Of marriage, divorce and criminalisation

Reflections on the Triple Talaq judgement in India

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Abstract: In India, where religion-specific laws govern issues of marriage, divorce, maintenance, adoption and inheritance, the family laws of Muslims – the largest religious minority – have been a thorny issue in the post-independence period. In recent years, the major intervention in Muslim personal law reform came in the form of the invalidation of instant divorce or triple *talaq* by the Supreme Court of India. Subsequently, a law was passed that criminalised it. By delving into a close examination of recent judicial activism and by drawing on our ethnographic work with Muslim women in India, we show that it is only by refocussing the debate from judicial discourse to legal practice that the trope of Muslim women's victimhood and the tired debates about religious freedom versus citizenship rights can be questioned and bypassed.

Keywords: Darul Qaza, inter-legality, judicial activism, Muslim personal law, triple *talaq*, Uniform Civil Code

'Any man can say "*talaq*, *talaq*, *talaq*" over the phone and divorce his wife. Now, you tell me, is this a Taliban country or what?' commented a gold jewellery manufacturer in a village in Medinipur, West Bengal, in October 2016.[1] The interview was on the informal gold manufacturing sector and had nothing do with personal laws or Muslims. The remark was made when the conversation drifted to the issue of rise of the Bharatiya Janata Party (BJP) in the region. What the comment captures is the tenor of public discourse around the issue of Muslim personal law as the Triple Talaq[2] case was unfolding in the courts and in the media. In the following year, triple *talaq* was invalidated by the Supreme Court of India. In July 2019, the Muslim Women (Protection of Rights on Marriage) Act (MWA) was passed. This act turned instant divorce, now invalid, into a criminal offence. This article dwells on the trajectory of Muslim personal law reform since the Shah Bano case in

doi:10.3167/jla.2022.060103 ISSN 1758-9576 (Print) • ISSN 1758-9584 (Online)

the mid-1980s and argues that a decentering of the binary between religious identity and constitutional rights is necessary in order to think through the inter-related issues of gender justice, religion and family law in India. We argue that the current conundrum surrounding the criminalisation of an invalid act of divorce offers the right moment in which to do so.

In India, religion-specific family laws (known as 'personal laws') have a long history, and they operate under the Indian Constitution's provision for religious freedom (Articles 25–30). The colonial imprint that the personal law regime bears can be traced back to the transformation of the customary rules of numerous communities into religion-based 'personal laws' of two distinct religious groups: Hindus and Muslims. Religion was used to classify communities in matters governing their marriage, divorce, custody and inheritance practices (Derrett 1968; Kugle 2001; Mallampalli 2010; Menski 2003; Williams 2006). The core assumption was that Hindus and Muslims are homogeneous groups adhering to their religion-specific laws. Caste, sect, occupation, language and regionality were ignored. As a result, the legal fiction that Hindu and Islamic family practices are based on their own uniform scriptures was formed. Other minority groups, including Christians, Parsis and Jews, also came to be regulated by their own set of personal laws.[3]

However, the entrenched personal law regime co-exists with the Indian Constitution's desire for the state to create a Uniform Civil Code (UCC) that will apply uniformly to all religious communities at some point in the future.[4] The personal law of the Hindus underwent a process of codification and reform in the mid-1950s amidst bitter opposition from conservative political forces. At that time, Muslim personal law was not subjected to any such legislative process, which is often cited in support of the argument that Muslims are an appeased minority in India.[5] This public perception is built on the obliteration of the long history of Muslim family law reforms in the pre-independence period when the Shariat Application Act of 1937 and the Dissolution of Muslim Marriage Act 1939 were enacted to ensure Muslim women's right to their Quranic share in the property of their household and their right to initiate divorce in a civil court.[6] The trope of minority appeasement caught the public imagination in the mid-1980s with the case of Shah Bano, a Muslim woman who had approached the judiciary to demand a reasonable amount of maintenance from her husband. The landmark judgement and its aftermath changed the course of Indian politics, and in the eyes of the public Muslim personal law, as

opposed to the secular, progressive law of the land, came to stand in for everything that was regressive.

The Shah Bano case called for renewed efforts to implement a UCC. The demand was governed by three distinct presuppositions: the need for gender equality, national integration and the creation of a modern, secular nation-state. [7] Those at opposite ends of the political spectrum such as women's rights activists, secular liberals and Hindu nationalists came to be united in their demand for this legal remedy to ameliorate the social and economic sufferings of Indian women in general and Muslim women in particular.[8] In this discourse, Muslim women emerged as an abstract category, distanced from actual political processes and socio-economic registers.[9] From this point of view, any possibility of change from within India's religious communities was discounted. Muslim women were perceived as 'victims' who lacked a voice and agency both within their own community as well as within the existing legal structure, and were therefore believed to be unable to claim their rights.

Pitted against the idea of a gender-just UCC, Muslim personal law emerged as a homogeneous religio-legal category: archaic, oppressive and misogynist. It was buttressed by the constitutional commitment to religious freedom but was repugnant to the idea of 'constitutional morality'.[10] This article traces the recent judicial activism on the question of triple *talaq* (instant, unilateral divorce by a Muslim husband), where Muslim-women-led groups (often described as 'Islamic feminists'), secular feminist organisations, activist judges, and the news media all joined the fray for banning triple *talaq* through a series of public interest litigations (PILs). This judicial activism and subsequent legislative interventions finally led not only to its invalidation by the Supreme Court but also to its criminalisation by the Indian Parliament.

Earlier, in the Shah Bano case, the issue at stake was Muslim women's exclusion from access to religion-neutral legal remedies when they were unable to maintain themselves. But in the 2017 Shayara Bano case, the key question was to reform Muslim personal law so that it became compatible with 'constitutional morality'. The *suo moto* PIL, for the sake of gender equality for Muslim women, finally resulted in the criminalisation of a civil matter, a non-uniform criminal law instead of uniform civil law. The intention here is not to underplay unjust gender practices such as instant divorce and polygamy but to raise questions about the modalities of state intervention and to draw attention to the procedural mechanisms through which family disputes are addressed and resolved in a legally pluralistic landscape.

In the first section of this article, we revisit the 1985 Shah Bano case, the milestone judgement, the nationwide agitation and the government's overturning of the judgement and the enactment of the MWA, in order to frame the discourse on Muslim personal law in India. The MWA was a codification of Muslim personal law, but its importance was lost in the circumstances under which it was brought about. The second section discusses the Shayara Bano case in detail and seeks to understand the questions and ideas that animated the recent spate of judicial activism. We conclude this section by drawing attention to the key difference between the two historical cases. The third section draws on our fieldwork with Muslim women in the Sharia courts of Uttar Pradesh and similar field-based scholarly work in other parts of India. It highlights the importance of the procedural aspect of dispute resolution in family matters in different state and non-state forums. By doing so, we argue that this procedural aspect of family law is crucial for understanding how Muslim women address and resolve their disputes as they approach different legal forums and make use of relevant existing civil and criminal laws. We highlight how the judges in different courts have interpreted the much-maligned MWA to benefit divorced Muslim women. The ethnographic material presented in this section leads us to question the trope of the opposition between oppressive personal laws and an abstract notion of citizenship rights. Based on these insights, we conclude by arguing that the question of personal law and gender justice needs to be hinged on harmonising the existing criminal and civil laws of the country and recognising the collocation between state and non-state legal forums. We can do this only when we pay attention to the institutional aspects and procedural mechanisms of family dispute resolution with regard to their empirical details.

The Shah Bano judgement, an agitated minority and the discourse of Muslim appeasement: The Muslim Women's (Protection of Rights on Divorce) Act 1986

In 1932, Shah Bano, a Muslim woman, was married to Mohammed Ahmad Khan, a wealthy advocate in Indore (Madhya Pradesh). Shah Bano was the first cousin of Khan, and they had five children from the marriage. After fourteen years, in 1946, Khan married another of his cousins. An ongoing property dispute within the family was exacerbated, culminating in a serious fight over the issue. In 1975, Khan drove Shah Bano out of the house.[11] Three years later, in 1978, Shah Bano

appealed at the local court for maintenance from her husband under Section 125 of the Criminal Procedure Code (CrPC).[12] In August 1979, Shah Bano won the suit, with the local magistrate ordering Khan to provide her with the maintenance of 25 rupees per month. In July 1980, Shah Bano filed another plea for revised maintenance. The Madhya Pradesh High Court ruled in her favour, ordering maintenance of 179.20 rupees per month.

Shortly after the court order, Khan divorced Shah Bano, invoking the irrevocable triple *talaq* in a single sitting and claimed that he had no obligation to support Shah Bano since she was no longer his wife. Moreover, he argued that since he had fulfilled all his post-divorce obligations ordained by Islam he should not be ordered to pay any more maintenance. He then appealed to the Supreme Court of India. The All India Muslim Personal Law Board (AIMPLB) sought and obtained permission to intervene on behalf of the husband. In the Supreme Court, Khan's counsel argued that, since a divorced woman is entitled to maintenance only during *iddat* under Muslim personal law, Khan could not be ordered to pay maintenance to Shah Bano beyond that period. In fact, they argued, to do so would mean opposing the principles of Islam.

Furthermore, Khan claimed that he had already fulfilled Shah Bano's dues under Muslim personal law and that Section CrPC 125 therefore did not apply. His point rested on Section CrPC 127(3)(b).[13] However, Chief Justice Chandrachud ruled in favour of Shah Bano, thus dismissing Khan's appeal. He ruled that Section 125 did apply to divorced Muslim wives. What difference, he then asked, would it make as to what religion is professed by the neglected wife, child or parent? (Mohd. Ahmad Khan v. Shah Bano Begum [1985] SCC, 10). To buttress the argument that Khan had not fulfilled his duty under the Muslim personal law, the judgement drew on the verses of the Quran which ordered for maintenance on a reasonable scale, as the Quran stressed that it is the duty of the righteous to do so.[14] Khan's counsel argued that the obligation discussed in the verses only applied to the particular, pious, righteous and god-fearing or reverent and not to the general run of Muslims. The judges rejected Khan's self-confessed lack of religiosity as a valid ground for non-maintenance. A number of Quranic verses were cited to describe a husband's obligation to his wife on death or divorce.

The Shah Bano judgement unleashed a massive protest from different segments of the Muslim community. The orthodox Muslim leadership reacted sharply to the fact that, contrary to Sharia, not only did

the verdict award post-divorce maintenance to a Muslim divorced wife under the religion-neutral Section 125 of the Code of Criminal Procedure (1973), but it also made several critical comments on Islam. The orthodox Muslim leadership and the AIMPLB[15] were essentially indignant that the judgement had misinterpreted the Quran and had called for doing away altogether with Muslim personal law (Vatuk 2009).

In December 1985, the AIMPLB met with the then prime minister Rajiv Gandhi to express their opposition to the Shah Bano decision, and forced the government to introduce the Muslim Women (Protection of Rights on Divorce) Bill in Parliament. The ruling government quickly bowed to pressure (Bajpai 2011; Vatuk 2009). In May 1986, the MWA was passed. Though the act denied a Muslim woman her right to maintenance after divorce, it permitted her to a one-off lump-sum maintenance payment from her husband. A Muslim wife had the complete right over her *mahr*. The MWA also specified that if a woman faces issues with subsistence, she could approach a magistrate, and a ruling could be issued directing her adult children or any of her biological relatives to provide for maintenance. In the absence of a family member, the court could also order the state Waqf Board[16] to pay that amount.[17]

Women's organisations, secular political groups, human rights activists and some independent Muslim organisations strongly opposed the MWA. In the public discourse, it was framed as the exclusion of Muslim women from the purview of the religion-neutral Section 125 CrPC and as forcing them into the domain of Islamic law. In this melee, no one had the patience to look into the exact provisions of the MWA – a codification of Muslim personal law. Since then, in public as well as academic discourse, the Shah Bano case and the MWA have come to symbolise Muslim women's victimhood on the one hand and the minority appeasement policy of the Indian National Congress on the other.[18] In the Indian political imagination, the case and its aftermath transformed the concept of the secular into a partisan category. The debate also led to a renewed demand for a UCC.

Amidst this polarised and heated political discourse, what went unnoticed was the very fact that MWA, a 'codified' provision of Muslim personal law, functioned within the ambit of the secular legal structure of the state. Scholars have shown how the act benefitted divorced women over Section 125 CPrC.[19] The MWA, which was perceived as anti-women, was found to be used by judges to give divorced Muslim women 'reasonable and fair' compensation that was at times more than what they could have received under any other personal law as well as CrPC 125 (Agnes 2001; Nath 2013; Solanki 2011). Moreover, unlike

CrPC 125, the MWA extends the responsibility for maintaining women without means of sustenance beyond the domain of the family.[20]

More than thirty years later, Muslim women's plight again dominated the public socio-political discourse. In the next section, we will discuss the *suo moto* Muslim Women's Quest for Equality PIL that came to be known as the 'Shayara Bano case' and show how the questions of Muslim women's victimhood, constitutional morality, and reform in Muslim personal law were envisaged as a reifying moment since the injustice meted out in the Shah Bano case.

The Shayara Bano case, Muslim women's victimhood and Muslim misogyny: The Muslim Women (Protection of Rights on Marriage) Act 2019

The five individual petitioners in the Triple Talaq case were Muslim women who were divorced by triple *talaq* by their husbands. All of them were victims of terrible marriages and did not wish to remain married to their abusive husbands, but they challenged the arbitrary and cruel nature of unilateral triple *talaq*. In contrast to the Shah Bano case, in which her maintenance was the central issue, the core issue in the Shayara Bano case was revising Muslim personal law and appealing state intervention, not the individual petitioner's remedy.[21] The Triple Talaq case, however, did not begin with Shayara Bano's petition, but with a *suo moto* PIL case which was brought by two Supreme Court judges on the grounds of gender discrimination in Muslim personal law.[22] Triple *talaq* permitted under Muslim personal law was flagged as one of the grounds of gender oppression of Muslim women. After this, writ petitions or intervener applications were filed by individual Muslim women who had suffered triple *talaq*. Despite differences in their ideological positions, many women's groups joined the campaign demanding the Supreme Court strike down the practice. The binary between gender oppression of Muslim women (exemplified by the practice of instant divorce) and their constitutional rights for equality was juxtaposed as the central issue.

The Bharatiya Muslim Mahila Andolan (BMMA), an organisation founded in 2007, has been at the forefront of the campaign since 2015, when they came out with a report titled *Seeking Justice within Family*. This judicial activism also included the Rashtriya Swayamsevak Sangh (RSS)-affiliated Rashtrawadi Muslim Mahila Sangh, Lucknow, which filed an application asking for the codification of Muslim personal

law. The PIL was given extraordinary attention in the public discourse by the media. Reforming Muslim family law emerged as an object of 'public interest'.[23] On 22 August 2017, by a three-to-two majority, triple *talaq* was declared unconstitutional and therefore invalid.[24] The judgement was hailed for recognising triple *talaq* as both 'un-Quranic and un-constitutional' (The Wire Staff 2017).

However, it was pointed out that this judgement was not as historic as it is claimed because in 2002, in the Shamim Ara judgement,[25] the Supreme Court had already declared instant triple *talaq* invalid and had laid down the procedure for pronouncing *talaq*, thus concluding that triple *talaq* is not an essential core of Islamic law in India and hence is invalid.[26] Since there was no media hype, the historical ruling delivered in the Shamim Ara case had gone unnoticed. What proved to be historic about this judgement was the legislative intervention that followed the invalidation of triple *talaq*. It came two years later, and it took a carceral turn that was quite unanticipated to many. After the Supreme Court invalidated triple *talaq*, it was soon found that it did not deter the practice. A bill was introduced in Parliament to make triple *talaq* a criminal offence. In this way, the *suo moto* PIL turned the civil issue of divorce into a criminal offence. The Muslim Women (Protection of Rights on Marriage) Bill 2017 was passed in July 2019, and since then the attempt at arbitrary divorce by a Muslim man has become a cognizable offence. The minimum jail term for the errant husband is now three years. Efforts to transform social and religious life through state intervention led to a criminal provision and the further marginalisation of a religious minority. By framing the question of wrongly divorced Muslim women solely as a religio-cultural issue and seeking a religion-specific criminal law, the real question of abuse and violence in marriage was obfuscated. Attention to this point was drawn by legal scholars, most notably Faizan Mustafa[27] and Flavia Agnes, but in the din of the demand for the abolition of triple *talaq* their voices went unheard (Alam 2017).[28]

During the period of triple *talaq* activism, the popular debates raging in the Indian news media set a polarising tone, pitting the 'neutral, secular, liberal progressive' voices crying for justice for Muslim women against the 'misogynist and patriarchal Muslim men'. The discourse of the Muslim women's activism also contributed to the idea of a uniform Muslim patriarchy. In this rhetoric, Muslim marriage and divorce practices were presented in the public imagination as shaped solely by Islamic injunctions, and such presentation ignored various local socio-cultural and economic factors that were guiding them. Such rhetoric transformed all Muslim men of religion into a homogeneous

collective group, a situation that did not obtain in real life. Such a reductionist approach also overlooked the social context in which divorce takes place in India.

In the next section, we draw on our ethnographic work at a Darul Qaza, which is situated in a Muslim ghetto of Kanpur in the state of Uttar Pradesh, and on other empirically informed research to argue that the legislative route to addressing this gender issue in personal law needs to first pay attention to the actual process of dispute resolution not only across the different state and non-state forums but also across currently existing civil and criminal laws.

Criminalisation versus harmonisation: Family dispute resolution in practice

In the weeks after the Triple Talaq judgement on 22 August 2017, we interviewed several women in the Muslim ghetto in Kanpur. Whenever we had met with them in the past, they had always been an articulate group, but now they were cautious and cryptic. We asked about their views on the judgement, and some of them posed a different question to us in response. A middle-aged woman asked whether a parent would send back their daughter to the marital home of the rogue husband who had given her triple *talaq*. We could not come up with an answer. What we had unconsciously subtracted from all the rights talk was the question of human dignity. One of them asked us: 'You always ask us about *teen talaq* (triple *talaq*); why do not you ask us why it happens?' In the midst of the urban blight where this interview took place, her question made perfect sense. This reprimand was a harsh reminder of the neglect of both the issue of class and the issue of poverty. Hardships of different kinds, economic hardship being an important one, take a toll on human relations, even the most sacrosanct, we were told. She drove home the point that the question of personal law was not so much a matter of law but that of personal trouble: it was one of affect – love and suffering – not that of pure legal rationality.[29] We were looking at unhappy families, who were unhappy in their own ways. The dimension of class and social standing becomes clearer when we consider ethnographic work that has shown how the situation of Muslim women in marital distress was not that different from their Hindu counterparts.[30] The triple *talaq* campaign reinforced the idea of Muslim misogyny without paying attention to marriage, divorce and maintenance practices amongst different communities and classes.[31]

A number of recent empirically grounded studies have foregrounded how women seek to resolve their family troubles across different legal forums. This field-based research shows that Muslim women file criminal charges under CrPC 498A and the Protection of Women from Domestic Violence Act 2005 (DV Act)[32] while also filing for divorce at the Darul Qaza to dissolve their failed marriage. The petitioners addressed their family conflicts by balancing religious procedures and state law as they simultaneously approached multiple forums. Each forum worked within its responsibilities, authority and restrictions. This functional interdependence was upheld in the landmark Vishwa Lochan Madan judgement of 2014 when the Supreme Court handed down its decision on a PIL demanding that all Sharia courts be declared unlawful. The Supreme Court stated that the Darul Qaza did not violate the country's secular legal framework. The Supreme Court recognised the Darul Qaza as a mediation, reconciliation and dispute resolution agency in family matters. Petitioners should be free to seek (or avoid) such venues in family matters, whose 'judgements' were essentially attempts at mediation and were not enforceable. The judgement was astute in its understanding of the practice and procedures of family dispute resolution (see also Kokal 2014; and Chakrabarti 2021).

Scholars aware of the procedural aspects of family dispute resolution have argued that the way forward is to understand how the gender-just secular legislation and the institutions of personal law function in collocation (Solanki 2011). These scholars urge us to think about how these two sets of laws could be harmonised rather than be perceived in opposition. The adjudications at the Darul Qaza demonstrate how Muslim women navigate between two sets of rights: those granted by the religious community, which are rooted in kinship responsibilities and obligations, and those granted by the state. While they are opposed in principle, ethnography reveals how the gap is bridged in practice (Ghosh and Chakrabarti 2020, 2021; Lemons 2019; Redding 2014). In our study of the Darul Qaza for a period of two years, we found that it was women who brought over 90 per cent of the complaints. If the judgements were anti-women, why did they come there in the first place? In the field, the *qazi* pointed out to Suchandra Ghosh on several occasions that if the woman was not in trouble she would not have approached the Darul Qaza in the first place. Jeffrey Redding has described the Darul Qazas as 'sites of Muslim women's divorces' (2020: 7). Depending on the problem to be resolved, women address different forums – ranging from police stations to neighbourhood forums[33] and/or a *qazi*'s counsel. The family dispute resolution landscape has always been a

fragmented one, and the rise of Muslim women's groups have added to this already existing plurality.

The invalidation of triple *talaq* by the Supreme Court and its subsequent criminalisation has led the marital relationship and its dissolution into a serious quandary. It has severe implications for the economically marginalised. Sohaira Siddiqui (2021) has argued that by embracing the carceral solution of criminalising triple *talaq* and imprisoning men who pronounce *talaq*, women may be left in a situation in which their husbands are imprisoned while they are unable to remarry.[34] Moreover, without an alternate source of financial support for their family, women are often left in a more vulnerable state. There also exists the concern that in as much as triple *talaq* is now invalid, Muslim women could find themselves in a serious conundrum where they are considered religiously divorced but still married according to state law (Siddiqui 2021). Due to the contractual character of Muslim marriages, however, civil remedies are compatible and effective in resolving any marital dispute. When a problem could be solved with civil remedies, how justified is it to use the state apparatus to imprison someone for three years? (Shrotriya and Pachauri 2019). Civil remedies, such as adequate compensation and specially created procedures such as alternative dispute resolution methods are examples of such solutions. This scheme of providing civil remedies as opposed to criminal sanctions has been followed in various statutes, for instance, the DV Act and CrPC 125. In the midst of the polarising debates, we forget that legal remedies to physical or mental abuse/cruelty are accessible to all women, as they are not a matter of Muslim personal law.[35]

This manoeuvre of criminalisation by the Supreme Court was noted by Werner Menski (2008) when he insightfully argued that the Indian state, along with its legislative and judicial branches, shares a history of harmonising criminal and family laws to benefit women from all religious communities. He shows how the post-modern state follows a judicial trial with judges interpreting the personal laws and applying criminal law techniques to hold men obligated to provide for women, children and senior citizens in the family. Harmonisation between the civil and criminal codes is also a legal reality in the lower courts. Drawing on their research at a family court in Delhi, where Muslim women pursued their property, domestic violence and maintenance cases, Catherine Larouche and Katherine Lemons (2020) noted that the disputes amenable for treatment solely under Muslim personal law were insignificant. Instead, the cases pursued at the family court were brought under the uniform criminal and civil codes and not under

religious personal law. The authors argue for a better understanding of this process of harmonisation between the family and criminal codes, as the women litigants, irrespective of their religion, shared both predicaments and legal remedies. Lawyers practising at courts have also noted the harmonisation between personal laws and the Uniform Civil and Criminal Codes where religious doctrines are delicately balanced with government imperatives, a balance instantiated by judicial creativity (Agnes 2016).

While discussing the Triple Talaq case, Saptarshi Mandal (2018) expands this argument by highlighting the lack of correspondence between the problem defined and the remedy proposed by the new legislation. The problem of triple *talaq* is often identified as an issue of domestic violence or desertion, sometimes being used by the husbands as a threat to abuse their wives. Now, the problem of domestic abuse is not singularly Muslim and could be addressed under the DV Act 2005, as the law has a broad understanding of violence encompassing physical, sexual, verbal and economic abuse. The legislation is the outcome of the long-standing feminist demand for a civil remedy for domestic violence, given that recourse to criminal law often seems unhelpful and even counterproductive (Mandal 2018: 17).

But in the Triple Talaq case, this insight was abandoned. The judicial campaign often evoked the argument that instant triple *talaq* has been banned in several Muslim majority countries. Here, we take a closer look at this argument. In most of these countries, proceedings related to the pronouncement of triple *talaq* take place in civil courts providing civil remedies. The invalidation of triple *talaq* prescribed various mechanisms to facilitate reconciliation, such as consultation with an arbitrator or a religious head. Some states do not recognise a divorce pronounced outside a court of law. Here are some details. We chose, for instance, the cases of the following countries because they were extensively referred to in the Indian media, following the triple *talaq* row, as Muslim majority countries where the triple *talaq* is banned.[36]

In the case of Egypt, a *talaq*, whether or not accompanied by a number, shall be counted as one *talaq* and will be deemed a revocable *talaq* under Law No. 25 of 1929. This rule could be bypassed only when three *talaqs* are given in three *tuhr*, a period between two menstruations (see Bernard-Maugiron 2013). Yemen[37] and the UAE[38] have followed suit, although with a few additions. According to its Code of Personal Status 1956, Tunisia does not recognise divorces granted outside of a court of law, which is obligated to investigate the grounds for a couple's separation and attempt a reconciliation between them. The

divorce decree is only issued if reconciliation is not possible.[39] Algeria also adopted this regulation, and it set a deadline of ninety days for the reconciliation procedure to be completed. In Algerian Muslim law, a 'divorce may only be formed by a court ruling preceded by a judge's attempt at reconciliation which should not exceed a period of three months'.[40] According to Syria's Personal Status Law, if *talaq* is said expressly or implicitly with any number, only one divorce will be regarded as valid.[41] In the case of Pakistan, Section 7 of the Muslim Family Law Ordinance of 1961 states that any man who declares '*talaq* in any form' must notify the Chairman of the Union Council, which is an elected local government body, and provide a copy to the partner. Failure to do so could result in a one-year prison sentence or 5,000 rupee fine. A divorce will not take effect until ninety days have passed since the party notified the Chairman. The Chairman must form an arbitration council to reconcile the couples within thirty days of receiving this notice.

Similarly in India's neighbouring Muslim minority country Sri Lanka, the Muslim Marriage and Divorce Act of Sri Lanka states that a husband intending to divorce his wife must file a divorce petition with the court, and 'shall give notice of his intention to the *qazi* who shall initiate the reconciliation between the spouses with the help of the relatives of the parties and of the elders and other influential Muslims of the area'. If reconciliation efforts fail thirty days after the *qazi*'s notification, 'the husband, if he wishes to continue with the divorce, shall announce the *talaq* in front of the *qazi* and in the presence of two witnesses'.[42]

All of these cases not only effectively nullify the instant triple *talaq* but also chart a path to reconciliation as well as civil procedure by which to do so. By invalidating the instant *talaq*, these procedures facilitate the *talaq ahsan* or *talaq hasan*,[43] the legitimate and preferred method of divorce in Islam according to the *ijma* (consensus view), followed by the reconciliation and civil remedies.[44] The point to be noted is that in these countries invalidating triple *talaq* did not lead to a carceral route. By referring to these Muslim majority countries, the Indian case invalidated triple *talaq* but at the same time chose criminalisation over the provision of civil remedies, which leaves no space for reconciliation. Flavia Agnes has insightfully argued that while merely uttering *talaq* does not dissolve a marriage, incarcerating a husband would certainly do so, with the enraged husband resorting to the approved Quranic divorce pronouncing *talaq* thrice over a three-month period (2019: 349).

The insight that uniformity does not ensure equality and that the question of gender justice gets notoriously messy along the axis of class,

ethnicity, religion and race has not been completely missing in policy documents, however. The 21st Law Commission, in its 'Consultation Paper on Family Law Reforms' released on 31 August 2018, brought a much-nuanced view on the question of personal law and civil law. It astutely observed: 'Mere existence of difference does not imply discrimination, but is indicative of a robust democracy'. It further added that most countries are now moving towards recognising differences rather than a flat uniformity between culturally diverse people, as the latter causes more injustice to the weaker and vulnerable sections of society. Rather than enacting a UCC, the Law Commission recommended that family laws of every religion be reformed to render them gender-just. All personal laws were discriminatory towards women, but they are discriminatory in their own way, so it is not a UCC that was the need of the day but reforms within each community.

In this section, we have shown how religion-based personal laws and the religion-neutral criminal/civil laws work in collocation thanks to the existence of pluralistic legal landscape (legitimised and sustained by constitutionally backed legal pluralism). According to Yüksel Sezgin, 'people do not just sit on the sidelines and silently accept the imposed limitations and disabilities, they constantly resist and try to find ways to change the system and promote the rights and liberties from within' (2013: 12). The research findings suggest that a workable solution needs to focus on harmonising the prevalent gender-sensitive civil/criminal laws of the country, the existing codified Muslim personal law and divergent practices and manifold interpretations that exist under the rubric of Muslim personal law. The rule of law theory, the idea on which judicial campaigns are based, tend to ignore the law's actual mechanics and procedures both in the state courts and in the non-state legal forums. Redding notes how such an ideology conjures up an idealised image of the state courts' practices and procedures (2020: 79). The case of triple *talaq* judicial campaign and its outcome clearly bring into relief the fault lines of this idealised image.

The following section summarises the key arguments, and concludes that legal literacy, not only for citizens but also for legal functionaries, is what India so direly needs more of. Family dispute resolution constantly negotiates not only the inter-legality of different forums but also the porous boundaries between of civil and criminal law. Therefore, any judicial interventions in personal law need to first pay attention to the practices and procedures of dispute resolution at these various forums.

Conclusion

In the post-independence period, the fundamental rights of equality and non-discrimination have come into conflict with the constitutionally backed idea of religious freedom, be it with regard to worship or the family. The carceral outcome of the triple *talaq* PIL illustrates how judicial campaigns that do not pay adequate attention to the actual working of the law, especially criminal law, can lead to serious unintended consequences. Criminal law provides unbridled discretionary power to the police in implementing the law. How such police action works along the lines of vulnerable communities and classes is neither unknown nor undocumented (Solanki and Dave 2000; Verma 2001). In India, when gender-based allegations of domestic violence are filed with the police or the courts, it is up to the criminal court and judicial officers to determine whether the case is civil or criminal (TNN 2014). The criminalisation of triple *talaq* needs to be understood and further investigated in this institutional and socio-political context.

The question of how legal reforms unfold on the ground over a period of time needs urgent empirical work and theoretical discussion. More empirically grounded research is needed to comprehend how family disputes are addressed and resolved in practice in different communities – not only along the lines of religion but also along the lines of class and region.[45] Rather than further codification and new laws, the urgent need is a deeper understanding of the practice of personal law. Agnes (2017) has insightfully commented how it became evident during the hearing of the triple *talaq* case that the lawyers in the Supreme Court lacked the knowledge of the workings of Muslim personal law. Sylvia Vatuk has documented how at times even lawyers do not comprehend the MWA (2017: 252). In the absence of judicial literacy, it is not difficult to predict how additional laws would benefit vulnerable women from marginalised communities. In our fieldwork, we observed that Muslim women were unfamiliar with the different provisions of Muslim personal law.

Marc Galanter has observed that the Indian judiciary, with a reformist approach to laws in dealing with religious communities, favours a mode of intervention that seeks to grasp the 'levers of religious authority and to reformulate the religious tradition from within, as it were' (1971: 480). The trajectory of the judicial life of Muslim personal law since the Shah Bano judgement vindicates Galanter's prediction. We argue that the current criminalisation of an invalid act should lead to a sustained discussion on religion, judicial activism and the state.[46] The

vexed case at hand can open up a larger jurisprudential discussion on restitutive versus repressive law on the one hand and the procedural aspects of civil and criminal law on the other.

This article shows that the collocation of different judicial forums, gender-just criminal and civil laws, and the emergence of Muslim women's voices within India's already fragmented legally pluralistic landscape offer a roadmap, albeit a labyrinthine one, to negotiate domestic disputes within the framework of a pluri-legal system. All of these things, as the women in the Kanpur ghetto reminded us, unfold in a larger socio-economic context, and intersectional location cannot be sidelined in the public and academic discourse. It is only by prioritising the lived experience of women and by acknowledging their agency in negotiating a pluralistic legal landscape and its 'many rooms of justice'[47] that we can open a discussion on the larger question of gender justice, legal remedies and social change. A serious engagement with legal praxis should inform these judicial debates where the women of a minority community do not inhabit a position of perpetual cultural victimhood and where the incarceration of errant husbands is deemed to be the only solution.

Acknowledgements

Writing this article would not have been possible without the support extended by those who participated in the interviews and let us sit through the deliberations at a Darul Qaza in Kanpur, India. We are thankful to the Multiple Secularities – Beyond the West, Beyond Modernities project at Leipzig University, where some of the material presented in this article was discussed. We would like to thank Dr. Kalindi Kokal for her comments on an earlier draft of this article.

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Notes

1. The interview was conducted by Anindita Chakrabarti.

2. The term *talaq* refers to the instant divorce by a Muslim husband of his wife, which is permitted in Muslim personal law.

3. There are six different family laws in India: those for Hindus, Muslims, Christians, Parsis and Jews, and then the non-religion-specific Special Marriage Act. The Special Marriage Act is applicable to the parties only if they choose to be governed by it. For family law, Sikhs, Buddhists and Jains are considered as Hindus (see Diwan and Diwan 2018).

4. This provision (Article 44) is found in Part 4 of the Indian Constitution, which is only a Directive Principle of State Policy: it is not binding on the state and hence it is unenforceable.

5. The trend of reform in the Muslim family law through judicial interpretation had set in the decades following the 1970s (see Subramanian 2008).

6. In a fascinating paper, Rohit De (2009) captures the critical historic moments bearing witness to the formation of a political consensus between the conservative *ulama*, Muslim reformers, nationalist politicians, and women's organisations leading to the enactment of two key laws – the Shariat Application Act of 1937 and the Dissolution of Muslim Marriage Act of 1939. While the members of the diverse coalitions came together to draw the bills, each had a different vision of them and yet came to a consensus on applying Islamic law to guarantee women's rights.

7. In the current public discourse, the idea of a population explosion has been tagged with the necessity of a UCC. Thereby, the panacea of a UCC saves not only Muslim women from the evils of polygamy but also the nation from the problem of population increase. The non-implementation of Article 44 of the Constitution, according to this propaganda, has increased the Muslim population. Monogamy, imposed on Muslims through a mandatory code, is therefore seen as a pressing need.

8. For a nuanced discussion on these different political positions, see Rajan (2003).

9. See Sturman (2012) on the emergence of gender as an abstract category of reform and policy in British India.

10. See KoKal (2020) for a discussion on the Indian courts' reading of 'essential practices' of religion as they impose an interpretation of public/constitutional morality rooted in a human rights discourse.

11. For more details on this case, refer to Express Web Desk (2017) and DNA Web Team (2017).

12. Section 125(1): 'If any person having sufficient means neglects or refuses to maintain -

> (a) his wife, unable to maintain herself, . . . A magistrate of the First Class may, upon proof of such neglect or refusal, order such a person to make a monthly allowance for the maintenance of his wife . . . at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit'. It is also mentioned in the judgement that the most that can be awarded as maintenance under Section 125 is 500 rupees per month (p. 10). This upper limit is set because this section is primarily meant to prevent vagrancy, and thus only applies when a woman is unable to maintain herself. This section was not planned to confine the totality of the spouses' obligations to each other, nor was it meant to be applicable to all cases. It was meant to apply to only those cases in which the wife was destitute.

13. Section 127(3): 'Where any order has been under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that . . .

> (b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order . . .
>
> (i) in the case where such sum was paid before such order, from the date on which such order was made.
>
> (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman'.

14. The Quran says (*walilmotallaqatimataun*) maintenance should be provided to the divorced (*bilmaaroofay*) on a reasonable scale (*haqqan*) and that this is a duty (*alalmuttaqeena*) on the righteous (Surah Nisa: 246), as explained in the Shah Bano case.

15. For them, the key concern was the closing note of the judgement that stated: 'It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country' (p. 19, Mohd. Ahmad Khan v. Shah Bano Begum [1985] SCC).

16. Waqf Boards in India administer, control and safeguard the Waqf properties. Waqf is the permanent dedication of property by community members for religious, pious or charitable purposes, as recognised by Islamic law.

17. Section 4(1&2) of the MWA Act states that if a magistrate is satisfied that a divorced woman is not remarried and is unable to maintain herself following the *iddat* period, he may issue an order directing her relatives who would be entitled to inherit her property on her death to pay such reasonable and fair maintenance to her as the judge may deem fit and proper. Nonetheless, in the event of any relatives being unable to pay the maintenance, the magistrate would direct the state Waqf Board functioning in the area in which the woman resides to pay such maintenance.

18. According to Vatuk, it was a pitched battle between 'fundamentalist, orthodox, obscurantist male chauvinists' and 'modern, secular, pro-women rationalists' (2009: 357).

19. For an illustration of the cases, see Solanki (2011: 147–148); Agnes (2012); and Herklotz (2017).

20. There are instances where Muslim divorcees agitated against the Waqf Board over the delay in providing maintenance. See Indian Express (2011).

21. Two of those women petitioners joined the BJP in recent years (Das 2020; Nair et al. 2019).

22. The fact that it started as a *suo moto* case has undergone collective amnesia in the public imagination as well as in the relevant academic discourse. Tanja Herklotz wrongly assumes in an otherwise well-researched paper how the Triple Talaq case was initiated by a number of Muslim women who attempted to bring about a landmark judgement (2017: 266). See also Mandal (2018) and Agnes (2018) for more details.

23. Muslim women's groups such as BMMA have been described as Islamic feminists in academic scholarship that emerged amongst several other rights-based women's organisations in the closing decades of the twentieth century. The activists undertake an internal critique of the Sharia, accusing the male ulema of imposing 'patriarchal' interpretations of the Quran upon the illiterate masses. Instead, they assert their right to read and interpret the Quran to reclaim the rights enshrined in the holy text (see Kirmani 2009; Schneider 2009; and Vatuk 2008 for a discussion on Islamic feminism in the Indian context).

24. W.P. (C) 118/2016 (Shayara Bano v. Union of India & Ors) and the Suo W.P. (C) 2/2015 (In re: Muslim Women's Quest for Equality). The Jamiat Ulama-i-Hind, the AIMPLB, and the Union of India were the respondents in the Triple Talaq case. The issue before the five-judge bench was whether instant triple *talaq* was constitutional or not. In other words, it was about whether the practices granted under Muslim personal law violated the dignity and fundamental rights of Muslim women.

25. In 1979, the appellant Shamim Ara filed a petition seeking maintenance from the respondent Abrar Ahmed. The couple married in 1968 and had four sons. In 1990, Ahmad stated that he was not required to support Shamim because he had already divorced her in 1987 using triple talaq. In 2002, the Supreme Court ruled on this case.

26. See Agnes (2016); Mahmood (2017); and Mustafa (2016) for details.

27. Faizan Mustafa (2016) has argued that both BMMA and Shayara Bano, with their pleas to the Court that the triple *talaq* practice be declared unconstitutional, merely sought an Islamisation of Muslim personal law. Since the Supreme Court had already ruled to that effect in prior instances, the current hue and cry seemed unwarranted.

28. Commenting on the impugned judgement, Katharina Wommelsdorff (2021) argues that the judgement lays an undue emphasis on religion, sidelining equality and perpetuating the patriarchal notions of women's identity, social status and family life. The political environment further complicates the vexed relationship between Indian personal laws and constitutional rights with the growing influence of Hindu rights and societal anti-Muslim bias.

29. For details of these cases from the Darul Qaza, see Ghosh and Chakrabarti (2021).

30. Patricia Jeffrey's (2001) ethnographic study deserves special mention. The author shows that when a marriage fails in the lives of the rural poor there is no difference in their social standing, despite their different religious affiliations. It is family, kinship and custom that matter. Such ethnographic details draw our attention to the fact that women's rights are not narrowly legal matters amenable only to legal resolution but are entrenched in the economics of kinship and customary practices (Jeffrey 2001: 24–25). Mustafa (2016) argues that, despite legislation such as the Child Marriage Restraint Act 1929 and the Prohibition of Child Marriages Act 2006, an appalling 84 per cent of Hindu children and 11 per cent of Muslim children are married before they are 10 year old, clearly indicating the limitation of normative changes in the law. On the same line, Basu (2013) claims that while the religious prescriptions and constitutional safeguards are essential, the real-life situation and social praxis need paramount attention to alleviate the sufferings of the women.

31. There is data deficit on the prevalence of triple *talaq*, and very often opinion surveys are mistaken as actual practice. A recent study conducted by the Center for Research and Debates in Development Policy (CRDDP) found that only 0.3 per cent of divorces in the Muslim community are through triple *talaq*, indicating that the practice is aberrant. The 2011 Census Report (accessible through https://censusindia.gov.in/census.website/node/378) suggests that out of a total population of 83.97 million Muslim women, about 212,000, or 0.25 per cent, are divorced.

32. The Karnataka High Court has said that proceedings under the Protection of Women from Domestic Violence Act 2005 are neither purely criminal nor purely civil. Thus, the DV Act has the authority of criminal law but offers civil remedies (DHNS 2021).

33. Field-based studies have noted how the women facing violence at home rarely approach the police or courts for assistance. Such restraint is motivated by the fear that such action might jeopardise the marriage they were to file a charge under Section 498. Many take their complaints to natal families, community leaders, local caste *sangham*s (councils), *basti*-level women's groups and influential local personalities – even before approaching a family counselling centre – thereby treading the terrain of family dispute and its settlement with caution (Suneetha and Nagaraj 2006: 4356–4357).

34. Siddiqui (2021) has argued that social evils afflict women from all communities, and that a holistic approach is required to address and redress gender-based injustice.

35. The fact that personal laws do not exist independently is not a new argument, but it does not find a space in the judicial discourse. Sezgin draws on the work of Nathan J. Brown to show how they not only engage with one another, but are also closely linked to the state's general or territorial laws (Brown 2007 as cited in Sezgin 2013).

36. For instance, see Kaveesha and Narayanan (2017); Press Trust of India (2018); PTI (2019); and IANS (2017).

37. Decree on Personal Status 1992, Article 71 [Yemen].

38. Law of Personal Status 2005, Article 140 [United Arab Emirates].

39. Code of Personal Status 1956, Article 32 [Tunisia].

40. As stated in Article 49 of Law No 84-II of 9 June 1984 in the Family Law of Algeria.

41. Code of Personal Status 1953, Article 117 [Syria].

42. Marriage and Divorce Muslim Act 1951 (as amended till 2006, Section 27 and Rules 1 and 2 Second Schedule).

43. The *talaq ahsan* divorce process needs the husband to offer his wife a *talaq* during her *tuhr*, or menses-free period. He might revoke the *talaq* during the *iddat* period, or waiting time, which lasts around three months. If he does not do so before the *iddat* expires, divorce will occur. However, the divorced couple can remarry at a later date, which is why this *talaq* is known as *ahsan*. Using the same procedure as above, when a husband divorces his wife for the second time, the *talaq* is known as *hasan*. Before the *iddat* period passes, the husband can again rescind the *talaq*. Thus, the divorced couple has a chance to remarry in the future if they so desire. A *talaq* given for the third time immediately terminates the marriage. There is neither the option of the waiting period nor a chance for a reconciliation process. Therefore, the divorce is final. Only if the woman is ready to marry another man and he divorces her can the divorced couple remarry.

44. There are differences of opinion about whether pronouncing *talaq* thrice instantly will result in divorce or not. Many of these countries referred to the opinion of Hanbali scholar Ibn Taimiyah (1268–1328), who argued that three *talaqs* in one sitting counts as one.

45. How these disputes unfold in patrilocal and patrilineal communities is very different from how they unfold in neolocal, matrilocal and/or matrilineal ones. The importance of an intersectional approach has been pointed out by Wommelsdorff (2021) in a recent paper on this topic.

46. We would like to draw attention to John Duncan Derrett's astute advice: the best way to reform Mohammedan law was not to reform it at all. 'Let its inconvenient and archaic features wither away. Once it is accepted that this is the policy, it will wither away fast enough. If there is a frontal attack on personal law, it will survive with a tenacity it has been unable to show in countries where the majority of the population are and always have been Muslims' (cited in Mustafa 2015). The very emergence and existence of bodies such as the AIMPLB vindicates this argument.

47. We borrow the phrase from Galanter, who made a similar observation on dispute resolution by negotiation at multiple forums of justice. He argued how a small fraction of the disputes reaching the courts get resolved, even as a small proportion of the universe of disputes are brought to the courts (1981: 2–3).

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