
CRIMINOLOGY OF TRIPLE TALAQ: CRITICAL APPRAISAL THE INDIAN CRIMINALIZATION OF IMMEDIATE TRIPLE TALAQ

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ABSTRACT

The case for the criminalization of instant triple talaq by the Muslim Women (Protection of Rights on Marriage) Act, 2019¹ is one of the most contentious legal reforms in modern India. Although the objective of this legislation is to prevent arbitrary divorce of Muslim women in the interest of gender justice² It has also triggered heated debates amongst criminologists, constitutional law experts, social scientists and human rights activists on whether or not criminal law is suited as a tool for regulating matrimonial relationships. Not only this is not merely a personal law issue, but given that the State legislated to legislate a civil wrong within matrimony into a cognizable and non-bailable 'criminal' offence punishable with imprisonment³ simple for three years. The effect of this legislative move is to throw into relief some core issues here. They include the philosophy behind punishment⁴ What deterrent value pain has/Cass Sunstein's arguments with Fernandes: what do we want the family courts to do/keep apart?

Drawing on classical, positivist, feminist, conflict, labeling and restorative justice theories⁵ This paper critiques the process of criminalizing triple talaq through criminological perspectives. It examines whether the incarceration of Muslim spouses is an effective measure for safeguarding women, or does it lead to unintended socio-economic consequences for victims and their families. It also explores the constitutional validity of criminalisation under Articles 14, 15, 21 and 25⁶ of the Constitution of India and examines important and landmark judicial pronouncements predominantly *Shayara Bano v. Union of India*⁷. A comparative legal analysis between even Muslim-

¹ The Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019, India Code (2019).

² INDIA CONST. arts. 14,15,21.

³ The Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019, section 4 (India).

⁴ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans, Bobbs - Merrill 1963) (1764).

⁵ FRANK P. WILLIAMS III & MARILYN D. MCGSHANE, CRIMINOLOGICAL THEORY (8th ed. 2018).

⁶ INDIA CONST. Arts. 14,15,21 & 25.

⁷ *Shayara Bano v. Union of India*, (2017) 9. S.c.c 1 (India).

majority jurisdictions⁸ would show that most of them abolished instant triple talaq many decades ago but very few opted for criminal sanctions.

It also concluded that while the ban on instant triple talaq was an important step towards achieving constitutional equality and dignity for Muslim women, the decision to make it a criminal offense is criminologically debatable. The study calls for more focus on civil remedies, economic rehabilitation, mediation and other restorative justice mechanisms in addition to legal deterrence. An optimal approach weaving together a gender justice work that also merits effective victim protection will probably be more successful in achieving the goals of the legislation than a purely punitive criminal sanction.

1. Introduction

Every legal system places married persons at the very centre because marriage is both a social institution and a legal relationship. Traditionally, under Islamic law marriage (Nikah), is seen as a civil contract conferring mutual rights and duties between husband and wife. Islamic law allows dissolution of marriage but places a restriction to use it as the last option, after genuine attempts of reconciliation. Historically, out of the known types of divorce, Talaq-e-Ahsan and Talaq-e-Hasan were interpreted to be endorsed modes, even accommodating time for reflection/mediation and reconciliation. On the other hand, Talaq-e-Biddat or triple talaq instantaneously gives the right to a Muslim husband to decide the marriage in one-go by saying "talaq" three times. This type of individual punishment is acknowledged as acceptable in certain schools of Sunni legal theory, but has been reviled for centuries as arbitrary, cruel and inconsistent with Qur'anic guidelines.

Despite sustained opposition to instant triple talaq from women's organizations, legal scholars and constitutional experts, it remained legally recognised in India for several decades. Many Muslim women were divorced abruptly through oral declarations, letters, phone calls, electronic messages, and even text messages. Those surrenders took away from women economic security, emotional stability and social standing⁹. These apprehensions eventually resulted in the first constitutional challenge to instant triple talaq before the Supreme Court which was *Shayara Bano v Union of India*.

⁸ Muslim Family Laws Ordinance, 1961 (Pak.); Code of Personal Status, 1956 (Tunis); Mudawana (Family Code), Law No. 70 - 03 (Marocco).

⁹ *Shayara Bano v. Union of India*, (2017) 9 SC 1.

In August 2017, the Supreme Court announced that instant triple talaq was unconstitutional and legally unenforceable on the basis that it breached constitutional principles of equality as well as failing to be protected under a minority rights essential religious practice claim. In the aftermath of the judgment, Parliament passed Muslim Women (Protection of Rights on Marriage) Act, 2019¹⁰, which accorded a non-bailable criminal offence to pronouncing instant triple talaq for up to five years.

The enactment was a historic departure from the setting of Indian criminal justice policy. Criminal law has traditionally stepped in¹¹ when activity harms the public sphere, where social order is threatened, or in violation of a "fundamental" interest of society. On the other hand, matrimonial disputes are usually resolved through civil remedies¹². This then begs the criminological question, why criminalize triple talaq whether or not there are violations of personal law and involving family relationships, should we even allow for recourse to be made by criminal law?

Criminology offers an appropriate lens of analysis¹³ because it does not only study criminal behaviour but also the process by which some behaviours are turned into crime. Modern criminology focuses on legislative policy, punishment and victim protection, rehabilitation and social control, as well as the effectiveness of criminal sanctions. In this light, the criminalization of triple talaq appears to be an instance of the growing ambit of criminal law into family relations.

In light of the above stated rationale, this study thus attempts to explore whether the criminalisation is instrumental in achieving deterrence and gender justice objectives by giving adequate protection to victims and with pursuit for social reform or may have unintended consequences resulting in obstruction of these objectives.

2. Research Methodology

The research follows a doctrinal and analytical approach¹⁴. The doctrinal element analyzes constitutional articles, legislation, legal rulings, and Islamic law principles. The key legal

¹⁰ The Muslim Women (Protection of Rights on Marriage) Act, 2019, section 3 - 7.

¹¹ CESARE BECCARIA, ON CRIMES AND PUNISHMENT 11- 18.

¹² H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1 - 27.

¹³ N.V. PARANJPE, CRIMINOLOGY AND PENOLOGY 25- 39.

¹⁴ M.P. JAIN, INDIAN CONSTITUTION LAW 45 - 52 (9th ed. 2023).

sources are the Constitution of India¹⁵, the Muslim Women (Protection of Rights on Marriage) Act, 2019¹⁶ and relevant personal law statutes including judgments from the Supreme Court and High Courts.

Other sources include criminology books, criminal law notes, Islamic law notes and other constitutional law material, sociology articles, feminist legal theory in cite to the research paper, Law Commission Reports¹⁷ those of India and the United Kingdom too; debates in Parliament (in relation to armed violence), international legal resources.

The focus of the study: Comparative legal analysis¹⁸ : A comparative legal analysis is undertaken to see how other Muslim majority jurisdictions function with regard to instant triple talaq. This research also draws upon some of the major criminological theories¹⁹ to assess whether criminalization would represent a viable legal response.

This is a qualitative study which seeks to show legal reasoning rather than an empirical statistical related investigation.

3. Historical Evolution of Triple Talaq

Divorce was known and had no therapeutic institutions during the times of Jahiliya in Arabia prior to Islam. Film: Men can unilaterally repeal wives, even several times causing severe burden to women. Islamic law attempted to regulate this capricious act²⁰ by adding procedural stipulations meant to keep marriage intact when possible.

The Qur'an advocates for efforts to reconcile disputes²¹ through family mediation before the divorce is finalized. It outlines waiting stages (iddat), modules for revocation, and the participation of arbitrators from both families. Thus again, divorce under Islam became a progressive measure rather than an immediate declaration.

Islamic scholars then identified three main types of talaq:

¹⁵ INDIA CONST. Arts. 14,15,21,& 25.

¹⁶ The Muslim Women (Protection of Rights on Marriage) Act, 2019.

¹⁷ LAW COMM'N OF INDIA, CONSULTATION PAPER ON REFORM OF FAMILY LAW (2018).

¹⁸ TAHIR MAHMOOD, MUSLIM LAW IN INDIA AND ABROAD 95 - 110.

¹⁹ N.V. PARANJPE, CRIMINOLOGY, CRIMINOLOGY AND PENOLOGY 41 - 58.

²⁰ ASAF A.A. FYZEE, OUTLINE OF MUHAMMADAN LAW 89 - 96 (5th ed. 2008).

²¹ Qur'an 2:228.

(a) Talaq-e-Ahsan²²

This is referred to as the most sanctioned method. The husband gives the talaq one time in tuhr and does not have sexual intercourse with his wife during that period of waiting. The option for reconciliation is open until the end of iddat.

(b) Talaq-e-Hasan²³

This practice, whereby talaq is pronounced over three consecutive periods of purity. But there are opportunities between each declaration, for atonement when pronouncing thy brother guilty.

(c) Talaq-e-Biddat²⁴

Immediate divorce or instant triple talaq where the husband pronounces talak thrice, either in one go or within a less than two hours period, has been practiced by some sects of Sunni law.

On the contrary to the first two modes, there is no direct reference of Talaq-e-Bidat in Qur'an²⁵. The majority opinion of Islamic scholars classify it as a [bid'ah] that was introduced approximately during the Umayyad era to facilitate administration rather than being religiously required. Classical jurists themselves often described it as sinful, while recognising its status in law.

As a result of this, a number of predominantly Muslim countries did away with or limited instant triple talaq²⁶ throughout the 20th century. In some countries like Egypt, Pakistan, Bangladesh, Tunisia and Morocco, Algeria or Jordan or Indonesia introduced procedural mechanisms that prevented the divorce being effective unless it occurred after registration with a government authority (as in UK) or be subject to reconciliation attempts.

But India, incomplete until the Supreme Court came in 2017 and ruled instant triple talaq unconstitutional under uncodified Muslim Personal Law.

²² MULLA, PRINCIPLES OF MOHAMMEDAN LAW, Section 311 (22d ed. 2017).

²³ Id. section 312.

²⁴ Id. section 313.

²⁵ Qur'an 2:229 - 230.

²⁶ Muslim Family Laws Ordinance, 1961(Pak.).

4. Triple Talaq under Islamic Jurisprudence

There is great diversity within Islamic jurisprudence (Fiqh)²⁷ with regard to divorce. However, the four major Sunni sects have different opinions on the legal implications of instant person tamale.

It would be morally deplorable but legally valid in the Hanafi school²⁸ for a man to pronounce divorce three times at once. The Shafi'i and Hanbali schools took nearly identical positions with minor variations.

In contrast, though, many modern Islamic legal scholars contend that multiple declarations made at once should only be counted as one revocable divorce because the Qur'an envisions the two-step (or even three or twelve step) process of divorcing someone rather than an instantaneous action.

Modern liberal scholars underline that the Prophet Muhammad specifically warned against random divorce²⁹, and also encouraged reconciliation. Many Ahadith reports alluded to his disapproval over being hasty in divorce.

Hence, the evolution of Islamic Jurisprudence clearly shows that militating against instant triple talaq is not just a constitutional or feminist development - there exists ample theological foundation within the Islamic legal tradition³⁰ itself for it.

5. Understanding Criminology: Concept and Scope

Criminology is a scientific study of crime, criminal behaviour, and the social response to crime (such as the criminal justice system). Criminal law may decide what is a crime and states the punishments for them, but criminology examines more than just definitions. It examines wider societal, political, economic and cultural determinants of criminalisation, as well as whether or not criminal sanctions are effective in deterrence, reducing crime and/or creating negative externalities. Modern criminology is an interdisciplinary field³¹ in both the behavioral and social sciences, focusing specifically on the psychology of crime. It utilizes elements from

²⁷ ASAF A.A. FYZEE, OUTLINES OF MUHAMMDAN LAW 97- 104 (5th ed. 2008).

²⁸ MULLA, PRINCIPLES OF MUHAMMEDAN LAW section 311 - 313 (22d. ed. 2017).

²⁹ Sahih al - Bukhari, Book of Divorce (Kitab al - Talaq).

³⁰ Qur'an 4:35.

³¹ LARRY J. SIEGEL, CRIMINOLOGY: THE CORE 1- 12(7th ed. 2018).

sociology, psychology, law, political science as well as anthropology to establish an understanding of offenders and victims within the framework of criminal justice. Criminology also explores the processes of legislative definition by which some acts are given status as criminal offences and evaluates if the criminal law is an appropriate tool for addressing specific social problems, in modern legal scholarship.

Criminalization of instant triple talaq is an important area for criminological analysis because it shows this evolution from the regulation by personal law to the enforcement of criminal law. Prior to the coming into force of the Muslim Women (Protection of Rights on Marriage) Act, 2019³², issues regarding triple talaq were primarily considered as civil disputes and matters involving family law. The Supreme Court has also declared instant triple talaq unconstitutional and not legally in force in *Shayara Bano v. Union of India* but Parliament went ahead to not only declare the practice void but to make pronouncing it a penal offence with up to three years' imprisonment as well. It converted acts stemming from marital conduct into a recognisable crime. Such an approach, in turn, poses basic criminological questions about the aims of criminal law: deterrence vs. punishment and victim protection or rehabilitation vs. social reform, to name but a few. It also raises questions about whether the criminalisation of coercive control is an efficient mechanism for advancing women's rights or whether equally that aim could be met through civil remedies, without the potential harms associated with prosecution?

Criminology takes this one step further, identifying that not all acts of quoted criminal activity are socially harmful and need to be punished by law. Because family disputes, matrimonial disagreements and marital abandonment deal with private legal relationships rather than offences against the society as a whole they have traditionally only been dealt with through civil proceedings. Criminalising instant triple talaq, thus, is an extension of criminal law in a domain traditionally governed by the personal law. This might lead to more explorative criminological issues of these over-criminalization, proportionality of punishment, selective criminal legislation and practice versus the fact that penal sanctions can do little to tackle deep-rooted social/cultural practices. Therefore, the criminological study provides a theoretical background to understand how certain deviant behaviours are correlated with criminal justice policy, constitutional values and social reform work in conjunction with gender equality.

³² Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019, section 3 - 7(India).

6. Theoretical Framework

The concepts of instant triple talaq scrutiny can be done under many well-established theories of criminology which seek to explain the objectives of criminal law and the success of sanctions. Hence these theoretical perspectives would assist one in assessing if the Muslim Women (Protection of Rights on Marriage) Act, 2019 succeeds in promoting protection, deterring arbitrary divorce and providing social justice.

The Classical School of Criminology³³, created by Cesare Beccaria and Jeremy Bentham, is based on the article belief that people have free will and make rational considerations for everything they do. The principle behind this theory is that punishment should be guaranteed, appropriate and sufficiently severe to dissuade people from engaging in illegal behaviour. The reason the approach adopted by Parliament reflects classical criminological thought is that it was simply assumed that the threat of imprisonment would be sufficient to deter Muslim husbands from pronouncing instant divorce. By subjecting the spouse with arbitrary and capricious grounds of dissolution of marriage to civil and criminal liability, the legislation will act as a deterrent³⁴ and thus, further enforces compliance with constitutionalism which is equality before law provided by merit done in good faith dignity. But critics say marital conflicts are generated from emotional conflict, domestic struggle or social pressure rather than reasoning. As a result, this assumption that purely tougher punishment will successfully prevent that kind of behaviour is disputed by some criminologists.

The Positivist School of Criminology³⁵ proposes a contrasting explanation based on the rejection of the idea that criminal behaviour is strictly derived from free choice. Positivists (Cesare Lombroso, Enrico Ferri and Raffaele Garofalo³⁶) argued that criminal behaviour is influenced by biological, psychological, social and environmental factors. Coming to the topic of triple talaq, positivist criminology indicates that problems like discriminatory practices in marriage depend on patriarchal construct, less education, classless society and a sham belief system based on primordial religion raised lie blind foldedly by socio-economic dependency and gender disparity. Thus, on this view criminal punishment will never be sufficient for stamping out the underlying conditions and roots of the practice. For long term change you

³³ CESARE BECCARIA, ON CRIMES AND PUNISHMENT 11 - 19 (Henry Paolucci trans., 1963).

³⁴ Id. at 171 - 73.

³⁵ CESARE LOMBROSO, THE CRIMINAL MAN xxv (1911 ed.).

³⁶ ENRICO FERRI, CRIMINAL SOCIOLOGY 35 - 42 (1917).

need legal knowledge, community education, empowering women, developing the economy and awareness about what Islamic divorce is really about. Consequently positivist criminology supports the implementation of social policies on prevention to supplement legal sanctions.

Another useful lens for examining the criminalization of triple talaq is feminist criminology. Although the traditional legal system is male-dominated and structured to marginalize the experience of women, this perspective believes that it deprived women from their right-to-equal protection. Until October 2023, instant triple talaq in civil law allowed Muslim husbands to unilaterally end marriages without the right for women to take equivalent action which further entrenched structural gender inequality. The abolition of instant triple talaq has been seen by feminist scholars as a vital measure for constitutional equality and dignity. Nonetheless, opinion is divided on criminalization among feminists. Liberal feminists favour criminal sanctions on the basis that it reinforces women's legal protections and recognizes gender-based discrimination as a serious public wrong. But radical and intersectional feminists warn against the false hope that simply putting men in prison will bring down patriarchy, and some see this as compounding economic hardship on women whose husbands go to jail. These scholars maintain that criminal law ought to be accompanied and supported by extensive measures including maintenance, employment opportunities, legal aid, counselling and social welfare programmes in order for genuine empowerment.

Based mainly on the works of Howard Becker³⁷, the Labeling Theory moves away from crime causation and instead describes what happens when an act has been categorised as criminal . This theory states that criminal offenders are stigmatized so severely with a label that they become social pariahs, face employment discrimination and long-term stigma damaging their ability to rehabilitate and integrate back into society. Under the situation of triple talaq, criminal conviction can have a negative impact not just upon her husband but also upon his family, including the wife and children. A criminal record can limit job opportunities and strain the family's financial wellbeing, resulting in unintended hardship to children that the laws are intended to protect. Labeling theory raises the question of whether crime and punishment is always the most appropriate way to resolve conflicts occurring in an institution as central as marriage.

³⁷ Id. at 32 - 40.

Another critical view of conflict criminology³⁸ states that criminal law is more often than not the result of political power, social conflict, and a product of political concerns rather than anything having to do with objective principles of justice. This theory posits that not all possible persons in the community are criminalized, but only those persons defined by certain communities or social groups, while similar conduct elsewhere is civilly regulated. However, critics of the 2019 Act question: how does marital abandonment and desertion differ from one community to another because such an act is punishable under long-standing provisions in both the Indian Penal code and the Muslim Personal Law (Shariat) Application Act of 1930? Why has only instant triple talaq been criminalised? They argue that this calls into question selective criminalization and equal treatment under the law. On the other hand, those in favour argued that instant triple talaq had become such a blatant violation of constitutional rights as a discriminatory practice against women, that exceptional legislation was needed to put an end to it. So conflict theory prompts one to look at the larger political and constitutional environment in which criminal legislation is drafted.

Social Control Theory³⁹ is associated with Travis Hirschi, who believes that the law is obeyed due to their attachment to family and society, commitment to social institutions, involvement in conventional activities and belief in societal norms. This theory when applied to the triple talaq contemplates that a stronger emphasis on family counselling and community mediation, legal awareness and religious education may achieve better results in preventing such arbitrary divorce rather than using prison as a sole means of deterrent. Institutional metrics for marriage draw attention to the extent to which institutions, including sociocultural attitudes, can support constitutional values that are antithetical to discrimination in marital relations.

Finally, Restorative Justice Theory⁴⁰ refers to repairing rather than punishing offenders (Harris Wasik et al. In contrast to the traditional retributive justice model, restorative justice aims to repair relationships where possible, restore victims and yoke up offenders accountability and promote reconciliation through dialogue & mediation. Many women who suffer from instant triple talaq cases need economic sustenance, maintenance and custody of children along with the right to be treated dignified rather than a two or three years for their husbands. Therefore, some criminologists assert that restorative models like the use of mediation, compensation,

³⁸ RICHARD QUINNEY, CRITIQUE OF LEGAL ORDER 15 - 26 (1974).

³⁹ TRAVIS HIRSCHI, CAUSES OF DELINQUENCY 16 - 34 (1969).

⁴⁰ HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 7 - 18 (2002).

counselling and rehabilitation ought to supplement penal sanctions. This comprehensive approach would suit the immediate requirements of victims while also advancing broader structural and institutional changes in Indian society for justice and gender equality.

Criminalisation under the Muslim Women (Protection of Rights on Marriage) Act, 2019⁴¹

The passage of the Muslim Women (Protection of Rights on Marriage) Act, 2019 ushered in a watershed stage for India in limiting through the regulation of divorce amongst Muslims. Some of the data was cut off in October 2023 and the Supreme Court in *Shayara Bano v. Union of India* had held instant triple talaq to be unconstitutional and legally invalid even before the legislation came into force. However, Parliament still down agreed that judicial invalidation alone would not rid the practice of its pernicious tentacles given reports some husbands were still pronouncing instant triple talaq despite the judgement of the Court. Accordingly, with a twofold aim to safeguard the rights of Muslim women and discourage the practice of instant triple talaq by providing for punitive measures, the 2019 Act came into being.

The Act, in its Section 3⁴², states that no pronouncement of the instant triple talaq shall have effect and any marriage which is so dissolved shall be void. The fourth section provides for imprisonment⁴³ with a maximum of three years along with fine for the Muslim husband who gives instant triple talaq. Section 5 prescribes the subsistence allowance⁴⁴ which the wife and minor children are entitled to, as quantified by a Magistrate while Section 6 provides the award of custody⁴⁵ of minor children in favour of the Muslim woman on judicial determination. Section 7 also provides that the offence shall be non-bailable⁴⁶ and cognizable but may be compounded at the instance of the Muslim woman with the permission of Magistrate, thereby permissible reconciliation. Together these provisions demonstrate Parliament's willingness to balance criminal deterrence with protective measures for the economic and family interests of women affected. Thus, the legislation occupies an intersection of criminal law, family law, constitutional rights and gender justice, making it worthy of criminological attention.

⁴¹ Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019, Section 3 - 7 (India).

⁴² Muslim Women (Protection of Right on Marriage) Act, No. 20 of 2019, section 3 (India).

⁴³ Id. section 4.

⁴⁴ Id. section 5.

⁴⁵ Id. section 6.

⁴⁶ Id. section 7.

7. Victimology and Triple Talaq

This is one of the, if not the most focused field within criminology victimology that specializes by concentrating⁴⁷ on not only the rights and experiences of offenders but also of victims as part of criminal justice studies. In the case of triple talaq, Muslim women are the first victims who have been at the receiving end because the practice allowed husbands to unilaterally divorce their wives without going through established procedure and putting them in financial distress, social isolation and emotional pain. In contrast to traditional criminal offences which are either physically violent or property crimes, the offence of instant triple talaq is multidimensional. It includes economic deprivation, psychological trauma⁴⁸, displacement status or loss of family accoutrements, anxiety over children in terms of who has parenting responsibility and welfare (whether they remain under the main caretaker parent) as well as settlement location arrangements. The victimization widens as many women have no financial independence and rely on their husbands for economic sustenance. Therefore, arbitrary divorce often renders them destitute and socially excluded.

Victim protection in criminological terms does not suffice with punishment of perpetrators. The paradigm of victimology as used today highlights the concepts of restitution, compensation rehabilitation, counselling and institutional empowerment. The Muslim Women (Protection of Rights on Marriage) Act, 2019⁴⁹ tries to cater to some of these issues by ensuring subsistence allowance and custody of minor children. However, its practical enforcement does still raise issues. The man in prison for up to 3 years may not be able to pay maintenance and so the criminal punishment meant to protect him, destroys her financially. Such a contradiction has formed the centerpiece of one key critique leveled by criminologists and legal scholars.

Some victimologists also explore the issue of secondary victimization, an important theme in this field. Secondary victimization⁵⁰ refers to when victims are harmed even more by the legal processes. Criminal cases could last for months over prolonged investigations, multiple court appearances and facing social stigma under public pressure causing extreme emotional stress. In triple talaq cases too, many women prefer financial security or reconciliation rather than jailing their husbands. As a result, the various stages of the criminal justice process may not

⁴⁷ ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 3 - 18(9th ed. 2015).

⁴⁸ Id. at 55 - 61.

⁴⁹ Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019, section 5 - 6 (India).

⁵⁰ JOACHIM HERMAN, VICTIMS OF CRIME 150 - 56 (1978).

always align with the victim's true needs. This means that women should be able to choose whether criminal prosecution, mediation or negotiated settlement is in their long-term interest and hence sobriety-centred justice requires flexibility.

The Act partly assuages this apprehension⁵¹ by rendering the offence compoundable at the instance of a Muslim woman, thus allowing for reconciliation with the permission of the Magistrate. This provision is an attempt to strike a balance between deterrence and the autonomy of the victim. On the other hand, critics contend that more focus must be shifted towards economic recovery and rehabilitation mileage, legal assistance, counselling services⁵², vocational skills training or access to social welfare programmes. These measures would be more consistent with modern victimological perspectives by restoring women as victims to the proper role of being not an object only to be protected through punitive sanctions but actors in their own lives who should have the resources to restore their lives in a way that maintains dignity and independence.

8. Constitutional Analysis

To understand the criminalization of instant triple talaq, read with Articles 14, 15 and then bid farewell to equality in matters of religion. In the full-fledged debate, it was claimed that constitutional protection of fundamental rights must be restricted by the freedom awarded to religious communities to regulate their own affairs within doctrine based on age-old practices, in this particular case triple talaq as a personal law.

Equality before the law and equal protection of the laws Article 14⁵³. Instant triple talaq was condemned on the ground that it gave unilateral, absolute and uncontested power to a Muslim husband at the cost of his wife and her rights. This was argued to be an unconstitutional violation of the equality guarantee by discriminating against women simply on the basis that they were female. The Supreme Court embraced this rationale by asserting that arbitrary authority is at odds with constitutional norms of equality.

Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. While Muslim Personal Law applies only to those within the Muslim denomination,

⁵¹ Muslim Women (Protection of Right on Marriage) Act, No. 20 of 2019, section 7(India).

⁵² ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 376 - 82 (9th ed. 2015).

⁵³ Id. art. 14

opponents of instant triple talaq decried it as a gender-based injustice against women, restricting their rights to marriage. Therefore the criminalisation of practice was depicted as an aim at substantial equality rather than an infringement on religious freedom.

The right to life and personal liberty under Article 21 has been expansively construed by the Supreme Court to include the right to dignity, privacy, autonomy and a life which is meaningful. However, the somewhat even more arbitrary divorce through instant triple talaq had a damping effect on the morale and dignity of the women as it marginalised them socially, moved into economic distress and robbed their mental peace. Hence, the practice was deemed contrary to the principles of human dignity outlined under Article 21 of the Constitution.

What was the most disputed constitutional provision? Deficiency of Constitution provided in Article 25 is freedom of conscience and right freely to profess, practice and propagate religion. Advocates of instant triple talaq maintained it was a part of Muslim Personal law and thus guaranteed under the Constitution. The opposition had argued that only fundamental practices of religion enjoy protection under Article 25, and that instant triple talaq did not have either a sanction in the Qur'an or universal endorsement among Islamic scholars. The Supreme Court, as a result, finally determined that instant triple talaq was not an integral part of religion to warrant constitutional protection.

This constitutional analysis illustrates that the legislation is an exercise in balancing religious liberty with constitutionally-mandated morality. Personal laws should be respected in a diverse society, but cannot trump fundamental rights guaranteed for citizens. However, the constitutional legitimacy of criminalization is not the same as its criminological effectiveness. Even if a law is constitutionally sound, it may provoke discussion about whether using criminal sanctions as the primary instrument for obtaining social change was wise.

Case: Shayara Bano v. Union of India

The verdict in *Shayara Bano v. Union of India*⁵⁴ provides the constitutional basis for later criminalising instant triple talaq. The petitioner also claimed that talaq-e-biddat violates constitutional guarantees of equality, non-discrimination and dignity. A Constitution Bench of five judges gave a split verdict, with majority ruling instant triple talaq to be unconstitutional.

⁵⁴ *Shayara Bano v. Union of India*

The grounds that most reasoned was that the triple talaq had been manifestly arbitrary because it allowed a Muslim husband to unilaterally instantaneously and irrevocably destroy a marriage without any opportunity for reconciliation or due process. The court noted that this kind of unilateral power was antithetical to constitutional ideals of equality and justice. It also stated that the practice does not have sufficient protection as an integral part of a religion under article 25. As a result, the court ruled that instant triple talaq was null and not possible.

The judgment was a step forward in the constitutional jurisprudence of India, for it reaffirmed that fundamental rights do prevail over personal laws. The Court held that gender justice is an essential part of constitutional governance and even laws governing personal life practices cannot escape judicial review on grounds of free practice of religion.

Yet, the ruling it is based on did not propose criminalisation either from a criminological perspective. All that the Supreme Court did was to strike down the legal consequences of instant triple talaq. The grievance of the Parliament subsequently enacting a new criminal offence via the Muslim Women (Protection of Rights on Marriage) Act, 2019 was thus a distinct judicial policy choice. This distinction is important because judicial invalidation and criminal prosecution accomplish different goals. The Court concerned itself with constitutional rights, and Parliament turned to criminal law as a tool for enforcing adherence to the constitutional mandate.

The judgment also demonstrates the intersection between constitutional law and criminology. Legislative bodies can presumably classify some behaviour as a constitutional violation but need not make it a crime. Consequently, the shift from unconstitutionality to criminal treatment is a key illustration of how legal systems react against changing conceptions of justice and the social order, and what they find demand for gender equality.

9. Comparative Perspective

Comparative analysis of Muslim majority jurisdictions shows that while India is not the first country to have banned instant triple talaq, criminalisation set it apart from several other nations. Many Islamic countries began reforms decades before India, oftentimes through family law reforms instead of criminal sanctions.

The Muslim Family Laws Ordinance, passed in 1961⁵⁵, introduced changes in means of divorce through a new practice. Under this system, a husband who intends to divorce her wife should issue a written notice to the Chairman of the local Union Council. During a specific waiting period, the Chairman sets up an Arbitration Council to promote conciliation. In breach of those procedural formalities, the divorce does not take legal effect immediately. This legislative framework was maintained by Bangladesh after independence, and the regulation of divorce in Bangladesh remains cultural and regulated through administrative and civil mechanisms rather than as a criminal punishment.

Much like divorce does not become effective until certain procedures are completed, so too does Egyptian law require⁵⁶ safeguards. Contemporary Egyptian law evidently opposes arbitrary repudiation and, on the contrary, encourages judicial oversight, registration and chances of reconciliation. Tunisia had the most⁵⁷ radical form of unilateral divorce abolition, requiring all divorces to be granted judicially rather than extrajudicially and unilaterally. The 2004 Family Code in Morocco enacted far-reaching reforms⁵⁸, based on the principles of equality, state supervision for registration and divorce, mediation between spouses during marriage and divorce proceedings, as well as strengthened protection of women's legal rights. Indonesia and Malaysia, too need to follow proper legal procedure before recognising marriage as divorced thus limiting chances of frivolous divorces.

This comparative translation experience has shown that the most recent core tendency amongst Muslim-majority jurisdictions is to enact legal reforms over instant triple talaq via civil family law, rather than through criminal prosecution⁵⁹. Thus, India's political option to strengthen a jail here is a novel objective method. Advocates say the constitutional guarantee of gender equality should have provided a basis for harsher deterrence measures because legal reforms prior had not eradicated it. However, critics maintain that if the overall evidence is comparable, then effective regulation can be done by using court oversight, mandatory mediation procedures and registration and finance without criminal punishment.

The criminological dimension Comparative law demonstrates that there are multiple options to

⁵⁵ Muslim Family Laws Ordinance, 1961 section 7.

⁵⁶ NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD* 146 - 49 (1997).

⁵⁷ JOHN L. ESPOSITA & NATANA J. DELONG - BAS, *WOMEN IN MUSLIM FAMILY LAW* 91 - 96 (2d ed. 2001).

⁵⁸ *Id.* at 101 - 06.

⁵⁹ TAHIR MAHMOOD, *MUSLIM LAW IN INDIA AND ABROAD* 280 - 84(2d ed. 2012).

respond to harmful social practices, criminalization is just one of those potential responses. Legal reform does not depend merely on the definition of sanctions but also on institutional capacity, public awareness, enforcement mechanisms, access to justice and meaningful support to victims. Accordingly, global knowledge promotes a wider hope of legal transformation relating to both criminal accountability and civil protection and social benefit systems together.

10.The impact which criminalization of Triple Talaq has on socio-legal process

The immediate purpose of banning instant triple talaq may have been achieved upon operationalisation of the Muslim Women (Protection of Rights on Marriage) Act, 2019, but behind it lie larger socio-legal ramifications. Socially, this law has strengthened the constitutional commitment to gender equality by reiterating that Muslim women have equal basic rights in personhood, dignity and legal protection as women of other religions. The Act has not only made the civil crime of instant triple talaq legal but also made more women aware of their legitimate rights. According to various women's rights organizations⁶⁰, this law raised the legal awareness of Muslim women and they are now more willing to seek judicial redress from courts and legal aid institutions for protection against arbitrary marital practices. Thus, the law has played an important symbolic role in signalling that discrimination is unconstitutional and will not be legally recognised.

Meanwhile, the legislation has sparked significant discussion about its real-world application. However, critics contend that criminal prosecution cannot always offer sufficient rest to those women caught up in marital discord. The marital relationship is often so badly destroyed (by the husband being arrested and imprisoned) that there is little hope of reconciliation, even where both spouses otherwise might prefer mediation or negotiated settlement. More so, the conviction can remove the main breadwinner from the family therefore not just hurting you but also your wife and dependent children. While the Act allows for subsistence allowance, it is completely reliant on the husband and his financial capability as well as judicial efficacy. As a result, some scholars contend that the law captures metaphorical aspects of justice better than it does with its economic realities.

The Act also raises administrative issues for the criminal justice system. Specialised training is essential for police officers⁶¹, magistrates, and legal aid authorities to fairly investigate

⁶⁰ Bhartiya Muslim Mahila Andolan, seeking justice within Family (2015).

⁶¹ Bureau of Police Reserch and Development, Manual on Investigation of crimes Against Women (2020).

complaints without infringing on the rights of victims. Since the offence is cognizable, law enforcement authorities have a great deal of latitude in commencing criminal proceedings. That discretion should be exercised with regard to the often frayed relationship between them. Heavy over-reliance on arrest may diminish opportunities for mediation, while insufficient enforcement may erode the deterrent value of the legislation. This means designing a model that carefully balances the need to protect victims with ensuring due process for accused parties and proportionality in criminal justice responses.

Furthermore, with regard to criminal law and personal law, it brings about a much more critical socio-legal effect. Issues covering marriage, divorce, maintenance and custody of children have tended to be subject to dispute in civil courts or family courts. The representation of instant triple talaq as a criminal act is the extension of penal law to an issue arising from civil legal principles and relationships. But it also opens larger questions over the proper scope of criminal law. Criminologists frequently warn against the overuse of criminal sanctions, suggesting that those tools should be used only for offence with significant public harm and never as a quick fix to every social or familial dispute. Another important area for future research would be whether the instant triple talaq has paved the way for comparable legislative changes in other dimensions of family law.

11. Critical Criminological Evaluation

The response needs a two-pronged analysis from a criminological perspective, because there exist strengths and weaknesses of the criminalization of instant triple talaq. It is among its chief virtues that it regards family violence against women as a public issue⁶² rather than a private one. Traditionally, domestic violence, marital cruelty and economic abuse were considered to be issues internal to the family and not subject to criminal law. Modern criminologists are recognising that such practices bring considerable social harm and rationale of legal remedies. Parliament's decision to outlaw instant triple talaq has sent an unambiguous message that the summary nature of divorcing a woman, a practice essentially rooted in arbitrariness and patriarchy, does not fit into the promise of equality and dignity even for Muslim women which is at the heart of our constitutional democracy.

The same law also has symbolic significance⁶³. Criminal law punishes criminals, but it acts

⁶² MEDA CHESNEY - LIND & LISA PASKO, THE FEMALE VIOFFENDER 120 - 25 (3d ed .2013).

⁶³ JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW vol.1, at 55 - 63 (1984).

beyond that by ensuring expression to the society. An instant triple talaq ban is a criminal offence while the State does not support exclusionary practices in marriage, and women will finally recognise themselves as equal citizens under the Constitution. This kind of symbolic legislation can help to change social norms, helping communities develop an increasingly hostile attitude towards discriminatory behaviour on a long term basis beyond merely the formal legal prohibition. This view qualifies the Act as an extension of a global trend in gender responsive criminal justice.

However, this is not without serious criminological issues. The principle of proportionality⁶⁴ demands that the punishment for a crime should be in accordance with the seriousness of the offence and with the social harm it has caused. Critics have also argued that considering the declaration of instant triple talaq to be null and void means there is no legally valid dissolution of marriage, hence why a non-existent divorce should carry imprisonment up to three years under Section 3 of the Act⁶⁵. The level of punishment seems especially contentious when juxtaposed with other matrimonial offences which are mainly governed by civil remedies. This has led some scholars to argue that the legislation is a type of crime creep.

Another criticism concerns deterrence. The criminological research consistently shows that certainty of punishment is a stronger deterrent than the severity of punishment (though, this does not mean that severity cannot also have some effect). Of particular note to the Designated Consultation Institute is that if complaints are rarely made, investigations delayed or prosecutions inconsistent then increasing the maximum prison term will do little to deter the conduct from occurring. To this end, proper implementation demands not just legal punishment but focused legal institutions, public awareness, swift investigations and quick judicial processes.

Restorative Justice: The law has also been interpreted through the lens of Restorative justice⁶⁶. Restorative justice focuses on making amends; it encourages discussion (when appropriate), reparations, and accountability, but avoids unnecessarily breaking social bonds. For instance, in most cases of instant triple talaq, women may prefer maintenance, child support and a roof over their heads than jail time for their husbands. These practical needs cannot be fully met through criminal prosecution alone. Therefore a number of criminologists have argued that

⁶⁴ ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 74 - 84(7th ed. 2013).

⁶⁵ Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019, section 3 (India).

⁶⁶ HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 18 - 29 (2002).

restorative elements including mediation and counselling to offenders, monetary compensation from the offender to the victim, community service and social support should be incorporated within the current legal framework. An approach like that may meet the twin goals of gender justice and victim rehabilitation even better.

Conflict criminology⁶⁷ has further questioned selective criminalization. Opponents maintain that conditions of marital abandonment and desertion, grievance concerns invariably wronged outside the Muslim community too but only instant triple talaq received civil criminalization. This legislative distinction is said to have to be carefully entered on constitutional grounds, lest there appear to be some discriminating treatment. Supporters say immediate triple talaq constituted a peculiar form of law creating an automatic and unilateral divorce, demanding special parliamentary legislation. This debate exemplifies the ongoing struggle between community-specific law reform and the equality principle embedded in our Constitution.

Thus, overall the criminological assessment indicates that although that goal is a justifiable and constitutionally sufficient basis for legislative action to protect Muslim women, criminalisation on its own without complementary social, economic and institutional measures is unlikely to be effective. No criminal law can end deeply ingrained patriarchal mindsets or deliver meaningful gender equality. Sustainable reform depends, alongside punitive sanctions, on education, economic empowerment through job training and support services that are easily accessible; other forms of legal literacy.

12. Recommendations

The balanced criminological stance on triple talaq should include both criminal punitive aspects, but also preventative and restorative elements. There are three ways in which better implementation can be obtained from this. This can be a collaborative effort, where legal aid authorities partner with educational institutions⁶⁸ to raise awareness amongst its citizens over Islamic divorce laws and the role of civil society organisations as well as religious scholars⁶⁹ in reducing misconceptions.

Second, more needs to be done by governments to institutionalise the support of women

⁶⁷ RICHARD QUINNEY, CRITIQUE OF LEGAL ORDER 35 - 48(1974).

⁶⁸ Law Commission of India, Consultation Paper on Reform of Family Law (2018).

⁶⁹ ABDULLAHI AHMED AN - NA'IM, ISLAMIC FAMILY LAW IN A CHANGING WORLD 84 - 90 (2002).

affected including easy access to legal aid and counselling⁷⁰, temporary shelter, vocational training as well as financial assistance among others. Economic independence reduces dependence⁷¹ on scourges of marital opposition and tremendously increases women's capacity to exercise their legal rights. This kind of support should be a supplement not a substitute to criminal penalties.

Third, specialist family counselling and mediation centres⁷² be established for reconciliation where suitable and consistent with the parties wishes. Coercive mediation (compelling women to remain in abusive relationships) should under no circumstances be forced upon the victims, but there may well be cases where misunderstanding rather than violence is at issue and the advantages of professionally supervised mediation exceed those of immediate criminal prosecution. This is where the compoundable nature of the offence under the Act⁷³ offers scope for victim-centred approaches.

Fourth, judicial officers along with police personnel⁷⁴ and prosecutors should receive special training on gender-sensitive investigation and identifying factors contributing to some women being victims (instead of). Good implementation relies on informed decisions about when to deter and how to do so fairly and proportionately.

Finally, the Parliament ought to review the functioning of the legislation every few years using empirical studies tracking prosecution rates, conviction rates, victim satisfaction measures, maintenance enforcement and socio-economic outcomes. It is only through evidence-based legislative reform that we can have laws that work as they are intended and not create unnecessary hardship in the criminal law.

Finally, reforms in wider civil and political rights, such as maintenance, inheritance, guardianship as well as efforts to promote equal access to education and employment opportunities should further contribute towards enhancement of gender equality within family law. Criminalization needs to be seen as part of a bigger strategy, not the only tool for the empowerment of women.

⁷⁰ ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 381 - 90 (9th ed. 2015).

⁷¹ UN Women, Progress of the World's Women 2019 - 2020.

⁷² HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 37 - 46 (2002).

⁷³ Muslim Women Protection of Rights on Marriage) Act, No. 20 of 2019, section 7 (India).

⁷⁴ Bureau of Police Research and Development, Manual on Investigation of Crimes Against Women (2020).

13. Conclusion

Criminalisation of instant triple talaq is a landmark legal development in Indian constitutional and criminal justice context. It is a symbol of the State's determination to remove gender-based discrimination and protect Muslim women from unilateral and arbitrary divorce practices that are antithetical to gender equality, personal liberty and dignity. The Supreme Court's judgment in *Shayara Bano v. Union of India* laid the constitutional groundwork⁷⁵ for reform by holding instant triple talaq unconstitutional, and the Muslim Women (Protection of Rights on Marriage) Act, 2019⁷⁶ has built on that foundation with criminalising those breaching it.

But from a criminological perspective, the laws raised uncomfortable issues about the proper role of criminal law in addressing something as intimate and sensitive as family relations. Classical criminology supports criminalisation⁷⁷ in the name of deterrence, while positivist and restorative perspectives favour education, social reform and getting placed as a victim.

This paper analyses that abolition of instant triple talaq was necessary both in terms of constitution and society. However, criminalisation in isolation will not fulfil the larger aspiration for gender justice. To ameliorate the plight of Muslim women, a comprehensive framework is needed which ensures legal deterrence, economic empowerment, victim support services, legal literacy through counseling and appropriate civil dealings and speedy judicial administration. Criminal law must work as a last-resort tool⁷⁸, not as the only means of social reform.

At the end of the day, however, what will really count in measuring the success or otherwise of the 2019 Act will not only be how many prosecutions and convictions are secured but whether Muslim women feel that they have been given substantive equality, dignity and fewer reduction signs of discrimination in their lives. Thus, a study of criminology would indeed push policymakers away from punishment and toward a more holistic system of justice based around prevention, restoration, rehabilitation, and respect for basic human rights⁷⁹. This balance is more in line with constitutional ideals, contemporary criminological wisdom, and the ultimate goals of an accessible and just system of legal justice.

⁷⁵ *Shayara Bano v. Union of India*.

⁷⁶ Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019 (India).

⁷⁷ CASARE BECCARIA, ON CRIMES AND PUNISHMENT 11 - 19 (Henry Paolucci trans, 1963).

⁷⁸ LARRY J. SIEGEL, CRIMINOLOGY: THE CORE 367 - 71 (7th ed. 2018).

⁷⁹ HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 47 - 55 (2002).