
CONSTITUTIONALIZING PERSONAL LAW: A CRITICAL ANALYSIS OF THE TRIPLE TALAQ CONTROVERSY, GENDER JUSTICE, AND EXECUTIVE LEGISLATION IN INDIA

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ABSTRACT

This paper analyzes the complex constitutional interface between religious personal laws and fundamental civil rights in India. By critically examining the practice of Talaq-e-Biddat (instant triple talaq), the study explores the boundaries of judicial review under Article 32, the constitutional susceptibility of personal laws under Article 13, and the limits of executive power under the Ordinance-making provisions of Article 123. Furthermore, the paper incorporates critical and active legal developments up to 2026, focusing on the constitutional challenges against the criminalization of divorce under the Muslim Women (Protection of Rights on Marriage) Act, 2019. It argues that while the eradication of discriminatory marital practices is a vital milestone for gender justice, the mechanisms of reform must respect the separation of powers, avoid disproportionate criminalization, and align with the principles of transformative constitutionalism and constitutional morality.

1. Introduction

The intersection of family law and constitutional guarantees represents one of the most contested battlegrounds in modern pluralistic democracies. Under the constitutional framework of India, this tension is fundamentally manifested in the conflict between individual rights to equality and non-discrimination (Articles 14 and 15), the right to life and personal dignity (Article 21), and the collective and individual freedom of religion (Articles 25 and 26). The historical practice of Talaq-e-Biddat (instant triple talaq)—wherein a Muslim husband could instantly and irrevocably dissolve the marital tie by pronouncing the word "talaq" three times in a single sitting—serves as a classic case study of this systemic conflict.

For decades, the constitutional resolution of such conflicts was hindered by jurisdictional and doctrinal shields that insulated customary religious practices from judicial scrutiny. However, modern Indian jurisprudence has increasingly embraced a transformative approach, prioritizing individual dignity and gender equality over discriminatory customary personal laws. This transition reached a landmark milestone in the Supreme Court's decision in *Shayara Bano v. Union of India* (2017), which declared instant triple talaq unconstitutional. Despite this judicial invalidation, the subsequent legislative intervention via the Muslim Women (Protection of Rights on Marriage) Act, 2019 has sparked a new wave of constitutional disputes. In 2026, the Supreme Court of India is actively hearing challenges to the validity of criminalizing a civil matrimonial wrong, bringing the debates on executive overreach, penological foundations, and minoritarian rights to the forefront of constitutional discourse.

This paper conducts a comprehensive legal and constitutional inquiry into these developments. It is organized into three major thematic sections: first, an analysis of the maintainability and jurisdictional hurdles in personal law litigation; second, an evaluation of the substantive constitutionality of Talaq-e-Biddat under Part III of the Constitution; and third, an investigation into the constitutional limits of executive legislation and the ongoing 2026 legal debates surrounding criminalization.

2. Part I: Jurisdictional and Maintainability Hurdles

2.1 Writ Jurisdiction Under Article 32 and Private Matrimonial Disputes

A primary hurdle in challenging unilateral personal law practices under Article 32 is whether

the extraordinary writ jurisdiction of the Supreme Court can be invoked for what appears to be a private matrimonial dispute between two individuals. Opponents of judicial intervention contend that fundamental rights are enforceable only against the "State" as defined under Article 12, and that private disputes must be resolved through standard civil and family court remedies.

This argument, however, fails to recognize the evolution of Indian constitutional jurisprudence. In *Chiranjit Lal Chowdhuri v. Union of India* and *Nain Sukh Das v. State of U.P.*, the Supreme Court established that for a petition under Article 32 to lie, the petitioner must establish a direct invasion or threat of invasion of their fundamental rights. While matrimonial disputes are generally private, when a private party's claim is sanctioned or enforced by a legal system or customary personal law recognized and enacted by the State, the constitutional validity of that underlying custom or statutory recognition is subject to challenge. In *K.K. Kochuni v. State of Madras*, the Supreme Court ruled that when a private claim is backed by state action—whether legislative, executive, or customary laws recognized by the state—the person aggrieved may challenge the constitutionality of that state action.

Furthermore, in the landmark case of *Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty*, the Supreme Court of India held that fundamental rights, particularly the right to life and personal dignity under Article 21, can be enforced even against private bodies and individuals in exceptional circumstances of severe abuse. The court demonstrated that the judiciary can exercise its equitable jurisdiction to protect vulnerable individuals from gross violations of their human and constitutional rights.

In the context of instant triple talaq, the pronouncement is not a purely private act; it derives its purported legal authority from the State's statutory recognition of personal law through the Muslim Personal Law (Shariat) Application Act, 1937. To the extent that the State enforces a legal regime that permits a husband to unilaterally and capriciously terminate a marriage without judicial oversight, the State's legislative recognition is directly complicit in the violation of Article 21. Therefore, a writ petition under Article 32 is fully maintainable as a challenge to the constitutional validity of Talaq-e-Biddat and its statutory recognition.

2.2 The "Mandamus to Legislate" and Separation of Powers

A common defense raised by the state in personal law litigation is that petitioners are essentially

seeking a writ of mandamus to compel the government to enact social reform or personal law legislation, such as a Uniform Civil Code (UCC) under Article 44. The state frequently cites *Maharshi Avadhesh v. Union of India* and the *Ahmedabad Women's Action Group (AWAG) v. Union of India* cases, where the Supreme Court dismissed petitions seeking a mandamus to reform personal laws, holding that these are policy matters that fall strictly within the legislative domain.

While it is a settled principle that the judiciary cannot issue a mandamus to the legislature to enact a specific law, this limitation does not prevent the Court from declaring an existing, state-recognized practice or statutory provision unconstitutional if it violates Part III. Petitioners in these cases do not ask the court to draft a new personal law code; rather, they demand that the court declare a specific, discriminatory method of divorce void and unconstitutional. The judiciary's primary duty is to act as the sentinel on the qui vive of the Constitution, and it cannot abdicate its responsibility to review the validity of state-enforced personal laws under the guise of the separation of powers.

2.3 Discretionary Jurisdiction and Complete Justice (Articles 136 and 142)

When personal law challenges reach the Supreme Court through Special Leave Petitions under Article 136, the Court's extraordinary discretionary powers are brought into play. In *Chandra Bansi Singh v. State of Bihar*, the Court held that it could decide matters on the basis of pure equity and justice, even when strict legal provisions might dictate a different outcome. Similarly, in *Balakrishna Iyer v. Ramaswamy Iyer* and *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, the Court emphasized that the only limitation on its powers under Article 136 is the wisdom and good sense of the judges.

Because the constitutional questions raised by arbitrary personal law practices involve the fundamental rights of millions of citizens and the limits of executive power, the Supreme Court is fully justified in exercising its complete jurisdiction to do absolute justice under Article 142, resolving both procedural anomalies and substantive injustices.

3. Part II: The Constitutional Validity of Talaq-e-Biddat

3.1 Equality and the Arbitrariness Doctrine (Article 14)

The central substantive challenge to instant triple talaq is that it violates Article 14 of the

Constitution. In *M/S Sharma Transport v. Government of A.P.*, the Supreme Court defined arbitrariness as an act done in an unreasonable manner, capriciously, or at pleasure, without an adequate determining principle, and not founded in the nature of things.

Applying this definition, Talaq-e-Biddat is the very definition of manifest arbitrariness. It allows a Muslim husband to unilaterally, instantaneously, and irrevocably dissolve the marital tie on a whim, without providing any reasonable cause, without the consent of his wife, and without any attempts at reconciliation. In the landmark case of *Shayara Bano v. Union of India* (2017), a five-judge Constitution Bench of the Supreme Court of India struck down the practice of instant triple talaq by a 3:2 majority.

"What is held to be bad in the Holy Quran cannot be good in Shariat and, what is bad in theology is bad in law as well." — Justice Kurian Joseph, Shayara Bano v. Union of India (2017)

Justices Rohinton Nariman and U.U. Lalit held that the practice is recognized and enforced under the Muslim Personal Law (Shariat) Application Act, 1937, and because it allows a husband to break the marital tie capriciously and whimsically, it is "manifestly arbitrary" and therefore violative of Article 14. To the extent that the 1937 Act recognizes and enforces this practice, it is void under Article 13(1).

3.2 Gender Discrimination (Article 15) and Dignity (Article 21)

Article 15 prohibits the State from discriminating against any citizen on grounds only of sex or religion. Talaq-e-Biddat is a gender-discriminatory practice because the right to instant, unilateral, out-of-court divorce is available exclusively to Muslim husbands, while Muslim wives are forced to undergo lengthy judicial procedures under the Dissolution of Muslim Marriages Act, 1939 or resort to Khula (which requires the husband's consent or judicial intervention).

In *Valsamma Paul v. Cochin University*, the Supreme Court declared that gender discrimination cannot be tolerated under the constitutional scheme, emphasizing that human rights and social justice are the cornerstones of a progressive society. The unilateral right of the husband to eject his wife from the matrimonial home with a mere triple pronouncement of

"talaq" strips the woman of her dignity, security, and economic livelihood, directly violating her right to live with dignity under Article 21.

Furthermore, the cessation of maintenance following an arbitrary unilateral divorce leaves divorced women highly vulnerable. In a string of rulings including *Ali v. Sufaira* and *Nanak Chandra v. Chandra Kishore*, the courts have affirmed that the right to maintenance is a statutory right under the Code of Criminal Procedure, which exists independently of personal laws. The state must protect Muslim women from being reduced to destitution, reinforcing that personal religious rules cannot override statutory welfare protections.

3.3 The Shield of Personal Laws: Re-evaluating Narasu Appa Mali

For decades, the primary obstacle to testing personal laws on the touchstone of fundamental rights was the landmark decision of the Bombay High Court in *State of Bombay v. Narasu Appa Mali* (1951). In that case, Chief Justice Chagla and Justice Gajendragadkar held that uncodified personal laws do not fall within the definition of "laws" or "laws in force" under Article 13 of the Constitution, and are therefore immune from challenges based on violations of Part III. The court reasoned that the Constitution-makers did not intend to subject personal laws to fundamental rights scrutiny, leaving reform to the legislature under the Directive Principles of State Policy.

However, modern constitutional jurisprudence has heavily criticized and dismantled the Narasu doctrine. In the landmark *Sabarimala temple entry case* (*Indian Young Lawyers Association v. State of Kerala*, 2018), the Supreme Court, notably Justice D.Y. Chandrachud, openly questioned and rejected the Narasu holding, asserting that any custom, usage, or personal law that violates the fundamental rights of individuals—especially women—must be subject to constitutional scrutiny. The Court ruled that constitutional morality and individual dignity under Article 21 must always prevail over regressive personal or customary practices.

In *Shayara Bano*, the majority circumvented the Narasu hurdle by noting that triple talaq is recognized and regulated by a statutory enactment—the Muslim Personal Law (Shariat) Application Act, 1937. Since statutory law indisputably falls under Article 13, the Court was able to strike it down. Thus, the traditional shield of personal laws has been rendered largely ineffective in the face of transformative constitutionalism.

3.4 The Essential Religious Practices Doctrine (Article 25)

Proponents of traditional personal laws argue that triple talaq is protected under Article 25, which guarantees the freedom of conscience and the right freely to profess, practice, and propagate religion.

However, Article 25(1) explicitly states that the freedom of religion is subject to public order, morality, and health, and to the other provisions of Part III. Therefore, any religious practice that violates Article 14 or Article 21 is automatically excluded from the protection of Article 25. Furthermore, under the Essential Religious Practices (ERP) doctrine, only those practices that are fundamental and essential to the religion—such that the religion would lose its character without them—are protected.

In *Shayara Bano*, the Supreme Court analyzed Islamic jurisprudence and Quranic texts, concluding that Talaq-e-Biddat is not an essential religious practice of Islam. In his concurring opinion, Justice Kurian Joseph noted that triple talaq is actually held to be sinful and bad in theology. Because the practice is sinful, arbitrary, and highly discouraged by Islamic jurists themselves, it cannot claim the protection of Article 25.

4. Part III: Legislative Intervention, Criminalization, and the 2026 Legal Landscape

4.1 The Constitutional Limits of Executive Ordinances

In the aftermath of the *Shayara Bano* ruling, the executive promulgated the controversial Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 to ban and criminalize the practice, which was subsequently enacted into law. The re-promulgation of this ordinance before its legislative enactment raised serious constitutional queries regarding executive overreach.

Under Article 123, the executive has the power to promulgate ordinances only when the legislature is not in session and immediate action is necessary. In the landmark case of *Dr. D.C. Wadhwa v. State of Bihar* (1987), the Supreme Court held that the executive cannot use the ordinance-making power as a substitute for regular law-making by the legislature. The repeated re-promulgation of ordinances without placing them before the legislature is a "fraud on the Constitution" and a "subversion of the democratic legislative process." This principle was strongly reinforced by a seven-judge bench in *Krishna Kumar Singh v. State of Bihar* (2017),

which held that ordinances do not have "enduring rights" unless they are approved by the legislature, and their re-promulgation is highly unconstitutional.

While the government argued that immediate action was necessary to protect women because the practice of triple talaq continued despite the Shayara Bano judgment, the repeated use of ordinances to bypass parliamentary debate raises serious constitutional concerns regarding the separation of powers.

4.2 The Criminalization Debate and the 2026 Developments

The Ordinance was eventually replaced by the Muslim Women (Protection of Rights on Marriage) Act, 2019. Section 3 of the Act declares any pronouncement of instant triple talaq (spoken, written, or electronic) to be void and illegal. Section 4 prescribes a punishment of up to three years of imprisonment and a fine for any Muslim husband who pronounces triple talaq.

The criminalization of a civil matrimonial wrong has sparked intense constitutional debates, which have culminated in active hearings before the Supreme Court of India in late 2025 and 2026. The key constitutional challenges to the 2019 Act center on three primary arguments:

- **The Paradox of Criminalizing a Void Act:** As legal scholars note (Chaudhary, 2022), the Shayara Bano judgment stripped Talaq-e-Biddat of its legal power to dissolve a marriage. Consequently, when a husband utters "talaq" three times, no divorce occurs, and the marital bond remains fully intact. The husband has merely uttered a set of legally meaningless words. Therefore, criminalizing a void act—where no legal change or harm has occurred—is theoretically superfluous, excessive, and lacks a legitimate penological foundation.
- **Unconstitutional Discrimination against Muslim Men:** The petitioners in the ongoing 2026 Supreme Court challenge argue that the Act violates Article 14 because it singles out Muslim husbands for criminal prosecution for matrimonial desertion or unilateral verbal separation, while husbands of other religions who desert or abandon their wives face purely civil remedies under their respective personal laws or Section 125 of the CrPC.
- **Harm to the Wife and Family Unit:** Pragmatic critiques argue that sending the husband to prison for three years defeats the very purpose of protecting the wife. An incarcerated

husband is unable to provide maintenance, cohabit, or support his children, leaving the family in deep economic and social vulnerability.

These arguments form the crux of the constitutional challenge currently before the Supreme Court. The bench is examining whether criminalization serves a valid state interest (deterrence of a regressive practice) or represents a disproportionate and discriminatory exercise of state police power.

5. Conclusion and the Path Forward

The constitutional trajectory of personal law reform in India highlights the delicate balance that a constitutional court must strike between individual dignity, gender justice, and religious autonomy. From a constitutional standpoint, there is no doubt that Talaq-e-Biddat is unconstitutional. It violates the guarantee of equality under Article 14, represents unconstitutional gender discrimination under Article 15, and infringes upon a woman's right to live with dignity under Article 21. It is not an essential religious practice, and the historic shield of uncodified personal laws under the Narasu Appa Mali doctrine must be laid to rest. Modern transformative constitutionalism demands that all laws—including personal religious laws—be subject to the rigors of Part III of the Constitution.

However, the state's response to this constitutional wrong must also be measured and constitutionally sound. The executive's reliance on repeated ordinances was a subversion of the democratic process, violating the principles of D.C. Wadhwa. More importantly, as the legal debates of 2026 demonstrate, the criminalization of a legally void act represents a disproportionate, punitive approach that may cause more harm than good to the very women it seeks to protect.

The path forward lies not in the selective criminalization of matrimonial wrongs, but in comprehensive, non-discriminatory social reform. To fully realize the vision of the founding fathers under Article 44, India must work toward a harmonized civil framework—whether through a progressive Uniform Civil Code or through internal reforms within personal laws—that prioritizes gender equality, individual autonomy, and mutual respect, while preserving the secular, pluralistic fabric of the nation.

REFERENCES:

Ahmedabad Women's Action Group (AWAG) v. Union of India, (1997) 3 SCC 573.

Ali v. Sufaira, (1988) 3 Crimes 147.

Balakrishna Iyer v. Ramaswamy Iyer, AIR 1965 SC 195.

Chandra Bansi Singh v. State of Bihar, (1984) 4 SCC 316.

Chaudhary, Shraddha. "Criminalisation without an object: Critical reflections on the Muslim Women (Protection of Rights on Marriage) Act, 2019." *Socio-Legal Review*, Vol. 17, No. 2, 2022, pp. 105-135.

Chiranjit Lal Chowdhuri v. Union of India, 1950 SCR 869.

Dr. D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378.

Indian Young Lawyers Association v. State of Kerala (Sabarimala Case), (2019) 11 SCC 1.

Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai, AIR 2004 SC 1815.

John Vallamattom v. Union of India, (2003) 6 SCC 611.

K.K. Kochuni v. State of Madras, AIR 1959 SC 725.

Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1.

Maharshi Avadhesh v. Union of India, (1994) Supp (1) SCC 713.

M/S Sharma Transport v. Government of A.P., (2002) 2 SCC 188.

Mulla, Dinshaw Fardunji. *Principles of Mahomedan Law*. 22nd ed., LexisNexis, 2017.

Nain Sukh Das v. State of U.P., 1953 SCR 1184.

Nanak Chandra v. Chandra Kishore, AIR 1970 SC 446.

Sarla Mudgal v. Union of India, (1995) 3 SCC 635.

Seervai, H.M. Constitutional Law of India. 4th ed., Universal Law Publishing, 1991.

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

Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, (1996) 1 SCC 490.

Shukla, V.N. Constitution of India. 13th ed., Eastern Book Company, 2016.

State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

Universal Declaration of Human Rights (UDHR), 1948.

Valsamma Paul v. Cochin University, (1996) 3 SCC 545.