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## Living By Religion, Playing by Law: Early Glimpses of The Ban On Triple Talaq

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# LIVING BY RELIGION, PLAYING BY LAW: EARLY GLIMPSES OF THE BAN ON TRIPLE TALAQ

—Kalindi Kokal\*

*The Supreme Court of India declared triple talaq, a type of Islamic divorce, as unconstitutional in 2017. Following that, in 2019, the Parliament enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019, which criminalised the pronouncement of triple talaq. Triple talaq as a form of divorce continues to hold legitimacy under the uncodified religious law that Muslims in India abide by in their everyday life. What, then, is the impact of the criminalisation of this practice at the level of the community? What does intervention by the criminal justice system mean for justice in inter-personal disputes that are primarily of civil nature? The paper explores how disputes involving the question of triple talaq unfold in police stations, which are the first State institutions that take cognisance of the offence, to examine the value of criminal deterrence for offences related to domestic disputes.*

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## I. INTRODUCTION

In August 2017, the Supreme Court of India declared the pronouncement of triple talaq, a form of divorce under the Muslim personal law, as unconstitutional. The judgement in the case of *Shayara Bano v Union of India*<sup>1</sup> was

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\* Postdoctoral Fellow, Centre for Policy Studies, IIT Bombay. This paper would not have been complete without the critical insights of several friends and colleagues, specifically Prof Werner Menski, Prof Lynette Chua, Prof Srimati Basu, Prof Parthasarathy, Prof Pratiksha Baxi, and Prof Anindita Chakrabarti. I remain ever so grateful to the police officers and

followed by a legislation titled the Muslim Women (Protection of Rights on Marriage) Act 2019 ('Muslim Women's Act 2019') that was passed amidst escalated emotions, both celebratory and furious. The declaration of triple talaq as unconstitutional held promise of gender justice reform.<sup>2</sup> On the other hand, the criminalisation of the practice under the Muslim Women's Act 2019 fell right in the terrain where gender reform activists and the Hindu nationalist government become uncomfortable bedfellows in the current political environment in India.<sup>3</sup> Through an examination of the actual implementation of the Muslim Women's Act 2019 in three police stations in Mumbai, this paper explores what this new law means for gender justice reform, the interplay between religious laws and State law at the level of interpersonal relations, and the impact of this new law on the changing nature of State–society relations.

The present paper draws on sixteen months of fieldwork carried out in three police stations in central Mumbai located in the Khadakwadi, Neeve, and Chavan Nagar regions.<sup>4</sup> Fieldwork was carried out through several hours of participant observation combined with in-depth qualitative interviews. The interviews were in part extended informal conversations and in part semi-formal interviews conducted with a questionnaire. I sat at the station house where complainants first arrived. On a routine day, I shadowed individual police officers during day and night duties as well as patrolling, and observed senior

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police constables who allowed me a window into their lifescapes within and outside the police station, and to the Centre for Policy Studies at IIT Bombay for providing the required intellectual and financial support that made the study this paper is based on possible.

<sup>1</sup> (2017) 9 SCC 1.

<sup>2</sup> Popular narratives about the judgement indicate the passing of this judgement to be a milestone victory for the Indian women's movement. However, a closer reading of the arguments during the hearing reveals that there was indeed a debate among women's groups about the actual value of such an intervention. One prominent voice was that of grassroots activist and lawyer Flavia Agnes, who voiced her dissent about the nature of such judicial intervention. She argued for the already existing gender-justice legislations (such as the Protection of Women from Domestic Violence Act 2005) and provisions in criminal law (like s 498A of the Indian Penal Code 1860) to be evoked to remedy the issues the petitioners had highlighted. Another point raised by activists dissenting against the judgement was the Court circumventing the discussion about putting in place a plan for the economic welfare of women who were victims of violence. See S Naskar, 'Aim should be Uniformity of Rights, Not a Uniform Law: Flavia Agnes on a UCC' (*The Wire*, 19 October 2016) <<https://thewire.in/politics/interview-flavia-agnes-says-the-aim-should-be-the-uniformity-of-rights-rather-than-the-ucc>> accessed 20 September 2019.

<sup>3</sup> The Indian women's movement underwent a significant change with regard to their stand vis-à-vis the Uniform Civil Code (UCC), which was at the crux of advocacy that envisaged gender reform through the abolition of personal law systems in India. Mid-1980's onwards, women's groups began to prefer small-scale reforms within communities. This shift was preferred largely because of the communalisation of the issue of personal law reform and the UCC. See Tanja Herklotz, 'Law, Religion and Gender Equality: Literature on the Indian Personal Law System from a Women's Rights Perspective' (2017) 1 *Indian Law Review* 250, 262.

<sup>4</sup> The names of all respondents and police stations have been anonymised to maintain confidentiality.

police officers in their meeting hours with the public. The semi-formal interviews were a continuation of the informal conversations, meant to gather more focused responses to certain situations that had been jointly witnessed at the police station concerned. Police stations are often the first point of contact in India between individuals and State laws. Therefore, they remain crucial indicators of what people expect in terms of justice for a particular grievance or conflict. In other research, I have examined how the arrival of a family dispute in the public sphere is an indicator of the dispute having reached a stage of “crisis for the individual/s involved”.<sup>5</sup> In people’s imagination, the police station is also popularly regarded as a ‘public’ space in the context of family matters, which are perceived to concern the private part of people’s lives. Being located at the police station, I analyse the case studies presented in this paper from the state of such ‘crisis’, one element of which is the pronouncement of triple talaq.<sup>6</sup>

The areas within the jurisdiction of the police stations where participant observation was carried out were inhabited largely by low-income and middle-income groups, mostly comprising daily wage labourers, hawkers, auto-rickshaw and cab drivers, fruit and vegetable vendors, small shop owners, and small-scale business owners. In Neeve and Khadakwadi, the majority of the population belonged to the Muslim community; and in Chavan Nagar, Muslims comprised approximately 50% of the population. In all the jurisdictions, the remaining population comprised Hindus that belonged to Scheduled Caste and Scheduled Tribe communities. Mumbai witnesses a large amount of migration. With the exception of the Chavan Nagar police station, the other police stations were visited by people who identified themselves as belonging to a village or town outside of Mumbai, even though they may have been the second or third generation brought up in Mumbai. Therefore, the language of communication between the police and disputing parties was mostly Hindi, sometimes Marathi, and occasionally English. The police officers and constables in all three police stations spoke Marathi among themselves. I have translated and transcribed all interviews conducted and conversations observed into English. I selected the case studies described in this paper from among those that I observed, based on their capacity to bring forth the nuances of interactions between the police and the people in the specific context of the Muslim Women’s Act 2019. They are in no way meant to generalise the experiences of Muslim women, which the author appreciates are diverse.

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<sup>5</sup> Kalindi Kokal, *State Law, Dispute Processing and Legal Pluralism: Unspoken Dialogues from Rural India* (Routledge 2020).

<sup>6</sup> Triple talaq, although a matter of divorce which is ordinarily a subject of civil litigation, has been specifically brought within the jurisdiction of the police through a criminalising law, which is discussed in the following sections of this paper.

## II. DEBATING THE CONSTITUTIONALITY OF TRIPLE TALAQ

The *talaq-e-biddat*, also known as *teen talaq* or triple talaq,<sup>7</sup> is one form of Islamic divorce that is practised within the Muslim community in India. For it to come into force, this form of talaq requires the husband to pronounce the word ‘talaq’ (divorce) three times at once, after which the divorce immediately becomes effective and irrevocable.<sup>8</sup> Given its instantaneous and unilateral nature, the exact process for such a pronouncement to be final and irrevocable has undergone much examination in India at the hands of Indian courts, women’s groups, and Islamic scholars.<sup>9</sup> Triple talaq is recognised by the Indian state as well, by virtue of a personal law system that allows citizens of India to be governed by their religious and customary laws in matters of marriage, divorce, maintenance, and guardianship.<sup>10</sup> In 2017, a series of six petitions by Muslim women who had been divorced by way of the triple talaq were heard simultaneously by a full bench of the Supreme Court of India, and converged into a single judgement. This judgement held that this form of divorce was inconsistent with the fundamental rights guaranteed under the Indian Constitution and was thus unconstitutional.<sup>11</sup> All five judges agreed that the practice required revisiting. However, in light of the values that the Indian Constitution upholds, they were divided (in a ratio of 3:2) about whether the practice should be abolished or modified by way of a judicial decree, or whether such abolition or modification should be brought about at the legislature’s initiative. What resulted was that the Supreme Court declared the practice as unconstitutional and in the operational part of the judgement, added that a legislation concretising its ratio should follow.

This judgement was not unprecedented.<sup>12</sup> The Supreme Court’s judgement in *Shamim Ara v State of U.P.* had explained that triple talaq would be valid so long as it was for a reasonable cause and was preceded by an attempt at reconciliation. However, the judgement in *Shayara Bano v Union of India* remained

<sup>7</sup> This paper will use the term ‘triple talaq’ in the remaining part.

<sup>8</sup> For a brief description of the different types of divorces under Islamic law, see Sohaira Z Siddiqui ‘Triple Divorce and the Political Context of Islamic Law in India’ (2021) 2 Journal of Islamic Law 5.

<sup>9</sup> See Tanja Herklotz, ‘Shayara Bano versus Union of India and Others. The Indian Supreme Court’s Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice’ (2017) 50 *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia, and Latin America* 300, 305.

<sup>10</sup> Muslims are governed in India by their personal law, part of which is codified in State laws such as Muslim Personal Law (Shariat) Application Act 1937, the Dissolution of Muslim Marriages Act 1939, the Muslim Women (Protection of Rights on Divorce) Act 1986 and Muslim Women’s (Protection on Marriage) Act 2019. For the larger part, however, Muslim personal law remains uncodified.

<sup>11</sup> *Shayara Bano v Union of India*, (2017) 9 SCC 1.

<sup>12</sup> Siddiqui (n 8) 17–21.

celebrated for its clarity. Indian courts had already ruled on the inefficacy of the practice of triple talaq. Even the All India Muslim Personal Law Board ('the AIMPLB') had expressed its dissent against the perpetuation of the practice at the community level.<sup>13</sup> Despite these developments, Siddiqui observes that the legislature had remained "conspicuously silent", given the delicate balance it would have to strike between upholding fundamental rights on the one hand and the rights of individuals to be governed by their personal laws on the other hand. Notwithstanding whether and to what extent the judgement succeeded in creating this balance, it deserves to be applauded for laying to rest the longstanding debate on the validity of the triple talaq practice vis-à-vis State law, by unequivocally stating the unconstitutionality of the practice.<sup>14</sup>

In the context of the issues that were raised in these petitions and the manner in which the discussions around them panned out, they would fit within the understanding of 'strategic litigation' in social movement studies. In India, they formed the category of Public Interest Litigation ('PIL'). As a form of litigation, PILs are popular because of the procedural flexibility they offer. PIL procedures do not call for the strict enforcement of the rule of locus standi, i.e., that only a directly affected party may file a suit in the court. Additionally, the formalities involved in the filing process and the stages of hearing are also eased. This is primarily to avoid delay in decision-making due to the 'public' nature of the consequences that the decisions in these cases are likely have.<sup>15</sup>

Given the accessibility it enables,<sup>16</sup> this type of litigation is often used by activists and public-spirited citizens to test the boundaries to which they can stretch the enforcement of rights through the medium of State courts. For instance, when strategic litigation is unsuccessful, it is an indication to activists, lawyers, and others pursuing the litigated agenda to adopt other mechanisms to achieve their intended objective (probably less confrontational ones). However, the success of strategic litigation actually lies in the awareness it creates about the issues being debated, which is evident from the case studies

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<sup>13</sup> I mention the AIMPLB here because of the crucial role it has played in amendments and resistance to amendments in the context of Muslim personal law. The self-declaratory role of the AIMPLB as a representative institution of the Muslim community in India has been contested by different Muslim sects and Muslim women's rights groups. However, in popular political rhetoric, opinions of the AIMPLB continue to hold significance.

<sup>14</sup> Siddiqui (n 8) 21.

<sup>15</sup> Anindita Chakrabarti, 'Religious Freedom, Legal Activism, and Muslim Personal Law in Contemporary India: A Sociological Exploration of Secularism' in Olga Breskaya, Roger Finke, and Giuseppe Giordan (eds), *Religious Freedom: Social-Scientific Approaches* vol 12 (Brill 2021); Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016).

<sup>16</sup> Procedural formalities often deter people from litigating in courts. They are perceived to create hurdles that involve excessive expenditure of time and money. Here, I refer to accessibility. The absence of lengthy filing and hearing procedures were meant to make courts and "justice" more accessible. See Marc Galanter and Jayanth K Krishnan, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India' (2004) 55 *Hastings Law Journal* 789.

that are later discussed in this paper. While knowledge about the exact consequences of the pronouncement of a triple talaq may have been fuzzy, it was popular knowledge that triple talaq was invalid in the eyes of the State. Cases in the form of PILs that debated the legitimacy of *dar-ul-qazas*, the constitutionality of Section 377 of the Indian Penal Code, 1860 ('IPC'), or the status of the right to privacy as a fundamental right, witnessed how public opinion came to the front in scores on these issues through op-eds in newspapers, news channel debates, and hashtag trends on social media.<sup>17</sup> Similarly, by drawing public attention to the threads of arguments weaving into the main subject, the PIL testing the constitutionality of the practice of triple talaq threw light on the sustainability of, and popular support for, campaigns within the broader societal and social dynamics. These included the campaigns on gender equality and the uniform civil code.<sup>18</sup>

A closer reading of the judgement reveals that the intent of the petitions and the judgement that followed was twofold: *firstly*, to restructure the unequal power relations between men and women that were reinforced by this practice, in alignment with the right to equality;<sup>19</sup> and *secondly*, in line with the Indian state's welfare function, to curb the destitution that results from the instantaneous nature of this divorce practice. Following the judgement, the Muslim Women's Act 2019 was brought into force to give life to the decision of the Supreme Court. As Mandal notes from his reading of the Parliamentary debates, the government then in power felt that it was insufficient to just declare that the practice lacked legal validity: the backing of a sanction was

<sup>17</sup> Flavia Agnes, 'Darul Qaza Row: A Storm in a Teacup' (*The Asian Age*, 1 August 2018) <<http://www.asianage.com/opinion/oped/010818/darul-qaza-row-a-storm-in-a-teacup.html>> accessed 16 August 2018; Ajay Kumar, 'Section 377: What Two Recent SC Judgments Tell Us about Court's Altered View on Sexuality and Privacy in India' (*Firstpost*, 10 January 2018) <<https://www.firstpost.com/india/section-377-what-two-recent-sc-judgments-tell-us-about-courts-altered-view-on-sexuality-and-privacy-in-india-4295821.html>> accessed 5 September 2018; Faizan Mustafa, 'Sharia Courts in Fact' (*The Indian Express*, 10 August 2018) <<https://indianexpress.com/article/opinion/columns/sharia-courts-muslims-triple-talaq-aimplb-uniform-civil-code-in-fact-5299750/>> accessed 16 August 2018.

<sup>18</sup> Ratna Kapur, 'Triple Talaq Verdict: Wherein Lies the Much Hailed Victory?' (*The Wire*, 28 August 2017) <<https://thewire.in/gender/triple-talaq-verdict-wherein-lies-the-much-hailed-victory>> accessed 16 September 2019; Sherin BS, 'Feminism at a Crossroad: Triple Talaq Judgement and the Question of Gender' (*Outlook India*, 26 August 2017) <<https://www.outlookindia.com/website/story/feminism-at-a-crossroad-triple-talaq-judgment-and-the-question-of-gender-justice/300801>> accessed 29 June 2020; Jyoti Punwani, 'In the End, We'll Get a Good Law: Senior Advocate Bader Sayeed' (*The Hindu*, 3 February 2018) <<http://www.thehindu.com/society/in-the-end-well-get-a-good-law-senior-advocate-bader-sayeed/article22644167.ece>> accessed 5 February 2018.

<sup>19</sup> Justice Nariman wrote in his judgement that: "... this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India." *Shayara Bano* (n 11) [57].

further required. A criminal law that penalised the very pronouncement of the triple talaq was deemed to be an ideal deterrent for husbands.<sup>20</sup>

This action of the Hindu nationalist government evoked a lot of criticism. It was perceived to be politically motivated,<sup>21</sup> framing the question of arbitrary divorce as a religious problem, “leading to further homogenisation of Muslims and reification of Muslim misogyny.”<sup>22</sup> There was opposition to the bill on several grounds, including questioning the veracity of the deterrence thesis, the singling out of Muslim men, and the treatment of Muslim women as more vulnerable than others.<sup>23</sup> Such opposition remained unsuccessful, and the bill was eventually passed in both Houses of Parliament, bringing into force the Muslim Women’s Act 2019.<sup>24</sup>

In light of the discussions stirred by the enactment of this Act, the next part of this paper examines how the practice of triple talaq developed within the everyday life of the Muslim community in its interaction with the State after the law came into force.

### III. THE LIFE OF TRIPLE TALAQ ON DOCUMENTS

The validity of the triple talaq pronouncement through a written document received by the wife – letters, WhatsApp messages, and legal notices – has

<sup>20</sup> S Mandal, “‘Taking a Gun to Kill the Mosquito’: Gender Justice, Deterrence and Protection in the Legislative Debate on Criminalising Triple Talaq’ (2018) 2 *The JMC Review* 83, 91.

<sup>21</sup> Danish Raza, ‘Indian Parliament Bans Instant Divorce for Muslims’ (*The Atlantic*, 4 August 2019) <<https://www.theatlantic.com/international/archive/2019/08/india-triple-talaq/595414/>> accessed 28 March 2022; Faizan Mustafa, ‘Why Criminalising Triple Talaq is Unnecessary Overkill’ (*The Wire*, 15 December 2017) <<https://thewire.in/gender/why-criminalising-triple-talaq-is-unnecessary-overkill>> accessed 28 March 2022; Flavia Agnes, ‘The Politics behind Criminalising Triple Talaq’ (2018) 53 *Economic and Political Weekly* 12, 14.

<sup>22</sup> Chakrabarti (n 15) 52-53.

<sup>23</sup> Mandal (n 20) 92-93.

<sup>24</sup> *ibid* 86. Along with legal implications, the enactment of the Muslim Women’s Act 2019 held political significance as well, the title of the Act being the most prominent indicator of this. The Muslim Women (Protection of Rights on Marriage) Act 2019 is a mirror image of the Muslim Women (Protection of Rights on Divorce) Act 1986, mentioned before, with the word ‘divorce’ being replaced by ‘marriage’. The 1986 Act was passed by the Congress Government following the Supreme Court’s judgement in *Mohd Ahmed Khan v Shah Bano Begum*, AIR 1985 SC 945. This enactment was criticised for its supposed denial of applicability of the maintenance law under s 125 of the Code of Criminal Procedure to Muslim women. It was the context of what was popularly understood as the Congress government’s submission to the politics of conservative Muslim groups that the Modi government promoted an enactment whose title was worded in a manner “...to contrast the illusory protection of Muslim women’s rights ‘on divorce’ by the 1986 Act, with its own supposedly more radical protection offered to them ‘on marriage.’”



been long debated.<sup>25</sup> The issue reached a consensus in *Shamim Ara v State of U.P.*,<sup>26</sup> when the judges observed in the obiter dicta that a triple talaq would be valid and final only when it was pronounced for a reasonable cause, and was preceded by an attempt by the couple to reconcile their differences.

My ethnographic work at the police stations in Mumbai revealed that the pronouncement of triple talaq had evolved to combine State and religious law. It developed into a practice where Muslim husbands (seriously) intending to divorce their wives used a document titled as a deed of divorce to pronounce triple talaq. However, this was considered to be a valid pronouncement in the community only if the wife also signed the same document, as explained to me by one Muslim lady. Such documents looked like any other contract deed, duly notarised and executed on a stamp paper, with pictures and signatures of the couple and their witnesses. I could not get any clear answer from the members of the community or the police about whether this practice of documenting the pronouncement - attested by the parties in the presence of a notary and 2 witnesses—had gained traction after the Supreme Court judgement or had existed from before. However, what was evident was the treatment of such a document, which seemed to have been impacted significantly after the judgement and the passing of the Muslim Women’s Act 2019.

In the case of Rizwan and Saba, according to Saba’s narrative to Assistant Police Inspector (‘API’) Tawade, Rizwan had been compelling Saba to sign the deed of divorce so that he could marry his girlfriend - Ayesha – whom he was currently living with.<sup>27</sup> The deed was drafted to read that the divorce was by mutual consent,

...where the party of the first part (read: husband) herein grants the customary divorce pronounce(d) three times Talaq Talaq Talaq to the wife herein and the wife accepts the said Talaq in front of witnesses freely and voluntarily and without any force, coercion, or undue influence from anybody.<sup>28</sup>

Showing the document to the API, Saba said, “I am not divorced from him. But he has a new girlfriend, so he keeps pressurising me to give talaq. But

<sup>25</sup> ‘Talaq Delivered through Skype, WhatsApp and Others Means Valid: AIMPLB’ (*India Today TV*, 3 November 2015) <<https://www.indiatvnews.com/news/india/talaq-delivered-through-skype-whatsapp-sms-valid-55711.html>> accessed 15 October 2021; HT Correspondent, ‘Man Sends “Talaq” Notice by Registered Post, Kerala Court Nullifies the Divorce’ *Hindustan Times* (18 May 2017) <<https://www.hindustantimes.com/india-news/kerala-malappuram-court-nullifies-talaq-sent-by-post/story-SLxY2aA6PTp8zyVKOpOThK.html>> accessed 15 October 2021.

<sup>26</sup> *Shamim Ara v State of U.P.*, (2002) 7 SCC 518, AIR 2002 SC 3551.

<sup>27</sup> Participant observation at Neeve Police Station (2 February 2020).

<sup>28</sup> Copy of deed on record with the author.

what will I do? I have two children from him.” At the time of visiting the police station, Saba was living with her natal family. She had left her matrimonial home because of increasing instances of physical and mental violence caused by Rizwan, which, as she narrated, had a deteriorating impact on her health. “Ever since I discovered I have a heart problem I went to live with my father and brother. I cannot bear the beating that happens on a daily basis anymore (*Woh roz roz ka marna peetna sehen nahi hota hai*),” said Saba, who had been married to Rizwan for eight years at the time. Saba’s understanding of this divorce deed and the pronouncement of triple talaq in it was that it was not valid unless she consented to the divorce, which would be confirmed only with her signature on the deed. The API supported her perspective and said, “whether or not to give talaq is entirely your prerogative,” thus tilting the power balance – customarily in favour of the husband – in favour of Saba, the wife.<sup>29</sup>

However, in the background, paperwork to build a case against Rizwan had already begun on the basis of this divorce deed produced by Saba. Rizwan was listed as a habitual offender in the register of Neeve police station. The police had attempted to arrest him previously in other cases. However, given his political connections, they had been unable to keep him in actual custody. The police discussed that a matrimonial dispute was the perfect opportunity to do so.<sup>30</sup> The offence of pronouncing triple talaq was non-bailable, which meant that Rizwan could be held in police custody for at least twenty-four hours before being produced before the court. “This is enough time for us to interrogate him about the other offences he has been involved in,” said a Police Sub-Inspector working in the detection team of the police station. The ‘domestic’ nature of the offence, under the pretext of which Rizwan would be arrested, would shield the system from political interference, as such matters were considered one’s ‘private affairs’. Given the recentness of the enactment of this legislation, the police hoped that bail would not come easily even from the court.

Saba visited the police station a few more times after this day with different complaints against Rizwan, who was allegedly threatening her brother and

<sup>29</sup> Rizwan’s girlfriend Ayesha’s parents had also visited the police station earlier that week to lodge a complaint against Rizwan for ‘abducting’ their daughter. Before registering such a complaint formally, the police informally asked Ayesha to visit the police station. Such practices are commonly undertaken by the police in order to test the veracity of the complainant’s narrative. When Ayesha had been called to the police station in this context, she said that she was living with Rizwan of her own will and that she did not intend to marry him until he was divorced from his first wife. The pressure on Saba to accept the triple talaq was possibly a result of this situation, since polygamy within the Muslim community is otherwise recognised as a matrimonial arrangement by the Indian State.

<sup>30</sup> The police did not register the complaint for abduction as was being pursued by Ayesha’s parents because Ayesha and Rizwan were two adults in a consensual relationship and therefore, according to the police, a case for abduction would not hold ground in court.

father to compel her into signing the divorce deed. However, she only sought an ‘NC’ each time. An ‘NC’ is the short form for a non-cognisable complaint, which meant that the sections applied against Rizwan would not allow the police to arrest him without a warrant from the court.<sup>31</sup> The officer at the station house changed on a daily basis in this police station, and all of the officers knew that Rizwan was ‘wanted’ in connection with what they perceived as graver offences.<sup>32</sup> Hence, Saba was eventually convinced into filing a complaint against Rizwan for pronouncing triple talaq, which is a cognisable offence. This meant that a First Information Report (‘FIR’) was lodged against him, which gave the police powers to make an immediate arrest.

However, in another case from the same police station, that of Yusuf and Shabana, procedures panned out differently with respect to the document that recorded the pronouncement of the triple talaq. In Shabana’s narrative, Yusuf had already divorced her through a divorce deed that she had signed. This divorce deed was in Urdu, and it contained the pronouncement of triple talaq in the language of the document. It was executed by an Imam and notarised with a seal of the court. “My signatures were taken on a blank sheet of paper,” said Shabana, when I asked her if she understood the terms of the document.<sup>33</sup> According to the narrative of her neighbour, who accompanied Shabana, this document had been preceded by an oral pronouncement of the talaq a few days before, after which Shabana had been living with her mother.

Shabana came to the police station twice. The first time, she had come to complain that her husband had suddenly divorced her, and she had brought along the divorce deed as proof. The Police Sub-Inspector (‘PSI’) on duty at the station house had summoned her husband to the police station and had

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<sup>31</sup> To this end, however, the complainant has to approach the court with the NC document and acquire a warrant for his arrest. Most NCs however never reach the court, except as annexures to a civil case against the same person. The procurement of an NC document, however, seems to provide some mental relief to complainants.

<sup>32</sup> During my time spent at the police stations, police officers explained the varying ranks that there were “serious” and “trivial or useless (*faltu*)” offences. Serious offences mostly comprised murder, rape, thefts of large amounts or gold and theft rackets, large monetary frauds, and offences carried out using technology. While the former list could be expanded, most police officers shared the opinion that family disputes were inevitably trivial because they could never be “solved”, especially by the police who perceived themselves as outsiders to the situation. I also felt that it was the commonness of these disputes that made them seem unimportant, especially to the male police officers who were more interested in busying themselves with “more important” matters. These “more important” matters commanded investigation and interrogation – perceived to evoke more masculine attributes, unlike family disputes that often-required counselling skills – perceived popularly as a feminine talent – on part of the intervener. In this case study, Rizwan had been charged before as an abettor in cases of communal violence and grievous hurt arising from property disputes. For more on masculinity and policing, see Beatrice Jauregui, *Provisional Authority* (University of Chicago Press 2016).

<sup>33</sup> Participant observation and informal conversation with Shabana at Neeve Police Station (25 February 2020).

found that neither of them understood the document. He had later pointed out in a discussion with other police officers that the couple could not even read the Urdu document. Narrating the incidence of the event, emphasising the irony (of the offence, if there was one) with a short laugh, PSI Kolhe discussed with his colleagues:

The document contains the triple talaq pronouncement. But the husband said he was willing to live with the wife so long as she agreed to his terms and conditions. They had some petty differences between them. Currently I have mediated the situation between them and sent them back home (*tyana samjavun ghari pathavla*), asking them to give the relationship a second chance. But what is the meaning of this document now? Is this pronouncement an offence under the new Act? Both the husband and wife are illiterate (*angutha chāp*) and cannot even read the document, let alone understand it.<sup>34</sup>

Kolhe revealed that his sympathies were with Yusuf, and that if Shabana insisted on lodging an FIR, he would apply Section 498A of the IPC and not the Muslim Women’s Act 2019.<sup>35</sup> “My gut feeling is that this woman is using the document to corner Yusuf, because she knows that triple talaq is now an offence. She has been taught” (by someone), he remarked during the discussion. Some of the other officers in the discussion also felt that if the parties did not understand the document they had signed, the terms of such a document did not make for a cognisable offence.

I met Shabana when she came to the police station the second time, on the very next day after the discussion with Kolhe. This time the officer on duty at the station house was API Desai, who was taking a lunch break when Shabana

<sup>34</sup> Participant observation at Neeve Police Station (24 February 2020).

<sup>35</sup> This was because Kolhe was not compelled to arrest Yusuf. Section 498A of the IPC relates to cruelty against a woman by her husband and/or her in-laws. Its penal provisions are similar to the offence of pronouncement of triple talaq, in that, it is cognizable, non-bailable, and punishable with imprisonment of up to three years and a fine. In the city of Mumbai, however, there is an informal protocol amongst police officers to thoroughly enquire into the genuineness of a complaint under Section 498A before actually filing the FIR. Documents such as the statements of the complainant and witnesses are collected as part of this protocol and a rough file is created which needs to be approved by the senior inspector of the police station followed by the Assistant Commissioner of Police (ACP), and at times even the Deputy Commissioner of Police (DCP), to ensure the veracity of this complaint as well as the possibility of its success in court (as a conviction). This procedure can take anywhere between one to two months. The police can avoid arresting the individual for this period, as there is no “actual” complaint registered as an FIR. Even once the offence is registered, the police stated that they avoided arresting the accused under Section 498A in line with the Supreme Court’s verdict in *Arnesh Kumar v State of Bihar*, (2014) 8 SCC 273, which deters the arrest of an accused – unless absolutely necessary – for crimes punishable with upto 7 years of imprisonment.

arrived at the station house with her mother and her neighbour. Within the system of police hierarchy in India, an API is senior by several years of experience to a PSI. She told the probationary officer filling in for API Desai that her husband had divorced her, and that he had kept their child with him. She was seeking police intervention to get back her child's custody.

From the conversations among Shabana, her mother, and the neighbour, I learnt that Shabana's mother was more interested in Shabana returning to her matrimonial home if she wanted to keep the child. Shabana's neighbour emphasised how the pronouncement of triple talaq was now a criminal offence, and that Shabana could use this to compel her husband to give her some compensation for having abandoned her so suddenly. However, Shabana's focus remained on recovering the custody of the child. She said she was not keen to cohabit with Yusuf because he placed too many restrictions on her.

As per the informal policy, the probationary officer called Yusuf to the police station. By the time Yusuf arrived, API Desai was back at the station house, and had already been briefed about Shabana's grievance. On seeing Yusuf, Desai roughed him up with some abusive language and asked him why he was troubling his wife. He quickly realised that the differences between Yusuf and Shabana were not easily reconcilable, and so used the information of the talaq to make the next statement: "You are divorced already. You don't want to live together anyway. So, stay apart." This indicated that the API did not intend to delve into the issue of the pronouncement of the triple talaq. By virtue of his statement, it seemed as though he accepted it as it was. Turning to the issue of the child, which was Shabana's primary grievance on that day, Desai told Yusuf that he would have to gain custody of the child from the court. The child was barely a few months old, and under law would have to remain with the mother. Yusuf was unwilling to give the child to Shabana. He spoke agitatedly and gesticulated emphatically to explain how Shabana could not look after the child properly. "You take videos of how she is looking after the child and present that as evidence (in court)," advised Desai. The dispute concluded with Desai strictly telling Yusuf to return the child's custody to Shabana until he had a court order.

The unfolding of the cases of Rizwan and Saba, and Shabana and Yusuf, reveals that while the documentation of the pronouncement of triple talaq makes for concrete evidence of the occurrence of this offence under the Muslim Women's Act 2019, its interpretation remains within the discretion of the police officer who examines it. The police in India have long been criticised for using their discretion to decide whether or not an act should be categorised as a cognisable offence, particularly in the case of women

complainants.<sup>36</sup> The handling of triple talaq pronouncements by the police in Neeve police station was no different. In the case of Rizwan and Saba, Saba was unaware that the pronouncement of triple talaq constituted a criminal offence. She was aggrieved with her matrimonial situation and wanted it to be tackled by the police in some way. Registering an FIR for the pronouncement of triple talaq on the document that Saba produced at the police station also worked to meet the end Saba was trying to achieve. But more importantly, the Muslim Women's Act 2019 was swiftly enforced because the police needed a pretext to arrest Rizwan, whom they had been looking to gain custody of in his connection with other offences, unconnected to Saba. Therefore, the motivation to take cognisance of the triple talaq pronouncement was not so much Saba's matrimonial grievance, as had been envisaged by the Court and legislature – it was to overcome systemic hurdles that the police had been facing in getting police custody of Rizwan as an offender in other contexts.<sup>37</sup>

Contrastingly, there was no such urgency or motivation for the police in the case of Shabana and Yusuf. Like Saba, Shabana also did not persist in pursuing a case against Yusuf for the pronouncement of triple talaq. Her matrimonial grievance was specifically related to recovering custody of her child from Yusuf. In this case as well, the pronouncement of triple talaq was documented in the divorce deed. Nevertheless, the police chose to overlook this pronouncement as an offence under the Muslim Women's Act 2019. In fact, it was Shabana's neighbour who kept bringing the fact of pronouncement to the fore of the discussion with the police and among themselves. This reinforces the high level of awareness that was created as a result of the litigation that brought triple talaq into the spotlight.<sup>38</sup> However, the police had debated the legitimacy of the triple talaq. In the first instance (during the discussion with PSI Kolhe), on the basis of whether the couple understood the contents of the divorce deed when they concluded that the pronouncement was invalid, and in the second instance, on the basis of the circumstances of the dispute before them, when API Desai proceeded on the ground that the triple talaq had resulted in the fact of a divorce.

Such treatment of documents confirms early conjectures of scholars about the possible impacts of the Muslim Women's Act 2019 – that it has become an

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<sup>36</sup> Mandal (n 20) 12.

<sup>37</sup> *ibid* 13. The rhetoric of gender justice and empowerment underscored the discussions in the legislature during the passing of the Bill. "The government's advocacy of criminal law centred on the image of Muslim women as helpless victims of triple talaq... Criminal law ... was therefore as much an instrument of protection directed at Muslim women, as an instrument of deterrence directed at their husbands."<sup>37</sup>

<sup>38</sup> Chakrabarti (n 15).

additional armour for the police, specifically against Muslim men,<sup>39</sup> providing no novel relief to Muslim women in distressing matrimonial situations.<sup>40</sup>

#### IV. VICTIMS OR VICTORS? WOMEN'S NAVIGATION OF TRIPLE TALAQ PRONOUNCEMENTS

The Court and legislators obviously knew that banning triple talaq would not bring its pronouncement as a form of divorce within the Muslim community in India to a halt. The criminalisation of the pronouncement was meant to deter the use of this form of divorce under Muslim personal law, given its unilateral and instantaneous nature,<sup>41</sup> giving women dissatisfied with the separation a legal mechanism to counter balance the situation they found themselves in. In the cases I saw during my ethnographic work at the police stations, I noticed that the Muslim Women's Act 2019 was used not so much to dismiss the validity of the pronouncement – that continues to remain legitimate according to Islamic legal order – and restore matrimonial cohabitation, but rather in the aftermath of the pronouncement. Therefore, the legitimacy and finality of the pronouncement, which the State sought to revoke, remained. However women were observed to use the criminalisation of this pronouncement brought about by this Act to negotiate the terms of such a divorce.

Ayesha, a young Muslim woman of twenty-two years, approached the Khadakwadi police station with an application (*arzi*) against her husband, Shahid. While admitting the application for further enquiry into the register of the police station, the lady PSI Tigve asked Ayesha what the cause of her application was.<sup>42</sup> She mentioned that Shahid had divorced her by way of triple talaq a year ago, and all attempts at reconciliation by families, religious heads, and well-wishers had failed. She finally decided to lodge a police complaint for the harassment she had faced in her matrimonial home.

On learning that Ayesha *had* been open to reconciliation talks, in the hope that a more structured intervention for reconciliation may help, Tigve advised Ayesha to first visit the Special Cell for Women and Child Support ('Special Cell')<sup>43</sup> located in the premises of the police station. This Special Cell is

<sup>39</sup> Agnes (n 21) 14.

<sup>40</sup> Zubair Abbasi, 'Criminalization of Triple Talāq in India: A Dilemma for Religiously Divorced but Legally Married Muslim Women' (*Islamic Law Blog*, 8 August 2019) <<https://islamiclaw.blog/2019/08/08/commentary-criminalization-of-triple-%e1%b9%adalaq-in-india-a-dilemma-for-religiously-divorced-but-legally-married-muslim-women/>> accessed 20 October 2021.

<sup>41</sup> Mandal (n 20) 91.

<sup>42</sup> The observation of this case study spanned a few weeks between 25 August 2021 – when Ayesha visited Khadakwadi police station for the first time – and 29 September 2021.

<sup>43</sup> The Special Cell for Women and Child Support has been set up under a joint programme between the Tata Institute for Social Sciences and the Department of Women and Child

managed by two women who have a degree in social work and/or counselling practices. One of the functions they fulfilled was to intervene in matrimonial and family disputes, to explore whether the grievances and dispute concerned could be settled by way of mediation instead of a police complaint. On the same day, in the Special Cell, Ayesha narrated that she had been living with her parents for over a year because her husband had pronounced triple talaq and suddenly asked her to leave the matrimonial home. She explained that differences had arisen between her and her husband because he wanted her to cut off all relations with her parents. "I had made an application at the police station even then. At the time my husband's family said that we could talk this out (*sulah kareng*). They just kept beating around the bush and no settlement talks ever occurred," narrated Ayesha.<sup>44</sup> The Special Cell workers explained to Ayesha that they would, if Ayesha was willing, conduct a formal procedure for individual and joint meetings between Ayesha and Shahid. Ayesha conversed confidently, treating the circumstances she found herself in a matter-of-fact way. This was different from the distraught state that most women who approached the Special Cell for the first time appeared in. The Special Cell workers were keen to verify Ayesha's motivation for their intervention, and therefore asked Ayesha if she would be willing to return to her matrimonial home if the mediation resulted in such an understanding. "He has not taken my calls in one month, why will he take me back home now?" asked Ayesha rhetorically. As in her conversation with the PSI Tigve, so also in her discussion with the Special Cell workers, Ayesha was primarily interested to know whether this procedure would result in a "case".<sup>45</sup> When she could not get a clear answer from the Special Cell, she made photocopies of her application, submitting one to the Special Cell and another to the police station, putting the process in motion in both forums.

In the week that followed, the Special Cell managed to call Shahid for an individual meeting, in line with their procedure. The context to Ayesha's complaint, as had been speculated by both the Special Cell workers and PSI Tigve, had many threads. Ayesha's brother was married to Shahid's sister. The couple had not gotten along, and this had resulted in their separation, with Shahid's sister returning to her parent's home, i.e., Ayesha's matrimonial home. All attempts at settling differences between Ayesha's brother and Shahid's sister had failed. Shahid's sister had ultimately filed a case under Section 498A of the IPC against Ayesha's brother, because he refused to give her a divorce

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Development, Government of Maharashtra. It aims to eliminate violence against women ('VAW') by adopting a multifaceted response to the complex issue of VAW. These cells are strategically located in police stations, thus linking police systems with women's organisations and building a coordinated response to the needs of violated women.

<sup>44</sup> Participant observation at Special Cell meeting (25 August 2021).

<sup>45</sup> I observed that for the majority appearing at the police station, the popular understanding of "case" meant an active intervention by police personnel at the least, and a court appearance in its graver form.



(*talaq nahi diya*) as per Muslim personal law. Soon thereafter, problems arose between Shahid and Ayesha, because Shahid wanted Ayesha to suspend her relations with her parents until his sister's matrimonial dispute broke ground. In this context, a few weeks later, in another visit to the Special Cell, Shahid narrated: "I told her to wait until her brother either gave a divorce to my sister so that she could be remarried, or the court case reached its reasonable end."<sup>46</sup> Ayesha had eventually returned to her parent's home on the ground that the arguments between Shahid and her had led to him pronouncing triple talaq. This fact was denied by Shahid on both occasions when he visited the Special Cell. "We used to argue every day because she would not listen. (*Roz roz ladai hoti thi*)," he told the Special Cell workers when they asked him about the triple talaq pronouncement. In one conversation about the talaq, he carefully explained how in order to be valid, triple talaq had to be pronounced in the presence of two witnesses, and anything else did not actually amount to a talaq. According to him, Ayesha's complaint against him was closely interwoven with the processing of her brother's matrimonial dispute. While Shahid denied having pronounced the triple talaq, like Ayesha, he was also not keen on reconciliation. A joint meeting between Ayesha and Shahid was nevertheless planned by the Special Cell.

In the same week, Ayesha once again visited the police station with her parents. I was present at the station house at the time they visited. They informed PSI Kothe, who was on duty at the time, that Ayesha's case was simultaneously being processed in the Special Cell. When Kothe asked Ayesha for an update on the proceedings in the Special Cell, Ayesha's father said: "There is no hope of her going back. He has given her a divorce. And in our community, he has left our daughter. (*Usne talaq de diya hai. To humare main ise chodd diya hai*.) Now we want to file an FIR. Our daughter has suffered a lot. (*Bahut julm hua hai humare beti pe*)."<sup>47</sup> Ayesha sat quietly, while her mother confirmed her father's narrative and said: "Initially, she used to say nothing to us about her life in her matrimonial home. She used to only cry when we asked her anything. But then when she came to live with us, she started telling us everything slowly."<sup>48</sup> On determining that Ayesha and her family were keen to lodge an FIR, Kothe – to whom Ayesha's application had been allotted – said he would call Ayesha and her family members in the next days for a statement.

Later, I learnt from the Special Cell that Ayesha had called them to cancel the joint meeting soon after her conversation with PSI Kothe. The Special Cell workers were convinced by Ayesha's narrative that she had been given the triple talaq, although Shahid denied it. However, they acknowledged that both Shahid and Ayesha accepted the legitimacy and finality of the triple talaq as

<sup>46</sup> Participant observation at Special Cell (27 September 2021).

<sup>47</sup> Participant observation at Khadakwadi police station (30 August 2021).

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

per their religious legal order, even though under State law this was now invalid. A Special Cell worker said:

This community is very strict (*kattar*) about the meanings and interpretations of their customary practices. In his head he (Shahid) knows that he has already given triple talaq and therefore he feels that even if he wants to, he may not be able to live together again with Ayesha, as Muslim personal law denies that right.

Accepting the religious legitimacy of such a pronouncement probably also aligned with the animosity that had arisen between Ayesha and Shahid due to the string of litigation between their families. In light of Ayesha's reluctance to pursue a process with the Special Cell, and the limited cooperation to this end from Shahid, her case was closed in the Special Cell.

Meanwhile, since his meeting with Ayesha and her family, Kothe had already begun to record the statements of Ayesha and her family members. Informal policy at the level of the police station requires the police to record the statement of the husband and the wife in matrimonial disputes. Accordingly, Shahid had narrated to PSI Kothe, as he had in the Special Cell, the connection of Ayesha's case against him with the case of his sister against Ayesha's brother. Here, in Kothe's perspective, Ayesha's complaint was "technical". As per police practice, husbands accused of pronouncing triple talaq were also charged under Section 498A of the IPC. The FIR against Shahid was no different. Ironically, Ayesha's case against Shahid was being developed with a charge under Section 498A of the IPC for pronouncing the triple talaq; whereas Ayesha's brother in his case was being charged under the same section of the IPC, but because he was refusing to pronounce the talaq!

Ayesha's case is a reminder of the fact that pronouncements (as well as non-pronouncement) of triple talaq are preceded by a history of violence and complex interpersonal dynamics.<sup>49</sup> Bracketing triple talaq as a criminal offence, to be dealt with through penal consequences, provides neither a simplistic nor a straightforward solution, given the web of complexities such a pronouncement is often tied into. Her case also evidences the practical difficulties that consequently arise for the police in investigating and collecting evidence for establishing such an oral pronouncement. This causes the police to adopt practices such as the application of Section 498A of the IPC, which nullify certain reconciliatory aspects of the legislation. While Section 498A of the IPC bears the same punishment as Section 3 of the Muslim Women's Act 2019, only the latter is compoundable. This means that the woman can stop

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<sup>49</sup> Agnes (n 21).

legal proceedings under the Act in the instance she decides to settle the matter with her husband. Theoretically, the facts of Ayesha's case made for an offence under Sections 498A of the IPC *and/or* Section 3 of the Muslim Women's Act 2019. However, given the procedural requirements of investigating facts and collecting evidence, the police – per practice – applied several sections in every FIR. This increased their scope of investigation, and simultaneously transferred decision-making about which sections the accused should finally be charged with, to the courts. However, in Ayesha's case, the joint application of both these sections nullified the possibility of her stopping proceedings and reconciling with her husband at her own will. This is because when provisions with differing consequences regarding bail and compounding are jointly applied, the discretion on these matters – which is very crucial to the dispute – is automatically transferred to the police and the State.<sup>50</sup>

Triple talaq was declared unconstitutional because it violated certain fundamental rights. The formal (and popular) reading of Muslim personal law indicates that the majority of methods for divorce under Muslim personal law are unilateral in nature and vest the power of “giving divorce” in the husband. What set triple talaq apart from the other forms of divorce was the fact that it was instantaneous and irrevocable after the third pronouncement of “talaq”, to be pronounced in immediate succession after the first two. In their judgement, the judges deciding this issue highlighted that this created scope for arbitrary and unfair decisions by a husband. This caused the practice of triple talaq to impose a disproportionate burden on women in matrimony, by leaving them at the mercy of their husband's will in the most unfortunate circumstances.

However, as the empirical data in this paper indicates, the use of this legislation by both the State and Muslim women, is shaping it to take on a life of its own. To what extent then was the court successful in – what critiques of the judgement call – “saving Muslim women” from the apparently arbitrary actions of their husbands? Does sending a husband to prison necessarily translate into the wife's well-being, as is envisaged by the promulgation of the Muslim Women's Act 2019? Does it not undo several years of work by the women's movement, that resulted in compelling the courts to consider civil remedies as an option for domestic disputes, including domestic violence?<sup>51</sup> The Supreme Court's judgement was heavily criticised as a lost opportunity to articulate jurisprudence on gender justice.<sup>52</sup> In declaring triple talaq invalid only on the grounds of its arbitrary nature, the judges obviously adopted a very narrow

<sup>50</sup> Fieldwork notes from various discussions with police inspector at Khadakwadi police station (1 July 2021 to 30 September 2021).

<sup>51</sup> Here, I am referring to the history of the Protection of Women from Domestic Violence Act 2005. For more details see A Suneetha and Vasudha Nagaraj, ‘A Difficult Match: Women's Actions and Legal Institutions in the Face of Domestic Violence’ (2006) 41 *Economic and Political Weekly* 4355.

<sup>52</sup> Herklotz (n 9).

approach in evaluating the practice and its consequences.<sup>53</sup> Leaning towards the preservation of marriages, the judgement framed women within a very protectionist discourse.<sup>54</sup> A perspective on the agency of women in navigating and using the law (as is evident from cases like that of Ayesha) as the agency of individual agents of the State (such as that of the police officers in Saba or Shabana's case) has been completely overlooked not only in the judgement, but also in the framing of the Muslim Women's Act 2019.

## V. EMPOWERING WHOM?

The Muslim community has long been navigating State law in a manner such that they can continue to follow their personal law without seeming to have violated State law.<sup>55</sup> Despite the recognition of personal laws in India, there is no clarity on the relationship between personal laws and State sovereignty, and whether the State can amend personal laws.<sup>56</sup> The judgement on triple talaq was an opportunity for the Supreme Court to begin jurisprudential discourse on this relationship between personal laws and the Constitution. However, as Sen points out, the judges avoided this more complex exercise, and limited their opinion to the relationship between triple talaq and Muslim personal law.<sup>57</sup>

Given this continued fuzziness, therefore, the practices of personal law oscillate between the two extremes of absolute non-interference by the State<sup>58</sup> and legislative amendments pertaining to often uncodified personal laws.<sup>59</sup> Such precarity results in hybrid forms of practice that use bureaucratic practices (borrowed from the architecture of the State)<sup>60</sup> to validate customary

<sup>53</sup> Jhuma Sen, 'The Gender Question' (*Frontline*, 15 September 2017) <<https://frontline.thehindu.com/the-nation/the-gender-question/article9834658.ece>> accessed 12 October 2021.

<sup>54</sup> Kapur (n 18).

<sup>55</sup> Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (Cambridge University Press 2011); Sylvia Vatuk, 'Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law' (2008) 42 *Modern Asian Studies* 489; S Ghosh and Anindita Chakrabarti, 'Religion-Based "Personal" Law, Legal Pluralism and Secularity: A Field View of Adjudication under Muslim Personal Law in India' (2021) 10 *Oxford Journal of Law and Religion* 254.

<sup>56</sup> Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (Oxford University Press 2011); Gilles Tarabout, 'Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism' (2018) 17 *South Asia Multidisciplinary Academic Journal* <<http://journals.openedition.org/samaj/4451>> accessed 20 January 2020.

<sup>57</sup> Suneetha and Nagaraj (n 51).

<sup>58</sup> See *Vishwa Lochan Madan v Union of India*, (2014) 7 SCC 707; *Shakti Vahini v Union of India*, (2018) 7 SCC 192.

<sup>59</sup> See *Indian Young Lawyers Association v State of Kerala*, (2018) SCC OnLine SC 1690.

<sup>60</sup> Akhil Gupta, *Red Tape: Bureaucracy, Structural Violence, and Poverty in India* (Duke University Press 2012); Nayanika Mathur, *Paper Tiger: Law, Bureaucracy and the Developmental State in Himalayan India* (Cambridge University Press 2015).

practices and grant them some form of legitimacy for their comprehension by State law and its institutions. The documentation and notarisation of divorce in a divorce deed (*talaqnama*) that records the pronouncement of triple talaq is a conspicuous sign of this trend, lending customarily oral practice a new meaning that has further evolved in light of the Muslim Women's Act 2019.

In Rizwan and Saba's case, the police decided to act on the written pronouncement because they had compelling reasons requiring the custody of Rizwan that were not related to Saba's dire matrimonial situation. Saba's opposition to the divorce lent strength to the case, thus giving a drive to the efforts of the police to investigate. Contrastingly, Shabana did not contest the pronouncement of talaq by Yusuf. While she would be as vulnerable as Saba after the divorce, her acceptance of the divorce and 'commonness' of her case resulted in the issue of triple talaq not becoming a point of discussion for the police officer at all. In fact, API Desai treated Shabana's situation in a 'post-divorce' context, cursorily treating the pronouncement as legitimate and final.

As this legislation unfolds at the levels of community and interpersonal relationships, these case studies remain examples of how the implementation of State law is accompanied by unforeseen consequences that empower (and disempower) individuals of the State and society in myriad ways. The paper describes and analyses how the enforcement machinery makes a choice regarding the implementation of the Muslim Women's Act 2019 in light of several factors, including the biographies of the parties, the strength of their motivation to pursue a complaint, and the uniqueness of the facts of the case. This confirms conjectures about the law being a political dialogue; but in this case, legitimising discrimination by the carceral State against a specific religious minority. The legislation has also equipped Muslim women with a strategic tool to negotiate matrimonial disputes, much like what Section 498A of the IPC is already being criticised to have provided.<sup>61</sup> My fieldwork revealed how the State has put into play a variety of informal practices to control litigation under Section 498A,<sup>62</sup> popularly perceived as being used to obtain a better (financial or emotional) bargain. Will the Muslim Women's Act 2019 meet a similar fate?

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<sup>61</sup> Express News Service, 'Sec 498A Being Used to Settle Personal Scores against Husband, His Kin: SC' (*The Indian Express*, 9 February 2022) <<https://indianexpress.com/article/india/sec-498a-being-used-to-settle-personal-scores-against-husband-his-kin-sc-7763471/>> accessed 5 April 2022; Kanchan Chaudhari, 'Section 498-A Being Misused to Implicate Husband's Entire Family: Bombay High Court' (*Hindustan Times*, 21 October 2020) <<https://www.hindustan-times.com/mumbai-news/section-498-a-being-misused-to-implicate-husband-s-entire-family-bombay-high-court/story-SJAdXS3OuXtXiq0Qx2IVDO.html>> accessed 5 April 2022.

<sup>62</sup> Kapur (n 18); Sherin (n 18); Punwani (n 18).

## VI. CONCLUSION

Gender justice as a value grounded in constitutional morality and broader public interest was the justification of the Court and the legislators for their interventionist approach and to literally “...grasp the levers of religious authority and to reformulate the religious tradition from within, as it were”.<sup>63</sup> However, this paper asks the question as to how the Muslim Women’s Act 2019 assures any outcome for gender justice that is different from those guaranteed under existing laws, such as the Protection of Women from Domestic Violence Act 2005 or Section 498A of the IPC. The data laid out in this paper point towards trends in the implementation and use of this law that may cause it to end up with the same checklist of criticisms that are levelled against other pro-women laws in the country.

In order to understand the significance of this legislation, then, we are compelled to review its motivations. Among these, the role of political leanings and ideologies holding force at the time the legislature that passed this bill cannot be overlooked. Therefore, a second question that this paper also probes into is to what extent a law with significant consequences for a particular community in society, in this case the Muslim community, actually unfolds to coincide with the political aspirations that drove it.<sup>64</sup> The legislation clearly equips the State with enhanced discretion vis-a-vis Muslim men in circumstances that are not unique to Muslim families alone. Interestingly, however, the exercise of this discretion may not necessarily be the consequence of an individual officer’s political leanings, as could be simply assumed. Based on my fieldwork in the city of Mumbai, I argue that it is in view of systemic issues that the possibility of an increase in the unwarranted persecution of Muslim men through the use of this legislation cannot be ruled out. These issues include the imbalanced representation (in terms of religion and gender) within implementational agencies such as the police,<sup>65</sup> procedural protocols for law and order that tend to be discriminatory on the lines of caste and religion in “communally sensitive” areas of a city, and every police station’s informal policies regarding investigation methods,<sup>66</sup> informant networks, and so forth. There is very little

<sup>63</sup> Marc Galanter, ‘Hinduism, Secularism, and the Indian Judiciary’ (1971) 21 *Philosophy East and West* 467, 480.

<sup>64</sup> Mandal (n 20).

<sup>65</sup> For instance, within the police in Mumbai, office holders – at all ranks – are predominantly male and Hindu. See also Bhatnagar, ‘Muslims Representation in Police Low, Number of Prisoners Relatively High’ (*The Wire*, 10 May 2018) <<https://thewire.in/government/muslims-representation-in-police-low-number-of-prisoners-relatively-high>> accessed 5 April 2022; Jauregui, ‘Police and Legal Patronage in Northern India’ in Anastasia Piliavsky (ed), *Patronage as Politics in South Asia* (Cambridge University Press 2014).

<sup>66</sup> Given the history of communal riots that Mumbai has witnessed over the years, the Mumbai police regularly update a list of communally sensitive areas in the city. These areas are determined, amongst other factors, on the basis of the number of riots that have taken place there in the past as well as its recent population and any changing developments that could lead to

evidence to suggest that imprisonment, or the length of imprisonment, is effective in deterring crime.<sup>67</sup> Moreover, the unfolding of the Muslim Women's Act 2019 at the level of interpersonal relationships pushes us to review the type of intervention that disputes under personal laws require. Given their complex intertwining with kinship networks, social values such as *izzat* and the multiple axes of their governance, it needs to be asked how suited they are to conflict resolution through adversarial mechanisms. Such methods, as the 'wise old men and women'<sup>68</sup> caution, mostly empower agents<sup>69</sup> other than those the State law purports to protect, and often to their detriment.

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a riot-like situation. See also 'Guidelines on Communal Harmony' (Ministry of Home Affairs) <<https://www.mha.gov.in/sites/default/files/ComHor141008.pdf>> accessed 6 April 2022.

<sup>67</sup> Ray Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100 *The Journal of Criminal Law & Criminology* 765, 818.

<sup>68</sup> Here, I am referring to the research on non-State mechanisms of conflict resolution at the community level. Community-based forums are popularly perceived to be led by the elders – wise and old – of the community. However, as empirical evidence shows, this is not always the case.

<sup>69</sup> This hesitation to approach State forums (that are mostly adversarial) is also connected to the large investment of time and money that the procedural and representational formalities of these forums command. See Kokal (n 5); Aditya Malik, *Tales of Justice and Rituals of Divine Embodiment: Oral Narratives from the Central Himalayas* (Oxford University Press 2016); Solanki (n 55); Marc Galanter, *Law and Society in Modern India* (Oxford University Press 1989); Erin Moore, *Conflict and Compromise: Justice in an Indian Village* (University Press of America 1985) for more details.