness of the conduct being criminalised.

In the Feinbergian sense, if the harm principle is to provide *a* reason (even if not *the* reason) for the criminalisation of triple talaq, it must be shown that triple *talaq* has a harmful effect on someone. This view also emerges from the decision of the Supreme Court of India in *Navtej Johar v. Union of India*<sup>93</sup> where Chandrachud J. held that there was no basis for criminalising the acts covered by S. 377, IPC<sup>94</sup> when performed by consenting adults because they do not harm anyone, nor do they pose a risk to society. It is painfully clear, however, that since triple talaq can no longer repudiate a marriage after being declared void by the Supreme Court, its pronouncement would have no effect-harmful or otherwise.

Jonathan Herring aptly described the 'harm' principle as a gatekeeper of criminalisation, implying that its utility lay more in determining which conduct

<sup>88</sup> Mill (n 74) 13.

<sup>89</sup> J Edwards, 'Harm Principles' (2014) 20(4) *Legal Theory* 253.

<sup>90</sup> J Feinberg, *The Moral Limits of the Criminal Law, Volume 1: Harm to Others* (OUP 1987) 11.

<sup>91</sup> RA Duff and S Marshall, 'Remote Harms and the Two Harm Principles' in Simester, du Bois-Pedain and Neumann (eds) *Liberal Criminal Theory: Essays for Andrew von Hirsch* (2004) 205, 206.

<sup>92</sup> AP Simester and A von Hirsch, *Crimes, Wrongs and Harms: On the Principles of Criminalisation* (OUP 2011) 35-36.

<sup>93</sup> *Navtej Johar* (n 83) [592].

<sup>94</sup> S 377, IPC: Unnatural offences: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

is unworthy of criminalisation by virtue of being ‘harmless’.<sup>95</sup> I agree with this characterisation, and propose that triple *talaq*, being harmless, is unfit for criminalisation.

It might, however, be argued that despite being void, triple *talaq* can technically still cause ‘harm’, not because it repudiates a marriage, but because of its association with patterns of ostracisation, material deprivation and violence.

There is little doubt that the background harms of divorce need to be acknowledged. However, the 2019 Act, which simply makes it a criminal offence to pronounce triple *talaq*, is not the appropriate solution, because the pronouncement itself is not the true cause of the trauma. The real reason for the likely trauma is the underlying vulnerability of Muslim women, which is not addressed by the 2019 Act in any meaningful way (II.D). The acts of physical and emotional violence that often accompany triple *talaq*,<sup>96</sup> moreover, are forms of domestic abuse, already covered by The Protection of Women from Domestic Violence Act, 2005.<sup>97</sup>

Notwithstanding this, it might be argued that triple *talaq* is still ‘harmful’ because it may cause severe mental trauma to a Muslim woman by conveying the husband’s intent to leave the wife. Even if she knows that no divorce can legally take place on the mere pronouncement of triple *talaq*, or that she has remedies to associated domestic abuse, the news of impending repudiation may cause distress.

However, is triple *talaq* the only kind of pronouncement that could cause such harm? I am inclined to say no. The same effect would be caused by a number of other statements which convey the same intent, including the pronouncement of other forms of *talaq*. In fact, other statements, such as, “Get out of my house” or “Go back to your parents’ house” may cause even more distress, by signalling not only the end of the marriage but the additional loss of the shared matrimonial home. The specific focus of the 2019 Act on the words, “*talaq talaq talaq*”, is, therefore, arbitrary.<sup>98</sup> The only reason triple *talaq* was distinct from other distressing exclamations was *because* it could instantaneously and irrevocably repudiate a marriage. Having lost this power because of the 2017 judgement, triple *talaq* has also lost its uniqueness. There is no longer

<sup>95</sup> J Herring, *Great Debates in Criminal Law* (Pagrave Macmillan 2015) 11-12.

<sup>96</sup> Mandal (n 2) 106.

<sup>97</sup> The Protection of Women from Domestic Violence Act 2005.

<sup>98</sup> This point has also been raised in relation to the continued availability of other forms of unilateral no-fault divorce available to Muslim men, such as *talaq-i-ahsan* and *talaq-i-hasan*. See Saumya Saxena, ‘The Triple Talaq Bill: A Mediocre Legislation and a Missed Opportunity’ (*The Indian Express*, 9 January 2018) <<https://indianexpress.com/article/gender/the-triple-talaq-bill-a-mediocre-legislation-and-a-missed-opportunity-5017088/>> accessed 5 October 2021.

a justification for singling it out and this, in turn makes its criminalisation arbitrary.

Moreover, as previously discussed, the existence of a harmful effect may be a gateway to criminalisation, but it is by no means a sufficient ground for it. Therefore, even if the distressing effect of triple *talaq* is accepted as a gateway ‘harm’, the criminalisation of triple *talaq* would have to fulfil certain other criteria, such as ‘wrongfulness’ or ‘blameworthiness’ to be justified.<sup>99</sup>

## 2. *Criminal Law and the Enforcement of Morality*

The criminalisation of triple *talaq* may be justified on the ground that criminal law is a means of enforcing some form of morality- the public morality of Patrick Devlin, the true or positive morality espoused by Moore, the public wrong standard theorised by Duff, or the constitutionalism standard of Malcolm Thorburn, especially as constitutional morality in India.

### a) Public morality

Lord Devlin asserted that society has a right to protect, through criminal law, aspects of private morality without which the survival of society would be threatened. Such aspects would include acts viewed as profoundly disgusting by members of society. He asserted that the separation of crime and sin is futile because all ‘social norms’ that the criminal law seeks to uphold, are drawn from religious morality.<sup>100</sup> However, as H.L.A. Hart argued in response, it is unclear whether the social norms of society *are*, in fact, drawn from religious or public morality, or that the acceptance of certain norms as the ‘positive’ morality of a society *should*, indeed, be the reason they are enforced through criminal law.<sup>101</sup>

In any case, it is unclear whether the majority community in India finds the practice of triple *talaq* so intensely immoral as to threaten the survival of society. This is especially because the practice does not affect the society as such, but only Muslim women. However, even if it is assumed that such a public morality existed, how would it be gauged? James Fitzjames Stephen, when debating Mill’s ‘harm principle’, argued that in a legal system that is ‘good’, the legislature may enact a ‘morally intolerant’ legislation.<sup>102</sup> If it is criminal legislation, such moral intolerance would “gratify the feeling of hatred... which

<sup>99</sup> Herring (n 95) 17.

<sup>100</sup> P Devlin, *The Enforcement of Morals* (OUP 1965) 7-9.

<sup>101</sup> HLA Hart, *Law, Liberty and Morality* (Stanford 1963) 22-24.

<sup>102</sup> JF Stephen, *Liberty, Equality, Fraternity* (Indianapolis 1993) 96.

the contemplation of such conduct excites in healthily constituted minds".<sup>103</sup> Grounded on this, an argument might be made to the effect that a properly elected legislature may be the custodian of public morality, and in that role, seek retribution through criminal sanction. However, such an argument would not even satisfy Stephen's own conditions. The 'hatred' or 'vengeance' of which he spoke was not directed towards people or communities, but towards the act, or conduct in question. And there is nothing to suggest that such a feeling of hatred exists towards triple *talaq* per se. Besides, it has been argued that Stephen was a critical legal moralist, meaning that he appealed not only to public morality but to a more universal morality not given to majoritarian tendencies.<sup>104</sup> Most importantly, however, the actions of the legislature, even when correct in form, cannot serve as the moral justification for criminalisation. Not only would it be a self-fulfilling principle, but also its consequences in this instance, would be too perverse to justify. It would result in the application of majoritarian morality, through a legislature openly hostile to minorities,<sup>105</sup> to justify the criminalisation of a legislation that exclusively governs a minority community in a society constitutionally committed to secular values.<sup>106</sup> For these reasons, the enforcement of morals, in the manner proposed by Devlin or Stephen, cannot serve as an appropriate ground to justify the criminalisation of triple *talaq*.

## b) Public wrong

Since Devlin, legal moralism has seen considerable revision, and is now considered one of the most acceptable theories of criminalisation, though it is not without its problems.<sup>107</sup> Moore, for example, has argued that the retributivist punishment of criminal law must be limited to those who are culpable (by intent) for a moral wrongdoing, recognised by law.<sup>108</sup> Unlike Devlin, Moore does not propose that criminal law enforce the morality of the public or of the majority, but that it enforce "morality as such",<sup>109</sup> referring to moral norms "telling us what we are obligated to do or not to do."<sup>110</sup> While Moore proposes positive retribution for the transgression of moral norms through criminal sanction, Duff offers a negative constraint on criminalisation- that conduct which is not 'wrongful' may not be criminalised.<sup>111</sup> He presents a more

<sup>103</sup> *ibid* 98.

<sup>104</sup> Duff (n 82) 54.

<sup>105</sup> The 2019 Act was passed by a Legislature comprising an overwhelming majority of a political party that is widely perceived as being anti-minority, with a record of allegedly orchestrating communal riots, the demolition of mosques, the murder of missionaries, and so on.

<sup>106</sup> Constitution, Preamble.

<sup>107</sup> See generally, Duff, Farmer, Marshall, Renzo and Tadros (n 84).

<sup>108</sup> Moore, *Placing Blame: A Theory of the Criminal Law* (OUP 2010) 660-661.

<sup>109</sup> M Thorburn, 'Constitutionalism and the Limits of Criminal Law' in Duff, Farmer et al (eds), *The Structure of Criminal Law* (OUP 2011) 85, 91.

<sup>110</sup> Moore (n 108) 660.

<sup>111</sup> Duff (n 82) 56.

workable standard for criminalisation- ‘public wrongs’. The conduct, to be worthy of criminalisation, must be ‘wrongful’ in the sense of a transgression of social norms substantial enough to merit coercive State action.<sup>112</sup> This largely overlaps with the category of offences termed *mala in se* (wrong in itself), and may best be defined as actions which “violate a value upon which the civic enterprise depends, and display a lack of the respect and concern that all citizens owe to each other as fellow citizens.”<sup>113</sup> The conduct must be more than just a private wrong that can be dealt with through civil law. This does not automatically exclude interpersonal conduct from the ambit of criminal law, as ‘public’ and ‘private’ are not defined by the location of the conduct, or even the relationship of the parties.<sup>114</sup> Duff and Sandra Marshall argued that wrongs would be ‘public’ when they damage important legal rights, which the State has an interest in upholding.<sup>115</sup> Grant Lamond, similarly, argued that the focus of criminal law should be the behaviour which the community would have an interest in punishing.<sup>116</sup> While the two arguments seem to be approaching the subject from different starting points,<sup>117</sup> conceptually, they converge. Both approaches define ‘public’ in terms of the role of Criminal law in protecting rights or matters that concern the community at large because they are essential to preserving and maintaining the good of the community and its members, and indeed, in maintaining the “civil order” of the polity.<sup>118</sup> It is to this standard that, in my opinion, Chandrachud J. referred when speaking of conduct that poses a “threat to the stability and security of society”.<sup>119</sup>

Does the pronouncement of triple *talaq* meet these criteria? I believe that it does not, even if it is assumed that its pronouncement had not already been declared void. Drawing from the discussion in II.C and II.D, triple *talaq* may be considered a ‘wrong’ in two senses: first, in consonance with the wrong identified by the Supreme Court and the 2019 Act- its very nature and character, its incompatibility with the preferred form of *talaq* in the *Quran* and the *Shariat*; or second, its impact, or the devastating consequences it may have for the repudiated woman. If, as it seems from the Preamble of the 2019 Act,<sup>120</sup> the Legislature sought to criminalise the first ‘wrong’, the criminalisation of triple *talaq* is entirely baseless. I have previously argued (II.C and II.D) that,

<sup>112</sup> Husak, ‘The Criminal Law as Last Resort’ (2004) 24 *Oxford Journal of Legal Studies* 207.

<sup>113</sup> Duff, ‘Towards a Theory of Criminal Law?’ (2010) 84 *Proceedings of the Aristotelian Society, Supplementary Volumes* 1, 21.

<sup>114</sup> Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Portland 2007) 141-142.

<sup>115</sup> Duff and Marshall (n 91).

<sup>116</sup> G Lamond, ‘What is a Crime?’ (2007) 27 *Oxford Journal of Legal Studies* 609.

<sup>117</sup> Herring (n 95) 18.

<sup>118</sup> Duff (n 82) 230-231.

<sup>119</sup> *Navtej Johar* (n 83) [592].

<sup>120</sup> 2019 Act, Preamble: “An Act to protect the rights of married Muslim women and to prohibit divorce by pronouncing *talaq* by their husbands and to provide for matters connected therewith or incidental thereto.”

assessed in light of the secular principles of the Constitution of India, there is nothing inherently wrong with triple *talaq*. Any perceived wrong is not of a nature that would ‘violate a value upon which the civic exercise depends’, and in that sense is private, rather than public. Likewise, there is nothing in the Constitution of India to suggest that a form or method of divorce must be based on fault or mutual consent or must provide scope for reconciliation. However, even if this were the constitutionally (instead of *Quranically*) preferred form of divorce, non-compliance would not amount to a transgression grave enough to merit coercive, liberty-limiting action through criminal law. It would, at best, be liable to redressal in civil or constitutional law, as it was in *Shayara Bano*.<sup>121</sup> This was also one of the arguments made by opposition parties when the Muslim Women (Protection of Rights on Marriage) Bill, 2019 was being debated in the Legislature.<sup>122</sup>

On the other hand, if the ‘wrong’ sought to be addressed was the *impact* of triple *talaq*, criminalisation was an unjustified and inappropriate policy choice because the pronouncement of triple *talaq* can no longer dissolve a marriage and give rise to the potentially harmful consequences of divorce (III.A.1). Moreover, even if such consequences did ensue, criminalisation would be unwarranted. Triple *talaq* by its nature does not qualify the standard of a wrong that deserves public censorship and punitively enforced accountability.<sup>123</sup> Criminalisation of the practice of triple *talaq* (which, I am assuming for the moment, is not void), would also not prevent a Muslim man from repudiating his wife without any obligation to support her or her children. He could still unilaterally, and without fault, repudiate her through other forms of *talaq*. Furthermore, deterring a Muslim man from practising triple *talaq* would not deter him from *leaving* his wife, which, in fact, would be the cause of her vulnerability.<sup>124</sup> The appropriate way to address this potential ‘wrong’ (II.D) would be by imposing maintenance obligations on Muslim husbands automatically upon divorce, or/and by providing a State-sponsored safety net which would allow women to meet their financial and material needs, as well as those of their children, whether or not their husbands supported them.

Triple *talaq*, therefore, does not meet the standard of moral culpability or ‘wrongfulness’ worthy of criminal sanction. It would also not qualify the higher standard of a ‘public wrong’ that must be addressed through criminal

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<sup>121</sup> *Shayara Bano* (n 12).

<sup>122</sup> Express Web Desk, ‘Amidst Intense Debate, Lok Sabha Clears Triple Talaq Bill’ (*The Indian Express*, 25 July 2019) <<https://indianexpress.com/article/india/triple-talaq-bill-lok-sabha-passed-ravi-shankar-prasad-5852101/>> accessed 10 July 2020.

<sup>123</sup> Duff (n 82) 333.

<sup>124</sup> A Neelakantan, ‘Triple Talaq: A Discrimination that will be a Hindrance’ (*The New Indian Express*, 25 August 2019) <<https://www.newindianexpress.com/magazine/voices/2019/aug/25/triple-talaq-a-discrimination-that-will-be-a-hindrance-2022861.html>> accessed 15 April 2020.

law to further the overall ‘good’ of the community. The criminalisation of triple *talaq* cannot, then, be justified against the ‘public wrong’ standard.

c) Constitutional morality:

The use of ‘morality’ to justify criminalisation must be contextualised through the development of the standard of ‘constitutional morality’ by the Supreme Court of India. Its conclusive decision in *Navtej Singh Johar v Union of India*,<sup>125</sup> which decriminalised sexual acts ‘against the order of nature’, firmly established the principle that the infringement of fundamental rights in India (including through criminalisation) must be justified against the standard of Constitutional morality and not public morality.<sup>126</sup> The judgement developed constitutional morality in specific contrast to public morality. The concept draws from the guarantee of minimum rights and the recognition of individual autonomy, privacy, and dignity.<sup>127</sup> Meant to enforce the transformative vision of the Constitution, such morality overrides majoritarian concerns.<sup>128</sup>

To some extent, this standard overlaps with the Constitutional limits to criminal law identified by Thorburn, although in the Indian context, its application has been broader, covering not just criminal law but *any* infringement of fundamental rights. He argues that a liberal Constitution seeks to set up a structure within which individuals may pursue their self-determined goals. In such a system, the criminal law punishes those who seek to subvert “law’s neutral ordering with their own preferred arrangements.” The ‘offence’ is against the system of equality and freedom rather than an individual.<sup>129</sup> Constitutional morality is also concerned with values that form the essence of the Constitution, of the order that it seeks to create for the citizens governed by it. It seeks to punish acts that would threaten such an order, and in that sense, occupies the same conceptual terrain.

Assessed on the anvil on Constitutional morality, triple *talaq*, when stripped of its power to repudiate marriage, does not violate any fundamental right or principle of the Constitution of India, or the order that it seeks to create. While it could still cause divorce, triple *talaq* was discriminatory, but even this, by itself, would not be a sufficient ground to criminalise the practice, because it did not *threaten* the Constitutional order. It went against one of the principles of the Constitution (equality) and could effectively have been remedied (as

<sup>125</sup> *Navtej Johar* (n 83).

<sup>126</sup> *Navtej Johar* (n 83) [606, 607] It should be noted that constitutional morality has expressly been used by Courts only in decriminalising conduct. It is unclear, therefore, whether it is even something that can or ought to be enforced through criminal law.

<sup>127</sup> *Navtej Johar* (n 83) [600].

<sup>128</sup> *Navtej Johar* (n 83) [599].

<sup>129</sup> Thorburn (n 109) 100.

it was, albeit for different reasons) by declaring it unconstitutional and void. Therefore, the criminalisation of triple *talaq* through the 2019 Act cannot be justified as appropriate enforcement of Constitutional morality through criminal law.

### 3. *Triple Talaq as Mala Prohibita*

It has been demonstrated in the foregoing sections that triple *talaq* does not qualify the threshold of moral blameworthiness or wrongfulness necessary for criminalisation, whatever moral lens one might adopt. In other words, the criminalisation of triple *talaq* cannot be justified as a *malum in se* type offence. Offences that are not *mala in se* (III.A.2) may be *mala prohibita* (conduct which is not wrongful without or independent of the law).<sup>130</sup> *Mala prohibita* offences have been justified as exceptions to, or weaker forms of moral restraints on the power of the state to criminalise conduct. For instance, Victor Tadros' utilitarian theory claimed that conduct which is not inherently wrong may legitimately be criminalised if such criminalisation "prevents a great deal of harm, and does not cause much harm."<sup>131</sup> This claim has been accepted by legal moralists such as Duff as a 'weak constraint' on criminalisation,<sup>132</sup> in that sense, justifying in principle the existence of *malum prohibitum* type offences.<sup>133</sup> However, this acceptance is subject to the condition that there be 'good reasons' for the criminalisation of such conduct, for the criminalisation itself does not make it morally 'wrong'.<sup>134</sup> Tadros' own reservations about the vagueness of terms such as 'harm',<sup>135</sup> which undoubtedly extend also to 'good reasons', and the difficulties of empirically establishing such a balance,<sup>136</sup> I believe, makes the application of this preventive theory highly subjective. The examples used by Tadros, such as preventing the destruction of the world, or stoppage of desperately needed foreign aid, set up scenarios in which even the strictest legal moralist would concede that "where utilitarian stakes are sufficiently high, any principle may be infringed."<sup>137</sup>

For the purposes of this paper, then, the question is whether the criminalisation of triple *talaq* meets such high utilitarian stakes. I believe it does not. In fact, it has no utilitarian value whatsoever. As discussed in III.A.1,

<sup>130</sup> S Dimock, 'Contractarian Criminal Law Theory and Mala Prohibita Offences' in Duff, Farmer *et al* (eds) *Criminalization: The Political Morality of Criminal Law* (OUP 2014) 151.

<sup>131</sup> Tadros, *Wrongs and Crimes* (OUP 2016) 98.

<sup>132</sup> Duff (n 82) 58.

<sup>133</sup> SP Green, 'Legal Moralism, Over inclusive Offences, and the Problem of Wrongful Conflation' (2020) 14 *Criminal Law and Philosophy* 417, 421.

<sup>134</sup> Duff (n 82) 58.

<sup>135</sup> Tadros (n 131) 93.

<sup>136</sup> *ibid.*

<sup>137</sup> Husak, 'Wrongs, Crimes and Criminalisation' (2019) 13 *Criminal Law and Philosophy* 393, 398.

a consequentialist assessment of triple *talaq* shows that it has *no* effect that can be identified as unique or particularly harmful, and especially not the monumental effect that Tadros envisages for *mala prohibita* offences. In fact, the criminalisation of triple *talaq* would, as I shall show in III.B., cause active harm, tilting the scales further against criminalisation.

A less onerous standard for creating *mala prohibita* offences was offered by Susan Dimock from a contractarian perspective. She argues that the social contract offers new possibilities of cooperation and interaction which can contribute to human flourishing. Therefore, “institutions which serve a common good, and regulations that coordinate conduct in mutually beneficial ways can be reinforced using criminal laws.”<sup>138</sup> Like the utilitarian view discussed above, the contractarian perspective also seeks to justify such offences for their preventive value, which would help maintain the legitimate expectations of parties involved in any such cooperative exercise.<sup>139</sup>

Does the criminalisation of triple *talaq* serve such a purpose? It could be argued that if marriage is an iteration of an exercise in social cooperation that contributes to human flourishing (I accept, *arguendo*, that it can be), then the arbitrary and unilateral ending of marriage without fault, ought to be deterred. However, such an argument does not withstand deeper scrutiny. For one, the premise that a practise ought to be deterred does not lead to the conclusion that the deterrence should be achieved through criminal law.<sup>140</sup> Secondly, and more particularly, the contractarian theory of criminalisation requires a law that would have been agreed upon *ex-ante* by every contracting individual on the belief that it would result in a net benefit to them.<sup>141</sup> In the absence of an inherent wrongfulness standard, *mala prohibita* offences must consider the regulatory background within which they were adopted. One important aspect of this consideration is that the benefits and burdens of the offence must be (and must be seen to be) distributed fairly,<sup>142</sup> failing which it cannot reasonably be assumed that each contracting individual would have agreed to the particular proscription. Even if it is assumed that the purpose of the criminalisation of triple *talaq* would lead to stabilising expectations from marriage, it would do so only with respect to Muslim marriages, as affected by *talaq-i-biddat*, while allowing other forms of destabilising conduct, such as desertion<sup>143</sup> or cheating

<sup>138</sup> Dimock (n 130) 168.

<sup>139</sup> *ibid* 177.

<sup>140</sup> In *Joseph Shine* (n 70), the Court held, in no uncertain terms, that the wrong, if any, of adultery was private in nature and did not deserve to be criminalised, even though it might have a destabilising effect on marriage. [57-58].

<sup>141</sup> Dimock (n 130) 177.

<sup>142</sup> *ibid* 181.

<sup>143</sup> S Varadarajan, ‘Why Just Muslims, Let’s Criminalise the Abandonment of All Wives’ (*The Wire*, 27 December 2018) <<https://thewire.in/law/triple-talaq-why-just-muslims-lets-criminalise-the-abandonment-of-all-wives>> accessed 17 October 2020.

unaddressed. This, in addition to the fact that the law would specifically target Muslim men, strongly indicates that the benefits and burdens of the offence are not equally distributed. Therefore, even from a contractarian perspective, the criminalisation of triple *talaq* cannot be justified as *mala prohibita*.

## B. Excessive and Counterproductive use of Criminalisation

I have argued in III.A. that the criminalisation of triple *talaq* in the 2019 Act lacks theoretical rationale and justification. In this section, I shall demonstrate that the 2019 Act, in addition, is disproportionate in its sentencing, gives excessive coercive powers to the State, and would only cause further harm to Muslim women.

The discussion on criminalisation in III.A was premised on the ground that criminal law requires special justification because of the very nature of criminal sanction, and because regulation of criminal conduct involves the use of coercive powers of prevention and punishment which threaten the liberty of the individual. The principle of proportionality of punishment- that the sentence prescribed for an offence should be legitimately imposed,<sup>144</sup> and should reflect the gravity of the offence- is a foundational requirement of ‘fairness’ in the application of criminal sanction.<sup>145</sup> The principle draws from Bentham’s utilitarian argument that all punishment is inherently evil, and can be justified only if it excludes some greater evil.<sup>146</sup>

Without entering the philosophical debate on punishment, I argue that the sentence for triple *talaq* (imprisonment for upto 3 years and fine)<sup>147</sup> is excessively harsh, both objectively and relatively. It is objectively excessive because there is no real ‘wrong’ that is being punished (III.A.2). It is subjectively excessive because other, arguably graver, offences carry smaller sentences. Consider, for instance, that the offence of rioting, which is demonstrably a public wrong, being violent and disruptive, and likely to cause both bodily and property damage, is punishable by imprisonment for upto 2 years or fine or both.<sup>148</sup> Similarly, causing death by negligence is punishable by imprisonment for upto 2 years,<sup>149</sup> even though it literally results in the loss of life. Therefore, there does not appear to be any determining principle behind the punishment prescribed for pronouncing triple *talaq*. In light of the anti-Muslim bias of the

<sup>144</sup> Thorburn, ‘Proportionate Sentencing and the Rule of Law’ in Zedner and Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 269.

<sup>145</sup> A Hirsch, ‘Proportionality in the Philosophy of Punishment’ (1992) 16 *Crime and Justice* 55.

<sup>146</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation* (OUP 1907) ch 13.

<sup>147</sup> 2019 Act, s 4.

<sup>148</sup> Indian Penal Code 1860, s 147 (IPC)

<sup>149</sup> IPC, s 304A.

Hindu-nationalist party in power (see below), the rationale behind such excessive sentencing becomes even more suspect.

Yet another sense in which the 2019 Act gives disproportionate coercive powers to the State is that the pronouncement of triple *talaq* is a cognizable and non-bailable offence,<sup>150</sup> meaning that the police may arrest a Muslim man for the ‘offence’ of pronouncing triple *talaq*, without a warrant.<sup>151</sup> Such power may be exercised, moreover, not just on the information given by a Muslim woman herself, but ‘by any person related to her by blood or marriage.’<sup>152</sup> Having been arrested, furthermore, a Muslim man cannot automatically be released on bail. He must surrender his liberty while he applies for bail, produces sureties and waits for the Magistrate to hear his wife and determine whether there are reasonable grounds to release him on bail.<sup>153</sup>

It might be argued that the extent of coercive powers given to the State can be justified in terms of the likely deterrent effect of the sentence. The High Court of Delhi in *Nadeem Khan v Union of India*,<sup>154</sup> recently held that merely because triple *talaq* was declared to be illegal and void, does not mean that the Parliament *could* not have criminalised it. The division bench observed that the purpose of criminalisation was to deter the practice. The question, however, ought not to be whether the Parliament could have criminalised it, but whether it *should* have done so. If the rationale of the High Court is accepted, then Indian jurisprudence on criminalisation would amount to nothing more than ‘the Parliament wants to prevent this conduct’. As is obvious, this would be a circular and self-fulfilling principle of criminalisation. Surely, in a democratic society that values individual liberty, it is important to ask *why* the Parliament wants to prevent the target conduct, and whether it is legitimate for the Parliament to do so through the coercive functions of criminal law. In other words, is deterrence or prevention (assuming it can be achieved) a good enough reason to criminalise conduct? Edwards and Simester, speaking of the moral force of preventive laws, argue that prevention, like harm, is a good reason for criminalisation. However, the conduct being prevented must, in some sense be wrongful,<sup>155</sup> which, as previously demonstrated, is not the case with triple *talaq* (III.A.2 and III.A.3). The criminalisation of conduct that is not demonstrably wrongful can, in fact, lead to the criminal law losing its moral force,<sup>156</sup> and should be avoided.

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<sup>150</sup> 2019 Act, s 7(a).

<sup>151</sup> CrPC 1973, s 2(c).

<sup>152</sup> 2019 Act, s 7(a).

<sup>153</sup> 2019 Act, s 7(c).

<sup>154</sup> 2020 SCC OnLine Del 1336.

<sup>155</sup> Edwards and Simester, ‘Prevention with a Moral Voice’ in Duff and du Bois-Pedain (eds) *Liberal Criminal Theory: Essays for Andreas Von Hirsch* (Hart Publishing 2004) 43.

<sup>156</sup> *ibid* 48.

Therefore, deterrence does not in itself justify criminalisation. Even if it is assumed that coercive sanction and severe punishment *could* deter behaviour, I argue that the deterrence of the pronouncement of triple *talaq* would make no difference to the predicament of Muslim women. Muslim men could still divorce their wives irrevocably, unilaterally and without fault, through other forms of *talaq*, and thereby end the marriage without any obligation to support her and her children (III.A.2).

If anything, the 2019 Act, purportedly enacted to ‘protect the rights of Muslim women’, is likely to cause further harm by criminalising triple *talaq*. One obvious consequence of incarcerating a Muslim man for pronouncing triple *talaq* is that his capacity to remain gainfully employed, and thereby pay for the maintenance of his wife and children, is severely damaged, if not destroyed. In the absence of a State-sponsored safety net, this exacerbates the predicament of the repudiated Muslim woman and her children.

Another, more serious, consequence of this criminalisation is that it exposes an already vulnerable minority to further coercive control by the State. Muslims have always been targeted in the enforcement of anti-terror legislations,<sup>157</sup> and have more recently been caught in the net of anti-cow slaughter legislation which affects them disproportionately due to their food and livelihood choices.<sup>158</sup> There is, in addition, a concerted effort to prevent conversions to Islam or the immigration of Muslims into India. The relatively wide-spread conspiratorial narrative of ‘love-jihad’ which suggests that there is an organised movement in the Muslim community to marry non-Muslim women and convert them to Islam, was first validated by the High Court of Kerala in *Asokan KM v Supt of Police*. In this case, the honourable judges raised doubts about the genuineness of Akhila’s conversion from Hinduism to Islam (asfter which her name was HAdiya), as well as on her marriage to Shafin Jahan, a Muslim man. Though this judgement was overruled by the Supreme Court of India,<sup>159</sup> the narrative has found legitimacy in the Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020.<sup>160</sup> This ordinance, promulgated in the northern Indian state of Uttar Pradesh (ruled by the same Hindu-nationalist party that forms the majority of the national government of India), seeks to prohibit inter-religious marriages ‘for the sole purpose of conversion’, and criminalises ‘conversion by marriage’. While the ordinance itself does not specify conversion to Islam, the narrative surrounding its promulgation, as well as its subsequent application, has clearly targeted Muslim men seeking

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<sup>157</sup> See A Calhan, GP Conroy *et al*, ‘Colonial Continuities: Human Rights, Terrorism and Security Laws in India’ (2006) 20 Columbia Journal of Asian Law 93.

<sup>158</sup> See R Sarkar and A Sarkar, ‘Sacred Slaughter: An Analysis of Historical, Communal, and Constitutional Aspects of Beef Bans in India’ (20014) 17 Politics, Religion and Ideology 329.

<sup>159</sup> *Shafin Jahan v KM Asokan* (2018) 16 SCC 368 : AIR 2018 SC 1933.

<sup>160</sup> The Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance 2020, ss. 3 and 6.

to marry Hindu women.<sup>161</sup> Similarly, the Citizenship (Amendment) Act, 2019 underscores the second-class status of Muslim identity in India, by allowing undocumented immigrants from neighbouring countries to apply for Indian citizenship provided they are *not* Muslim,<sup>162</sup> In this politically divisive, anti-minority context of India,<sup>163</sup> therefore, it is not difficult to see the 2019 Act being operationalised as a tool to secure and extend the incarceration of Muslim men.<sup>164</sup>

At this point, it would be valuable to consider, briefly, whether constitutional rights-based jurisprudence can serve as a guide to this discussion on criminalisation. In *KS Puttaswamy v Union of India (Puttaswamy II)*,<sup>165</sup> the Supreme Court of India laid down the criteria that must be met by a measure that seeks to restrict a right:

...a measure restricting a right must, first, serve a legitimate goal (legitimate goal stage); it must, secondly, be a suitable means of furthering this goal (suitability or rational connection stage); thirdly, there must not be any less restrictive but equally effective alternative (necessity stage); and fourthly, the measure must not have a disproportionate impact on the right-holder (balancing stage).

In my opinion, this criterion can and should inform decisions on (de)criminalisation because criminal law (as previously discussed in III.A and in this section), by its very nature, restricts the freedom and autonomy of the individual, and can potentially deprive them of their right to personal liberty. The decision to criminalise the pronouncement of triple *talaq* does restrict, on the face of it, the freedom of speech and expression protected by Article

<sup>161</sup> Arundhati Katju, 'The Hindu Nationalist Myth of Love Jihad: A New Law Makes it Harder for Indians to Marry Whom they Choose' (*Foreign Affairs*, 23 December 2020) <[https://www.foreignaffairs.com/articles/india/2020-12-23/hindu-nationalist-myth-love-jihad?utm\\_medium=promo\\_email&utm\\_source=lo\\_flows&utm\\_campaign=registered\\_user\\_welcome&utm\\_term=email\\_1&utm\\_content=20211005](https://www.foreignaffairs.com/articles/india/2020-12-23/hindu-nationalist-myth-love-jihad?utm_medium=promo_email&utm_source=lo_flows&utm_campaign=registered_user_welcome&utm_term=email_1&utm_content=20211005)> accessed 5 October 2021.

<sup>162</sup> Citizenship (Amendment) Act 2019, s. 2: "In the Citizenship Act 1955 (hereinafter referred to as the principal Act), in section 2, in sub-section (1), in clause (b), the following proviso shall be inserted, namely:—

'Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made there under, shall not be treated as illegal migrant for the purposes of this Act;'"

<sup>163</sup> J Gettleman, K. Schultz *et al.*, 'Under Modi, a Hindu Nationalist Surge Has Further Divided India' (*The New York Times*, 11 April 2019) <<https://www.nytimes.com/2019/04/11/world/asia/modi-india-elections.html>> accessed on 14 April 2020.

<sup>164</sup> Agnes (n 63).

<sup>165</sup> *KS Puttaswamy v Union of India*, (2019) 1 SCC 1 [152].

19(1)(a) and threatens, through arrest and imprisonment, the personal liberty of Muslim men who make such a pronouncement. This is not to suggest that these rights or freedoms are absolute, but that they *are* fundamental rights, and their restriction ought to be justified. So, how does the criminalisation of triple *talaq* fare against the criteria for valid restriction of rights?

The detailed discussion in III.A.1 and III.A.2 goes a long way in showing that the 2019 Act does not have a legitimate goal (since the pronouncement of triple *talaq* no longer poses a unique harm and does not qualify as a public wrong). The discussion in III.B so far has also shown that deterrence is not, in and by itself, a legitimate goal. The only possible legitimate goal of criminalising triple *talaq* might be to prevent and punish the accompanying harms of pronouncing triple *talaq* (such as domestic abuse, the loss of the matrimonial home), or to prevent the destitution of Muslim women that might follow from triple *talaq*. As regards them, even if it is accepted that they are legitimate, criminalising the pronouncement of triple *talaq* is not a suitable way of furthering them. As previously discussed, the accompanying harms of triple *talaq* are not unique to this form of divorce but could potentially result from any divorce. Criminalising triple *talaq*, therefore, would do nothing to protect Muslim women from these harms. Similarly, the destitution faced by Muslim women on divorce is not attributable to triple *talaq* (as it might follow from any form of divorce or abandonment) but to the inability of Muslim women to enforce maintenance obligations through Court, and the absence of a State-sponsored safety net. It is these underlying causes, then, that the State's should seek to address, and criminalising triple *talaq* has no rational nexus with these potential aims. Thirdly, since the decision of the Supreme Court had already declared triple *talaq* void, enforcing the decision of the Court through increased awareness within the Muslim community and taking the representatives of the community on board to implement the ban would have been a more effective and less restrictive way of achieving the aim of preventing the consequences of triple *talaq*. Therefore, criminalising triple *talaq* was not a necessary step. And finally, since the 2019 Act specifically targets Muslim men, increasing their carceral vulnerability and prescribing disproportionate punishment for the pronouncement of triple *talaq*, it also fails to fulfil the balancing requirement laid down by the Supreme Court of India.

In light of this analysis, therefore, the criminalisation of triple *talaq* through the 2019 Act is unprincipled, excessive, and likely to be counterproductive.

## V. CONCLUSION

Through this paper, I have provided a multi-pronged critique of the criminalisation of triple *talaq*. I argued that the judgement of the Supreme

Court, and in particular, its misidentification of the ‘wrong’ of triple *talaq* in *Shayara Bano* was not only problematic in itself, it also paved the way for the incoherent and coercive 2019 Act.

The 2019 Act, which has been the focus of my critique, seeks to criminalise the practice of triple *talaq* even though it has already been declared void by the Supreme Court. As the pronouncement of triple *talaq* cannot repudiate a marriage, it is wholly unclear *what* the Act is criminalising. In the absence of a clear object of criminalisation, the 2019 Act is arbitrary. Furthermore, the invocation of criminal sanction against triple *talaq*, being devoid of any theoretical rationale or foundation, is unjustified. Stripped of its power to effect divorce, the *talaq* utterance can no longer cause harm that would merit criminalisation and is excluded, at the threshold, by the ‘harm’ principle. Assessed, *arguendo*, against legal moralism, it was found that the criminalisation of triple *talaq* does not meet the more rigorous and universal moral standard of ‘public wrong’ as well as the specifically Indian standard of Constitutional morality. The criminalisation of the *talaq* utterance was then considered as potentially a *malum prohibitum* type offence but could not meet the high stakes imposed on such offences by utilitarians, nor could it be justified against the contractarian rationale of maintaining the cooperative social exercise through prevention.

Given the recent judgement of the Delhi High Court on the subject, I engaged also with deterrence as a justification for criminalisation. However, it was rejected in principle, for failing to meet a basic wrongfulness standard. It was also rejected from a consequentialist perspective, for failing to prevent the ‘harm’ sought to be addressed.

Finally, I argued that in addition to being unprincipled, the 2019 Act is against the interests of the Muslim community in general, and of Muslim women in particular, especially given the obvious anti-Muslim bias of the Hindu nationalist party in power which has enacted it. It is plainly an exercise in othering through criminalisation, which increases the carceral vulnerability of Muslim men. Based on these arguments, I demonstrated that the 2019 Act, which threatens both the right to freedom of speech and expression and the personal liberty of Muslim men who say the words ‘*talaq, talaq, talaq*’ to their wives, does not meet the Supreme Court of India’s standards for the legitimate restriction of fundamental rights as laid down in *Puttaswamy II*. For these reasons, the criminalisation of the triple *talaq* through the 2019 Act requires urgent reconsideration.