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India's Highest Court Strikes Instant Divorce Law Available to Husbands Only – Previously Protected by Personal Law

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India’s Highest Court Strikes Instant Divorce Law Available to Husbands Only— Previously Protected by Personal Law

Katelyn L. Dryden†

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I. Introduction

The Muslim divorce practice of instant *talaq* has existed for 1,400 years; in India, this practice has been employed only by Muslim husbands.¹ For many years, Muslim men in India had the ability to divorce their wives without going to court by the use of the instant “*triple talaq*” law.² Until recently, personal law protection in India allowed marriage and divorce to be regulated according to the religion of the spouses rather than state law.³

The only “requirement” for divorce that Muslim men had to

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¹ Lamat R. Hasan, *Battle to Pass Bill Banning Instant Divorce by Indian Muslim Men is On*, DAWN (Jan. 31, 2018), <https://www.dawn.com/news/1386274> [<https://perma.cc/8KBT-PE7Z>].

² The practice of “triple talaq” is also called “talaq e biddat.” See Prabhash K Dutta, *Instant Triple Talaq Outlawed but Triple Talaq Still Valid, Here is the Difference*, INDIA TODAY (Aug. 10, 2018), <https://www.indiatoday.in/india/story/talaq-e-biddat-triple-talaq-1310626-2018-08-10> [<https://perma.cc/NUU7-G7L3>].

³ Mili Mitra, *Why Did India Take So Long to Outlaw Instant Divorces Against Women?*, WASH. POST (Aug. 22, 2017), https://www.washingtonpost.com/news/global-opinions/wp/2017/08/22/why-did-india-take-so-long-to-outlaw-instant-divorces-against-women/?utm_term=.b9452d179cd4 [<http://perma.cc/8kr9-spjx>].

satisfy was to repeat “*talaq*” — meaning “divorce” in English — three times, and this action would result in an “instant and irrevocable divorce.”⁴ In-person verbal communication of the prescribed phrase was sufficient to execute the divorce under Muslim law.⁵ Husbands could even satisfy this requirement to make the divorce official through electronic means of communication to their wives, such as by email, social media, or text messaging applications.⁶ There was no governmental regulation as to how the process was to be carried out.⁷

While religious rights advocates contended that religious regulation of family law permitted the practice, for decades women’s rights groups have argued that the instant divorce law in India is unconstitutional.⁸ These groups claimed that the instant *triple talaq* practice promoted gender inequality and allowed husbands to emotionally and verbally abuse their wives.⁹ When a husband in a Muslim family chooses to implement an instant divorce, his wife often does not have any input in the matter and is left without any legal or economic protection.¹⁰ Specifically, the wives who were divorced through this method “were not entitled to alimony, child support, or anything else from their ex-husbands.”¹¹

As a result of the practice, Muslim women, who constitute approximately eight percent of India’s population, were left “unusually vulnerable to poverty, violence and predation.”¹² The lack of legal regulation of the practice allowed socioeconomic inequality to exponentially grow, as instant divorce left many

⁴ *Id.*

⁵ Mitra, *supra* note 3.

⁶ *Id.*; Hasan, *supra* note 1.

⁷ *See id.*

⁸ See Michael Safi, *India Court Bans Islamic Instant Divorce in Huge Win for Women’s Rights*, GUARDIAN (Aug. 22, 2017), <https://www.theguardian.com/world/2017/aug/22/india-supreme-court-bans-islamic-instant-divorce-triple-talaq> [<https://perma.cc/T6YD-AN7L>].

⁹ Hasan, *supra* note 1.

¹⁰ Scott Neuman & Camila Domonoske, *India’s High Court Outlaws Practice of Instant Divorce by Muslim Men*, NPR (Aug. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/22/545257237/india-s-high-court-overturns-law-allowing-instant-divorce-by-muslim-men> [<https://perma.cc/ZB7B-P9RH>].

¹¹ Mitra, *supra* note 3.

¹² *Id.*

women in India destitute and unable to care for their children.¹³ The societal implications of instant divorce and the impact on wives and children drew national attention, ultimately leading to an equal protection challenge that went all the way to the Supreme Court in India.¹⁴

On August 22, 2017, India's Supreme Court struck down the *triple talaq* law as unconstitutional in *Shayara Bano v. Union of India and others*.¹⁵ The Supreme Court held that the divorce law allowing husbands—but *not* wives—to initiate divorce through a “*triple talaq*” message violated Article 14 of India's Constitution.¹⁶ The Court decided in a narrow margin of 3-2 that the Plaintiff Wife had a successful claim, and it structured its opinion in a delicate manner so as to not completely invalidate personal law regulation of family law matters in India.¹⁷

Since this decision, however, enforcement issues have arisen across the country and continue to be an issue as men have not stopped using *triple talaq* to divorce their wives.¹⁸ While the Supreme Court ruled the practice was unconstitutional, there is no punishment mechanism for husbands who violate the law; therefore, husbands have not stopped using the method as a recognized form of divorce.¹⁹ As a result, India's Parliament has had ongoing discussions regarding parliamentary action to have a statutory ban on the practice as well—permitting criminal punishment for those who continue to carry on with the instant divorce practice.²⁰ To date, the government has not come to an agreement on how to handle enforcement issues in response to the Supreme Court's ruling.²¹

Women's rights advocates are pressing for a solution while

¹³ See Neuman & Domonoske, *supra* note 10.

¹⁴ See *id.*

¹⁵ *Shayara Bano v. Union of India and others*, Unreported Judgment 2017 (India), 393, <https://indiankanoon.org/doc/115701246/> [<https://perma.cc/QKF7-ZZWW>] [hereinafter *Bano*].

¹⁶ *Id.* at 393.

¹⁷ *Id.* at 263.

¹⁸ *Id.* at 10, 26–64.

¹⁹ Sasha Ingber, *India Makes Instant Divorce a Criminal Offense*, NPR (Sept. 19, 2018), <https://www.npr.org/2018/09/19/649514458/india-makes-instant-divorce-a-criminal-offense> [<https://perma.cc/6ETB-T5LE>].

²⁰ *Id.*

²¹ *Id.*

religious leaders are pushing to maintain India's tradition of personal law (application of a religion's law, rather than the State's law).²² The clashing groups are having trouble coming to a harmonious agreement that will protect gender equality as well as personal law.²³ The intersection of competing rights—religion and gender equality—has drawn criticism from many different interested parties across the spectrum of advocacy.²⁴

Part II of this Note will explore the facts and holding of *Shayara Bano v. Union of India and others*. Part III will examine the background law, and Part IV will provide an analysis of the court's opinion. Finally, this Note will conclude that while this ruling is a positive development for Muslim women in India, legal protections for women remain an ongoing concern as enforcement issues have proven difficult since the Supreme Court of India ruled the practice unconstitutional.

II. Statement of the Case

In *Shayara Bano v. Union of India and others* (hereinafter *Shayara Bano*) the Supreme Court of India held that the practice of “triple talaq” law was unconstitutional and violated Article 14 of India's constitution.²⁵

A. Facts and Procedural History

In *Shayara Bano*, the primary petitioner Shayara Bano asked the Court to declare: (1) her divorce under “talaq-e-biddat,”²⁶ which occurred on October 10, 2015, *void ab initio*; and (2) this form of abrupt divorce unconstitutional.²⁷ In a 3-2 decision, the court granted Bano's prayer for relief.²⁸

²² *Id.*

²³ See Hasan, *supra* note 1.

²⁴ See *id.*

²⁵ See *Bano*, *supra* note 15, at 263–64.

²⁶ *Biddat* is the Persian word for “sin.” See *Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle*, BBC (Aug. 22, 2017), <http://www.bbc.com/news/world-asia-india-40484276> [<https://perma.cc/3CMA-D72P>].

²⁷ *Bano*, *supra* note 15, at 3; see also *Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle*, *supra* note 26 (“She also asked the court to outlaw *halala* (where a divorced woman has to marry another man and consummate her marriage in order to go back to her former husband) and polygamy (Muslims in India are allowed to take four wives).”).

²⁸ *Bano*, *supra* note 15, at 264.

After a fifteen-year marriage, petitioner's husband Rizwan Ahmad divorced her through the instant *talaq* method.²⁹ Specifically, the evidence at trial demonstrated that the marriage was an extremely unhappy one, with verbal threats as well as physical and emotional abuse by the husband.³⁰ While neither party was happy in the marriage, the wife came from a family of limited means and was unable to support herself financially, ultimately returning to live with her parents.³¹ The couple had two children together during their marriage.³² Throughout their separation period, Ahmad allowed Bano to see their two children.³³

As a result of Bano's challenge, the Court joined the petitions of four other women in suits against their husbands who invoked instant divorce law.³⁴ Bano was a thirty-six year-old woman who lived in Uttarakhand.³⁵ She initially brought the petition in 2015; her goal was to ban the practice of instant divorce.³⁶ Following Bano's example, several other women also filed separate divorce petitions over the next few months, in addition to the other wives who were joined in her suit.³⁷

When the case was filed, Bano was unemployed and unable to support herself. Her father—and only source of income—was employed by the government with a low salary which could barely support his family and her dowry payments.³⁸ Shortly after Bano's marriage to her husband, her husband began to demand additional dowry from her father (e.g., “unreasonable demands for a car and

²⁹ *Supreme Court Scraps Instant Triple Talaq: Here's What You Should Know About the Practice*, HINDUSTAN TIMES, (Aug. 22, 2017), <http://www.hindustantimes.com/india-news/ahead-of-supreme-court-verdict-on-triple-talaq-here-s-a-primer-on-the-case/story-OJ6jjgGTRR988PfbNDpJ5I.html> [<https://perma.cc/E69P-XB7L>].

³⁰ *Bano*, *supra* note 15, at 6–7.

³¹ *Id.*

³² *Id.* at 4.

³³ *See id.* at 4–5.

³⁴ Gulam Jeelani, *Triple Talaq Verdict: Meet the Five Women Who Fought to Stop Instant Divorce*, HINDUSTAN TIMES, (Aug. 22, 2017), <https://www.hindustantimes.com/india-news/triple-talaq-crusaders-meet-the-5-women-who-fought-to-stop-instant-divorce/story-uZYgiB4t66GILK5PJLBRbP.html> [<https://perma.cc/NT6Q-UF7H>].

³⁵ *Id.*

³⁶ *See Bano*, *supra* note 15, at 3.

³⁷ Jeelani, *supra* note 34.

³⁸ *Bano*, *supra* note 15, at 6.

cash”), which put additional pressure on the marriage.³⁹ When his demands were not met, Ahmad frequently kicked Bano out of their house to go live with her parents again.⁴⁰

Bano was frequently abused and tortured by her husband and his family.⁴¹ The abuse ranged from physical to verbal and emotional.⁴² Examples of the torment she faced include recurrent beatings and threats from her husband’s family.⁴³ Bano was “kept hungry in a closed room for days.”⁴⁴ Additionally, her husband’s family gave her medication which made her memory foggy.⁴⁵ The medication also caused Bano to remain unconscious for long hours at a time.⁴⁶

In September 2015, Ahmad tried to murder Bano by using medicine to poison her.⁴⁷ A doctor later determined that the medicines Ahmad had administered to Bano led to “loss of mental balance after regular consumption.”⁴⁸ This inhumane treatment caused Bano’s mental health and medical issues. Ahmad tried to use these death attempts as a method to receive additional dowry from Bano’s family, with threats to abandon her if his dowry demands were not met.⁴⁹

The following month, in October 2015, Ahmad informed Bano’s parents that they needed to take Bano back into their home and that he would no longer keep her.⁵⁰ In response, Bano’s parents requested that Ahmad meet them in Kashipur, but Respondent Husband refused.⁵¹ Instead, he demanded even more dowry—this time 5,00,000 rupees.⁵² After multiple and continuous demands,

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ *Id.* at 6.

⁴² *See Bano, supra* note 15, at 6–8.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See Bano, supra* note 15, at 6.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Bano, supra* note 15, at 6; *see generally* *Historic Lookup, X-RATES*, <https://www.x-rates.com/historical/?from=USD&amount=1&date=2015-10-04> [<https://perma.cc/JJS9-ACK7>] (showing on Oct. 4, 2015 1 USD = 65.2234 INR.).

Bano's parents took her into their home to protect her and keep her from being turned out onto the streets.⁵³

B. Holding

In its decision, the Supreme Court addressed whether or not a man's ability to divorce his wife by saying "*talaq talaq talaq*" was in accordance with the nation's Constitution under Article 14 equal protection considerations.⁵⁴

The Court concluded that this form of divorce is *not* constitutional.⁵⁵ In its opinion, it analyzed the approach of the Shia schools—which evaluate and determine the Islamic approach to issues such as marriage—and the philosophical divide amongst religious leaders on ending a marriage by divorce:

Sanctity and effect of Talaq-e-bidaat or triple talaq. . . . There is no difficulty with ahsan talaq or hasan talaq. Both have legal recognition under all fiqh schools, sunni or shia. The difficulty lies with triple talaq which is classed as bidaat (an innovation). *Generally speaking, the shia schools do not recognise triple talaq as bringing about a valid divorce. There is, however, difference of opinion even within the sunni schools as to whether the triple talaq should be treated as three talaqs, irrevocably bringing to an end the marital relationship or as one rajai (revocable) talaq, operating in much the same way as an ahsan talaq.*⁵⁶

In the instant case, the Court focused on the interplay between legislation and the Constitution.⁵⁷ Specifically, the Court was forced to interpret the constitutionality and intent of the legislation, despite the previous personal law protections granted to religious groups to regulate their own marriage and divorce laws.⁵⁸

⁵³ See *Bano*, *supra* note 15, at 6.

⁵⁴ *Bano*, *supra* note 15, at 3–4. See generally INDIA CONST., art. 14 (“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”).

⁵⁵ See *Bano*, *supra* note 15, at 392–93.

⁵⁶ *Id.* at 60 (emphasis added).

⁵⁷ See *id.* at 305–06 (stating the case will address the Muslim Personal Law Application Act (Shariat Act) and its relationship to India's Constitution).

⁵⁸ *Id.* at 317–25 (interpreting the text of the Shariat Act); see *id.* at 303–08

The majority focused on the test of “manifest arbitrariness,” as explained in two previous judgments from the Court:⁵⁹

It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. . . . *The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In Indian Express Newspapers . . . this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; ‘unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary.’*⁶⁰

Next, the Court linked its decision to the Indian Parliament’s intent in order to apply logical reasoning:

Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.⁶¹

(recognizing a sub-sect of Sunni Muslims, the Hanafi School, has supported the practice of Triple Talaq for centuries); *see generally id.* at 325–33 (discussing Triple Talaq as a legal form of divorce applicable to Sunni Muslims);

⁵⁹ *Id.* at 388–89.

⁶⁰ *Id.*

⁶¹ *Id.* at 389.

For this case, the Supreme Court relied on precedent from *Indian Express Newspapers (Bombay) Ltd. v. Union of India* (1985), which held “subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation.”⁶² This holding was the basis for the “manifest arbitrariness” test.⁶³ Specifically, Justice Nariman stated the tradition was unreasonable and violated the equal protection principles Article 14 was designed to protect.⁶⁴ Ultimately, Justice Nariman went on to hold that practices should conform to certain public interest norms.⁶⁵ The reason the manifest arbitrariness test applies is:

[g]iven the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. It is clear 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.⁶⁶

As a result, the Supreme Court of India ultimately struck down

⁶² *Id.* at 390.

⁶³ *Id.*; see generally Aditya AK, *Why Nariman J's Treatise on Arbitrariness May Be a Big Development in SC Jurisprudence*, BAR & BENCH (Aug. 22, 2017), <https://barandbench.com/nariman-js-treatise-arbitrariness-may-huge-development-sc-jurisprudence/> [<https://perma.cc/MTK5-69AX>] (“In conclusion, we now have an authoritative Constitution Bench ruling stating, in no uncertain terms, that laws can be struck down for being arbitrary. More importantly, it paves the way for those cases which relied on McDowell to be revisited.”).

⁶⁴ See *Bano*, *supra* note 15, at 310, 333 (“Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage. . . . This being the case, the submission on behalf of the Muslim Personal Board that the ball must be bounced back to the legislature does not at all arise in that Article 25(2)(b) would only apply if a particular religious practice is first covered under Article 25(1) of the Constitution.”); see also V. Shivshankar, *What the Supreme Court Bench Had to Say While Striking Down Instant Triple Talaq*, WIRE, (Aug. 22, 2017), <https://thewire.in/170058/supreme-court-instant-triple-talaq-judgment/> [<https://perma.cc/SHN2-CGFP>].

⁶⁵ Shivshankar, *supra* note 64.

⁶⁶ *Id.*

triple talaq as far as the practice was recognized by the 1937 Sharia Act, voiding the law under Article 13(1) as a violation of a fundamental right “to the extent that it recognizes and enforces *Triple Talaq*.”⁶⁷ In support of Justice Nariman, Justice Joseph stated “[w]hat is held to be bad in the Holy Quran cannot be good in Sharia and, in that sense, what is bad in theology is bad in law as well.”⁶⁸

The decision was not unanimous—there were two dissenters.⁶⁹ Notably, the Chief Justice was among one of them.⁷⁰ The dissent, authored by Justice Kheher, explained that, despite what many would view as an unethical practice, it is not the Court’s place to strike down the religious practice.⁷¹ Instead, an injunction (lasting six months) should have been instituted until the legislature addressed the constitutionality of the *triple talaq* divorce.⁷² Ultimately, the dissent explained that faith, rather than logic, should control: “Some of these practices observed by members of one religion may appear to be excessive and even violative of human rights to members of another. But these are matters of faith. Reason and logic have little role to play.”⁷³

C. Analysis

The Court went into great detail discussing the Qur’an, including the Qur’an’s treatment of marriage and divorce:

A perusal of the aforesaid ‘verses’ reveals, that divorce for the reason of mutual incompatibility is allowed. There is however a recorded word of caution – that the parties could act in haste and then repent, and thereafter

⁶⁷ *Bano*, *supra* note 15, at 393. See INDIA CONST. art. 13, § 1 (“All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.”).

⁶⁸ *Bano*, *supra* note 15, at 299.

⁶⁹ Rohan Venkataramakrishnan ‘*Religion a Matter of Faith, not Logic*’: *CJI Khehar’s Dissenting Opinion on Triple Talaq*, SCROLL.IN (Aug. 22, 2017), <https://scroll.in/article/848076/religion-a-matter-of-faith-not-logic-cji-khehars-dissenting-opinion-on-triple-talaq> [<https://perma.cc/H9HM-CPZ3>].

⁷⁰ *Id.*

⁷¹ See *Bano*, *supra* note 15, at 272.

⁷² See *id.* Additionally, religious proponents of the practice also apply this reasoning for why the Court should not have struck down the law and that religious groups have the right under personal law to regulate the institution of marriage, discussed *infra*.

⁷³ *Bano*, *supra* note 15, at 228; see also Venkataramakrishnan, *supra* note 69.

again reunite, and yet again, separate. To prevent erratic and fitful repeated separations and reunions, a limit of two divorces is prescribed. In other words, reconciliation after two divorces is allowed. After the second divorce, the parties must definitely make up their mind, either to dissolve their ties permanently, or to live together honourably, in mutual love and forbearance – to hold together on equitable terms.⁷⁴

The Supreme Court⁷⁵ reasoned the practice of instant divorce was against gender equality and was also not a major part of the Islamic religion.⁷⁶ As a formal gesture against the practice, many Muslim countries have declared this form of divorce illegal.⁷⁷

The practice of instant *talaq* has been banned in twenty predominantly Muslim countries.⁷⁸ It has also been severely disfavored among Muslim leaders.⁷⁹ However, it is difficult to determine how frequently this form of divorce is employed. Nevertheless, some reports in the United Kingdom and China show some individuals consider themselves divorced after *triple talaq*, regardless of whether or not the couple went through the governmental channels deemed appropriate for divorce.⁸⁰

The *Shayara Bano* dissent expressed concern over the decision, because personal law is protected by India's Constitution.⁸¹ The dissenting justices argued it is not the place of the Court to violate a religious faith's regulation of marriage because that area was protected by the constitution, warning against a "cascading effect"

⁷⁴ *Bano*, *supra* note 15, at 19–20.

⁷⁵ The court was a panel of five all male judges. See *Supreme Court Scraps Instant Triple Talaq: Here's What You Should Know About the Practice*, *supra* note 29.

⁷⁶ *Id.*

⁷⁷ *Triple Talaq: India Court Bans Islamic Instant Divorce*, BBC (Aug. 22, 2017), <http://www.bbc.com/news/world-asia-india-41008802> [<https://perma.cc/P2RT-F9UH>].

⁷⁸ *Supreme Court Scraps Instant Triple Talaq: Here's What You Should Know About the Practice*, *supra* note 29.

⁷⁹ See Jeffrey Gettleman & Suhasini Raj, *India's Supreme Court Strikes Down 'Instant Divorce' for Muslims*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/world/asia/india-muslim-divorce-triple-talaq.html?mcubz=1> [<https://perma.cc/DL8B-NK4M>].

⁸⁰ *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77.

⁸¹ Venkataramkrishnan, *supra* note 69.

which could follow this decision.⁸²

D. Conclusion

Ultimately, India's highest court held in Bano's favor that "[t]he practice was against Article 14 of the Constitution, which guarantees the right to equality."⁸³ However, this case has highlighted the issues with having laws that do not uniformly apply to each citizen of a country and the enforcement issues associated with such disproportionate laws.⁸⁴ Furthermore, the Court merely held the practice unconstitutional and is not responsible for enforcement mechanisms.⁸⁵ For that, Parliament will need to enact a law outlining punishment for violations.

The Court stipulated:

It is accepted by all schools of law that talaq-e-bidaat is sinful. Yet some schools regard it as valid. Courts in India have also held it to be valid. The expression - *bad in theology but valid in law* - is often used in this context. The fact remains that it is considered to be sinful. It was deprecated by prophet Muhammad. It is definitely not recommended or even approved by any school. It is not . . . considered . . . valid divorce by shia schools. There are views . . . amongst the sunni schools that the triple talaq pronounced in one go would not be regarded as three talaqs but only as one. *Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation.*⁸⁶

The Supreme Court further stated "arbitrators are mandated to explore the possibility of reconciliation" but, "[i]n case reconciliation is not possible, dissolution is advised, without publicity or mud-throwing or by resorting to trickery or

⁸² *Id.*

⁸³ *Supreme Court Scraps Instant Triple Talaq: Here's What You Should Know About the Practice*, *supra* note 29.

⁸⁴ *See id.*

⁸⁵ *See Bano*, *supra* note 15, at 293.

⁸⁶ *Bano*, *supra* note 15, at 61–62 (emphasis added).

deception.”⁸⁷ The same Court reasoned that until the very last moment, reconciliation should be an option, and a preferred option at that.⁸⁸

The verdict highlights the practice of instant divorce is not supported by the Qur’an.⁸⁹ The majority opinion said it was manifestly arbitrary to allow a husband to break down “the marital tie . . . capriciously and whimsically.”⁹⁰ Notably, in the exclusively male panel of Supreme Court judges, each of India’s five core faiths were represented: Hinduism, Christianity, Islam, Sikhism and Zoroastrianism.⁹¹ Although the panel was all the same gender, it did represent each of India’s predominant religions and a wide array of India’s citizens.⁹²

In their dissent, Chief Justice JS Khehar and Justice S. Abdul Nazeer argued the practice of “instant *talaq*” should be changed through the government—specifically by law passed within the next six months to regulate the “instant *talaq*.”⁹³ They noted Parliament should remedy the issue, rather than the court system, and even went so far as saying the instant *talaq* law was not binding because it was up to Parliament to regulate.⁹⁴

Shayara Bano has become “the face of the movement challenging *triple talaq*.”⁹⁵ Her victory has inspired other wives to stand up against the use of instant divorce and file similar petitions.⁹⁶

⁸⁷ *Id.* at 25.

⁸⁸ *Id.* at 27.

⁸⁹ Hasina Khan, *Ending Instant Divorce is a Victory. But Indian Women Have a Fight Ahead*, GUARDIAN (Aug. 25, 2017), <https://www.theguardian.com/commentisfree/2017/aug/25/islamic-instant-divorce-victory-india-talaq-women-harmful-practices> [<https://perma.cc/Q2NS-F2YG>].

⁹⁰ *Bano*, *supra* note 15, at 392.

⁹¹ Safi, *supra* note 8.

⁹² *See id.* In a country that is a defender of personal law, the representation of each of the five main faiths is important for religious concerns.

⁹³ *Supreme Court Scraps Instant Triple Talaq: Here’s What You Should Know About the Practice*, *supra* note 29; *see also Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77 (“Chief Justice JS Khehar, in a differing opinion, said that personal law could not be touched by a constitutional court of law. The opposing judgements also recommended that parliament legislate on the issue. However, this is not binding and is up to parliament to take up.”).

⁹⁴ *See Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77.

⁹⁵ Hasan, *supra* note 1.

⁹⁶ *See id.*

The majority based their decision on Article 14 of the Constitution of India—citing equal protection rights. Article 14 of India's Constitution addresses equality and prohibits “discrimination on grounds of religion, race, caste, sex or place of birth.”⁹⁷ Specifically, the Supreme Court reasoned the *triple talaq* law violated a fundamental right because “it is clear 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.”⁹⁸

The Supreme Court also struck down Section 2 of the 1937 Act, which addressed personal law,⁹⁹ as “void to the extent that it recognizes and enforces *Triple Talaq*,” but did not completely strike down Muslim personal law.¹⁰⁰

III. Background Law

In India, certain areas of law are permitted to follow religious law.¹⁰¹ This concept is called personal law.¹⁰² Marriage and divorce fall within the scope of personal law and are thus subject to religious regulation.¹⁰³ Parliament also has the authority to legislate family relations.¹⁰⁴ Many Muslims view personal law as a way to protect “their faith, their culture and their way of life.”¹⁰⁵ Muslims in India have historically practiced Shariah law, “which is interpreted by

⁹⁷ INDIA CONST., art. 14.

⁹⁸ *Bano*, *supra* note 15, at 392–93.

⁹⁹ The Muslim Personal Law (Shariat) Application Act, No. 26 of 1937, INDIA CODE (1937), vol.9, <https://indiacode.nic.in/bitstream/123456789/2303/1/A1937-26.pdf#search=The%20Muslim%20Personal%20Law%20Application%20Act> [https://perma.cc/X3Q4-YQ6D] (“Notwithstanding any custom or usage to the contrary, in all questions . . . regarding . . . special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower, guardianship, . . . the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”).

¹⁰⁰ *Bano*, *supra* note 15, at 393.

¹⁰¹ See Mohammad Ghose, *Personal Laws and the Constitution in India*, in ISLAMIC LAW IN MODERN INDIA 50, 55 (Tahir Mahmood ed., 1972).

¹⁰² *Id.*

¹⁰³ Inheritance and adoption are also regulated by religious law in India. See Neuman & Domonoske, *supra* note 10. Compared with the United States, where personal law is not practiced. See also Ghose, *supra* note 101, at 55.

¹⁰⁴ Mohammad Ghose, *supra* note 101, at 50.

¹⁰⁵ *Id.* at 51.

male religious leaders and is tilted in their favour, allowing them to marry up to four times and giving them the right to divorce their wives unilaterally.”¹⁰⁶

Personal law is protected by several sections of the Indian Constitution, including, for example, Article 21. Personal law is also fiercely guarded by religious rights advocates.¹⁰⁷ Furthermore, Article 25(1) of India’s Constitution states: “[s]ubject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”¹⁰⁸

Though India codified many laws to prevent personal laws from infringing on certain group rights, instant divorce remained unchallenged.¹⁰⁹ In addition, India does not have laws that uniformly apply to marriage and divorce.¹¹⁰ Courts in India typically proceed with caution when striking down laws which implicate areas traditionally protected by personal law.¹¹¹ However, in cases of severe inequality, such as gender inequality, the intersection of these rights highlights the need for the Supreme Court to address the prejudicial impact on vulnerable groups (e.g., women left destitute by the instant *talaq* practice).¹¹²

In recent years, “many Muslim women have challenged *triple talaq* in courts.”¹¹³ While the majority religion in India is Hindu,¹¹⁴ India is home to 90 million Muslim women.¹¹⁵ In 2015, Bharatiya

¹⁰⁶ Hasan, *supra* note 1.

¹⁰⁷ *Id.*

¹⁰⁸ INDIA CONST. art. 25, § 1.

¹⁰⁹ *Id.*

¹¹⁰ See *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77 (“Most Islamic countries, including Pakistan and Bangladesh, have banned triple talaq, but the custom has continued in India, which does not have a uniform set of laws on marriage and divorce that apply to every citizen.”).

¹¹¹ See generally Safi, *supra* note 8.

¹¹² See generally *id.*

¹¹³ See *Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle*, *supra* note 26 (“We did a survey of 4,710 women and of the 525 who were divorced, 414 [or 78%] had been divorced through instant triple talaq.”).

¹¹⁴ *Recent Court Rulings in India Suggest Justice is Improving*, ECONOMIST (Aug. 31, 2017) <https://www.economist.com/news/asia/21727953-yet-many-ordinary-indians-still-feel-short-changed-recent-court-rulings-india-suggest-justice> [https://perma.cc/PM7H-GBLZ].

¹¹⁵ *Triple talaq: How it affects lives of India’s 90 million Muslim women*, INDIA TODAY (Aug. 22, 2017), <https://www.indiatoday.in/fyi/story/triple-talaq-muslim-women->

Muslim Mahila Andolan (BMMA) carried out a nationwide survey in India and found approximately “1 in 11 Muslim women were survivors of *triple talaq*, the vast majority receiving no alimony or compensation.”¹¹⁶ As a result, women’s advocacy groups such as BMMA have initiated a movement towards lobbying for legislation to increase rights afforded to women in India.¹¹⁷

The *triple talaq* practice dates back to eighth century A.D., and has been practiced up to present day, with technological advances highlighting major issues associated with husbands using electronic means to divorce their wives.¹¹⁸ Over time, the law has allowed men to divorce their wives without any questions asked, without any objections made, and even through electronic means—such as a text message.¹¹⁹ Today, husbands have invoked the instant divorce through social media including, but not limited to, WhatsApp, Skype, and Facebook.¹²⁰ On a whim, the husband could announce “*talaq talaq talaq*” over one of these social media platforms, and the wife would be immediately considered divorced from her husband.¹²¹ As a result of this divorce practice, women have been left helpless, without socioeconomic protection to care for themselves or their children.¹²² Frequently, women do not receive any warning and are left destitute and abandoned by their husbands.¹²³

Under the Sharia Act of 1937, wives shall not “pronounce *triple talaq* and are required to move a court for getting divorce.”¹²⁴ This

supreme-court-sharia-law-islam-968630-2017-03-30 [https://perma.cc/2V8F-AAKZ].

¹¹⁶ Safi, *supra* note 8 (emphasis added).

¹¹⁷ *Id.*

¹¹⁸ See *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77.

¹¹⁹ *Id.* (“There have been cases in which Muslim men in India have divorced their wives by issuing the so-called triple talaq by letter, telephone and, increasingly, by text message, WhatsApp and Skype. . . . Under some interpretations of Islamic law, a man can divorce his wife and get back together with her - but only twice. After the third divorce, the marriage is completely over and cannot be started again without an intervening marriage to someone else. Scholars are divided on whether it counts as a full and final divorce to say the word three times, or whether it needs to be said on three separate occasions.”).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77.

¹²³ See *id.*

¹²⁴ See *Supreme Court Scraps Instant Triple Talaq: Here’s What You Should Know*

Act codified religious law in India, leaving a gap between religious practices and governmental law, particularly pertaining to the evaluation of fundamental and equal rights issues.¹²⁵ While this method of divorce has been employed for decades, neither the Qur'an nor Sharia Law have explicitly recognized the practice.¹²⁶

While Islam encourages marriages to remain intact, religious law permits three forms of divorce: Ahsan (most approved), Hasan (approved) and Talaq-e-Biddat (most disapproved).¹²⁷ Ahsan is considered the “most proper” form of divorce under Islam, with many opportunities for the couple to reconcile and avoid divorce.¹²⁸ While Ahsan and Hasan are revocable forms of divorce, Biddat is instant and irrevocable.¹²⁹ Although instant *talaq* is technically allowed in the faith, it is considered “sinful” under Islamic beliefs and is severely disfavored.¹³⁰ The religious practice has disproportionately impacted Muslim women, with men predominately taking advantage of the practice on a whim.¹³¹

Triple talaq has been banned in much of the Islamic world— including Pakistan and Bangladesh.¹³² Fundamental Muslim

About the Practice, *supra* note 29.

¹²⁵ See Venkataramakrishnan, *supra* note 69.

¹²⁶ See *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77 (“Islamic scholars say the Koran clearly spells out how to issue a divorce - it has to be spread over three months, allowing a couple time for reflection and reconciliation.”).

¹²⁷ See generally Pragati Ghosh, *What are the Kinds of Talaq Under Muslim Law in India?*, SHARE YOUR ESSAYS, <http://www.shareyouressays.com/knowledge/what-are-the-kinds-of-talaq-under-muslim-law-in-india/117523> [https://perma.cc/M4ZK-NG7L] (comparing the different types of divorce permitted under Islam, including the steps to invoke each method divorce).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *Supreme Court Scraps Instant Triple Talaq: Here's What You Should Know about the Practice*, *supra* note 29.

¹³¹ See Namita Bhandare, *Triple Talaq Verdict: What Empowerment of Muslim Women Really Means*, HINDUSTAN TIMES (Aug. 25, 2017), <https://www.hindustantimes.com/columns/triple-talaq-verdict-what-empowerment-of-muslim-women-really-means/story-PLo56wnSS2G65p7bgrCLgO.html> [https://perma.cc/9UTN-C46Y]; see also Vibhuti Patel, *All Personal Laws in India Are Discriminatory*, LIVE MINT (Aug. 22, 2017), <http://www.livemint.com/Opinion/SpzJHXDZYhrrlRwu2f2xHP/All-personal-laws-in-India-are-discriminatorypublished-fro.html> [https://perma.cc/2WLV-5XAD].

¹³² *India Says No to Instant Triple Talaq: Here's What 5 Other Countries Have Done*, HINDUSTAN TIMES (Aug. 22, 2017), <http://www.hindustantimes.com/india-news/india-says-no-to-instant-triple-talaq-here-s-what-5-other-countries-have-done/story->

schools have criticized the law and many countries rooted in Islamic tradition have banned the instant divorce practice.¹³³ However, it has continued in India because of the religious freedoms in India.¹³⁴ India maintains Muslim, Hindu, and Christian communities which the government allows to abide by their own beliefs in “matters such as marriage, divorce, inheritance, and adoption.”¹³⁵ However, the government’s stance on these religious issues may be changing. Prime Minister Modi governs India under a “Hindu nationalist government,” a “party [which] has long pushed for a uniform civil code,” and he supported the Petitioners in *Shayara Bano*.¹³⁶ There are also strong proponents who favor a more secular rule, rather than the current rule allowing religious exceptions in areas of family law (e.g., marriage, divorce, and inheritance).¹³⁷

According to those promoting a uniform civil code, the regulation under such a code would promote equality and prevent circumstances such as the severe gender inequality witnessed under the *triple talaq* practice.¹³⁸ Furthermore, India would be able to enforce laws more easily under a uniform law. Under the current system, the government cannot get involved, and husbands who invoke the instant *talaq* are protected from prosecution.¹³⁹

LjXctBVyT18TuvlRFTveTL.html [https://perma.cc/944K-GZY2].

¹³³ *Id.*; see also Safi, *supra* note 8.

¹³⁴ Huizhong Wu, *Triple Talaq: India’s Top Court Bans Islamic Practice of Instant Divorce*, CNN (last updated Aug. 22, 2017), <http://www.cnn.com/2017/05/18/asia/triple-talaq-supreme-court/index.html> [https://perma.cc/LX4P-PBD4].

¹³⁵ See Safi, *supra* note 8.

¹³⁶ *Id.*; see *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77 (“The Indian government, led by the Hindu nationalist Bharatiya Janata Party (BJP), has supported ending the practice. Prime Minister Narendra Modi has brought up the issue several times including in his Independence Day address on 15 August.”).

¹³⁷ Kumar Shakti Shekhar, *Why Triple Talaq Verdict Will Help BJP Implement Uniform Civil Code*, INDIA TODAY (last updated Aug. 22, 2017), <http://indiatoday.intoday.in/story/triple-talaq-verdict-bjp-promise-uniform-civil-code/1/1031571.html> [https://perma.cc/5GNT-ZLTQ].

¹³⁸ *Id.*

¹³⁹ See Zeenat Saberina, *India: Triple Talaq or Instant Divorce Now a Criminal Offence*, AL JAZEERA (Sept. 19, 2018), <https://www.aljazeera.com/news/2018/09/india-triple-talaq-instant-divorce-criminal-offence-180919073349658.html> [https://perma.cc/7RZV-U34L] (“India, which is home to the world’s third-largest Muslim population, allows most religions, including Muslims to regulate matters such as marriage, divorce and inheritance through their own personal laws.”); see also Shekhar, *supra* note 137 (“[t]he British implemented criminal and civil laws for all Indians but did not touch personal laws because religion was a sensitive issue.”).

Opponents of a uniform civil code have expressed concern that husbands could “resort to illegal, criminal ways of murdering or burning [their wives] alive” because they no longer have the *triple talaq* option.¹⁴⁰ However, the overall consensus among the proponents is that a uniform, codified law would at least help alleviate the negative consequences for women in legal areas such as divorce, alimony, polygamy, custody of children, and property.¹⁴¹

Under instant divorce laws, Muslim men maintain all the contractual power for divorce. Due to the discriminatory personal and family laws in a significant amount of Muslim countries, women have routinely been “deprived of the right to initiate divorce; this discrimination exposes women to repudiation, unilateral extra judicial divorce by the husband, legal insecurity, and total absence of control over their matrimonial situation.”¹⁴² In cases of a contingent dowry, men have been incentivized not to invoke the instant divorce, because a divorce would cancel the dowry.¹⁴³ Over the course of a marriage, the dowry dwindles, and so does the incentive to remain married.¹⁴⁴

In 2007, the Bharatiya Muslim Mahila Andolan (BMMA) was established to promote secular and women’s rights in India, with a specific focus on protecting and promoting Muslim women’s rights.¹⁴⁵ Since the BMMA’s establishment, the organization “has

¹⁴⁰ *Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle*, *supra* note 26.

¹⁴¹ See generally Saksham Solanki & Shaivya Manaktala, *Uniform Civil Code and Conflict of Personal Laws*, 3 INT’L. J. OF L. 8, 8–13 (2017) (“Women of our country undergo many difficulties and experience severe trauma in matters concerning day to day matters including marriage, divorce and inheritance. Polygamy, desertion, triple divorces are just a few instances to show the possibilities of harassing women. Indian women are legally granted equality in political rights by the Indian Constitution. But due to the difference in the personal laws, women generally experience inequality, deprivation and violence.”).

¹⁴² TALAQ-I-TAFWID: THE MUSLIM WOMAN’S CONTRACTUAL ACCESS TO DIVORCE: AN INFORMATION KIT 5 (Lucy Carroll & Harsh Kapoor eds., 1996).

¹⁴³ See *id.* at 201 (explaining that a divorced woman is entitled to recover possession of her remaining dowry from her former husband).

¹⁴⁴ Joe McCarthy, *9 Reasons Why Dowries Are Horrible for Women*, GLOBAL CITIZEN (June 6, 2017), <https://www.globalcitizen.org/fr/content/8-reasons-dowries-are-bad-for-women/> [<https://perma.cc/7TZC-N35D>] (stating dowries are gifts, usually in the form of money, paid at the beginning of a marriage).

¹⁴⁵ Bharatiya Muslim Mahila Aandolan, *About*, <https://bmmaindia.com/about/> [<https://perma.cc/T3NQ-5XTR>].

been campaigning for a ban on *triple talaq*, calling it a travesty of divorce as envisaged in the Qur'an, where the word has to be pronounced on three separate occasions spread over three months and must be accompanied by efforts at reconciliation."¹⁴⁶ While the Court's decision was an initial victory for the BMMA, the organization still has work to do in order to enforce the Court's decision, given that husbands are not abiding by it.¹⁴⁷ In 1976 India established a "secular democracy" with the intention that "all citizens are equal;" specifically, the "fundamental rights are guaranteed to all citizens irrespective of religion, caste, ethnicity, sex or language."¹⁴⁸ The BMMA is able to promote enforcement of the Court's recent decision under such a principle.¹⁴⁹

Because instant *talaq* is not available to wives, Muslim women in India cannot divorce their husbands on their own volition the way their husbands do can (despite the Court's ruling).¹⁵⁰ Prior to 1939, "a Muslim wife had no right to seek divorce except on the ground of false charges of adultery, insanity or impotency of the husband."¹⁵¹ In addition, if a husband and wife came to an agreement, then the wife could be granted a means of divorce.¹⁵² However, the Dissolution of Muslim Marriages Act of 1939 outlines "several other grounds on the basis of which a Muslim wife may get her divorce decree passed by the order of the court."¹⁵³ After 1939, a woman in India married under Muslim law could be entitled to divorce for any of the grounds outlined in the Dissolution of Muslim Marriages Act of 1939.¹⁵⁴ The reasons vary, but the following are

¹⁴⁶ Amrit Dhillon, *India's Muslim Women Fight to End Triple Talaq Law that Yields Instant Divorce*, GUARDIAN (Aug. 10, 2015), <https://www.theguardian.com/global-development/2015/aug/10/india-muslim-women-fight-triple-talaq-law-instant-divorce> [https://perma.cc/2AMV-CLZY].

¹⁴⁷ Safi, *supra* note 8.

¹⁴⁸ See Noorjehan Safia Niaz & Zakia Soman, *Seeking Justice Within Family: A National Study of Muslim Women's Views on Reforms in Muslim Personal Law*, in BHARATIYA MUSLIM MAHILA ANDOLAN 7 (discussing background on India government and treatment of women).

¹⁴⁹ *See id.*

¹⁵⁰ Setu Gupta, *The Concept of Divorce Under Muslim Law*, LEGAL SERVICE INDIA, <http://www.legalserviceindia.com/article/I393-Divorce-under-Muslim-Law.html> [https://perma.cc/7JX8-BL7R].

¹⁵¹ *Id.*

¹⁵² The divorce law changed in India after 1939. *See id.*

¹⁵³ *Id.*

¹⁵⁴ The Dissolution of Muslim Marriages Act, No. 8 of 1939, INDIA CODE (1939).

some examples when a woman is entitled to a divorce: impotence, unknown whereabouts, venereal disease(s), obstruction of religious practice, and cruelty.¹⁵⁵

The *Shayara Bano* case is not the first time India's court system has addressed instant *talaq*.¹⁵⁶ Last year, Delhi's Supreme Court took up the issue in response to a petition from victims and women's rights groups.¹⁵⁷ A majority decision held that *triple talaq* was "not integral to religious practice and violates constitutional morality."¹⁵⁸ Previously, the Delhi court had recognized "instant divorces where the word '*talaq*' had been texted or emailed."¹⁵⁹ Going forward, however, the *triple talaq* practice would no longer be permitted by courts in India.¹⁶⁰

IV. Significance of the Case

One argument against personal law is that many religions have traditional practices considered gender discriminatory and the specific circumstances which led to the *Shayara Bano* case are not unique to Islamic practices in India.¹⁶¹ In such cases, and specifically in this case, competing liberty interests—personal law and gender inequality—clash due to the disparate effect on Muslim women.¹⁶² Here, the Court delicately and explicitly limited the decision to the practice of *triple talaq* law, rather than striking down personal law completely.¹⁶³ However, some leaders want the explicitly limited decision to extend beyond just the *triple talaq* issue to other chauvinistic practices,¹⁶⁴ such as marital rape and dowry.

Women have also challenged other personal law issues within the country, such as the disparate effect of inheritance rights on women compared to their male counterparts.¹⁶⁵ Personal law not

¹⁵⁵ *Id.*

¹⁵⁶ See Gettleman & Raj, *supra* note 79.

¹⁵⁷ Safi, *supra* note 8.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See Patel, *supra* note 131.

¹⁶² See *id.*

¹⁶³ *Id.*

¹⁶⁴ See *id.*

¹⁶⁵ *Id.* ("Their main concern is the threat of forced marriage, murderous attacks in

only implicates divorce matters but also property and adultery issues.¹⁶⁶ The Supreme Court's decision may—and some argue should—catalyze a debate on “religion-based personal laws” in India.¹⁶⁷

While other women had challenged the *triple talaq* practice for decades in India, this case was the first in which the plaintiff challenged the law on the basis that her “fundamental rights had been violated” and requested the Court to reconsider allowing men to treat their wives like “chattels.”¹⁶⁸ This case was the first nationwide victory to pave the way towards gender equality.¹⁶⁹

India is the twenty-third country to outlaw the *triple talaq* practice and is finally catching up to the worldwide trend of ending such discriminatory practices.¹⁷⁰ Women's rights advocates view this decision as a victory for Muslim women in India and are calling

cases of inter-caste, inter-class and inter-religious marriages and property disputes even while they have to deal with issues like adultery, bigamy, polygamy, divorce, custody of child/children, property and incest in their marital homes.”).

¹⁶⁶ Patel, *supra* note 131 (“For example, Hindu daughters were deprived of joint heirship in parental property as per the codes of Mitakshara, a school of Hindu law governing succession. It was only after Lata Mittal (case filed in 1985) won a 20-year legal battle in the Supreme Court that Hindu daughters were given equal rights in the ancestral property. . . . Christian women could not obtain divorce on the grounds of adultery committed by the husband; it had to be coupled with cruelty, bestiality and sodomy. On the other hand, Christian husbands *could simply declare their wives as adulteresses and divorce them*. These antiquated laws were enacted in the colonial period to serve the interests of the British bureaucrats who had their legally wedded wives in England and were cohabiting with a local. Due to pressure from Christian women, the government last year cleared a proposal to amend the antiquated Christian Divorce Act, 1869.”) (emphasis added).

¹⁶⁷ *Id.*

¹⁶⁸ *Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle*, *supra* note 26 (“Two months after Shayara Bano's petition was filed, another woman Aafreen Rahman challenged her divorce in the Supreme Court. Over the following weeks, three other women and two women's organizations, including the BMMA, filed similar writs in the top court.”); *see also Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77.

¹⁶⁹ *See Safi*, *supra* note 8.

¹⁷⁰ *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77 (“In countries including China and the [United Kingdom] a couple must go through the official channels to be legally divorced but there have been cases of individuals considering themselves divorced after the *triple talaq* has been said. In Saudi Arabia the law leaves room for various interpretations of religious custom, and *triple talaq* is practiced. This type of verbal divorce is practiced around the world but as it is illegal in so many countries, it is hard to say exactly how common it is.”).

for an end to other antiquated laws as well.¹⁷¹ A government census found that 13.5% of Muslim women were married before their fifteenth birthday, and 49% were married between the ages of fourteen and nineteen.¹⁷² Individuals who fall within this age demographic are less likely to have their own resources to support themselves in the event of an instant divorce.¹⁷³ Even after the 2017 Court ruling, more than 100 women have been thrown out of their homes without the protection of the law that would be provided to them if the Indian Parliament passed a law affirming the Supreme Court's recent decision.¹⁷⁴

Following Bano's victory, other women followed her lead to challenge their own marriages that had ended from instant *talaq*.¹⁷⁵ Not all responses were positive. The All India Muslim Personal Law Board (AIMPLB), a nongovernmental board with the purpose to promote Muslim personal law in India, has stated that the Court did not have jurisdiction to decide the issue.¹⁷⁶ The AIMPBL did not feel it was appropriate for the Court to interfere in matters pertaining to religion.¹⁷⁷

¹⁷¹ *See id.* ("The judgement is a huge victory for Muslim women. For decades, they have had to live with the threat of instant divorce dangling over their heads like a sword.")

¹⁷² There is an unequally negative impact of divorce based on gender. *See India Abandons Law to Ban Instant Divorce Among Muslims*, UCA NEWS (Jan. 8, 2018), <https://www.ucanews.com/news/india-abandons-law-to-ban-instant-divorce-among-muslims/81188> [<https://perma.cc/C8M6-V8BR>] ("Across all religious communities, more women remain divorced than men, according to census data. However, the percentage is higher among Muslims. For every Muslim man living divorced, there are four women who remain divorced, it showed.")

¹⁷³ *Id.*

¹⁷⁴ Anjana Pasricha, *Proposed Law to Jail Muslim Men in India for Instant Divorce Deadlocked*, VOA (Jan. 10, 2018), <https://www.voanews.com/a/fight-to-rid-of-indian-muslim-divorce-practices/4201287.html> [<https://perma.cc/Q5UF-TH8F>].

¹⁷⁵ Gulam Jeelani, *Triple Talaq Verdict: Meet the Five Women Who Fought to Stop Instant Divorce*, HINDUSTAN TIMES (Aug. 22, 2017), <https://www.hindustantimes.com/india-news/triple-talaq-crusaders-meet-the-5-women-who-fought-to-stop-instant-divorce/story-uZYgiB4t66GILK5PJLBRbP.html> [<https://perma.cc/H59W-4VWN>].

¹⁷⁶ *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77 ("The All India Muslim Personal Law Board (AIMPLB), which had maintained that the court had no jurisdiction over the matter, has yet to make an official statement on the ruling, but has convened a meeting to decide what its official response should be[.] . . . [A]n executive member [said] that the judgement would have 'wide ramifications' as it affected the religious rights of minority groups.")

¹⁷⁷ *Id.*

Still, the Court's decision had a lot of public support. The Prime Minister of India, Narendra Modi, welcomed the verdict.¹⁷⁸ In addition, some opponents of the instant divorce law have viewed the Court's decision as a "message to Muslim clergy."¹⁷⁹ Others see it as a mechanism for change: "The judgment is the precedent we need to now challenge 'nikah halala', . . . polygamy¹⁸⁰ and other discriminatory practices against women."¹⁸¹ Women's rights advocates have indicated this decision strengthens the "resolve to confront violence and abuse within our families, negotiate for property, inheritance and custody rights in our marriages, cohabit in congenial spaces, and perhaps even question the heteronormative framework of family itself, which is premised on heterosexual partnership as well as on kinship and bloodline."¹⁸²

Despite general public support for ending the practice of instant *talaq*, the legal impact of the Court's decision has yet to be determined given that enforcement issues remain. The issue of enforcement posits a question of separation of powers: does there need to be a separate legislative act, even though the highest court deemed the law unconstitutional?¹⁸³ After India's apex court rules a law unconstitutional, without any enforcement mechanism, those who violate the law cannot face punishment.¹⁸⁴ Therefore, until

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ The ramifications of striking down triple talaq opens the door for other practices, such as polygamy, to be challenged. See Khan, *supra* note 89.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Swapan Dasgupta, *Still on the Statutes: The Bill Against Instant Triple Talaq Has Led to Parliamentary Doublespeak*, TELEGRAPH INDIA (Jan. 11, 2018), <https://www.telegraphindia.com/opinion/still-on-the-statutes-200112> [<https://perma.cc/6PZV-5RYD>] ("In a similar vein, the argument that a divorce procedure deemed illegal by the highest court in the land doesn't require separate legislation to make it criminal is dodgy. The Supreme Court judgment in the Ishrat case doesn't remove instant triple talaq from the statutes; it merely makes it inapplicable. However, it is no guarantee against either deliberately flouting the ban - as often happens in the case of dowry - or a bench in a regressive future overturning the Ishrat judgment. Indeed, if there is no stipulated punishment prescribed for those who violate the Supreme Court order, we may even see defiant clerics sanctioning instant triple talaq on the ground that their version of sharia is sacrosanct and not prone to human intervention. Of course, a future Parliament has an undeniable right to overturn the Supreme Court judgment and restore instant triple talaq.").

¹⁸⁴ *Id.*

India's Parliament passes a law banning the practice and outlining the punishment for violating the law, India is in limbo as to how to enforce the Supreme Court's decision.¹⁸⁵ So far, proposed laws against instant *talaq* have led to "parliamentary doublespeak," which is a mechanism employed to filibuster away changes to laws.¹⁸⁶

India's Muslim community generally has a lower socioeconomic status.¹⁸⁷ While Muslims in India account for approximately 14% of India's population and are the largest minority population, those adhering to the Islamic faith account for the poorest in the country, with Muslims accounting for "one in four beggars."¹⁸⁸ It follows that Muslim women are even more vulnerable to poverty and disadvantaged by laws and practices such as instant *talaq* that can exacerbate negative consequences of gender inequality.

Ultimately, the change in policy should have desirable consequences. By holding the law unconstitutional, the Court's decision may lead to greater autonomy for women and prevent instant abandonment by their husbands. The law will also protect children by emphasizing more stability in families.¹⁸⁹ In February 2018, the AIMLB asked Muslim men to take a pledge not to employ the instant divorce practice.¹⁹⁰ Though the AIMLB was originally against the Court's decision, it recently acknowledged that women

¹⁸⁵ *Id.*

¹⁸⁶ See Dasgupta, *supra* note 183.

¹⁸⁷ Zia Haq, *Untouched by Economic Growth: One in 4 Beggars in India a Muslim, Reveals Census*, HINDUSTAN TIMES (July 30, 2016), <http://www.hindustantimes.com/india-news/untouched-by-economic-growth-destitution-illiteracy-hurt-india-s-muslims/story-Lz5HhyifFkPxZ4pu5gT85N.html> [https://perma.cc/KRB4-8ZK8]; see also *The Percentage of Indian Muslims Living Below Poverty Line*, MILLI GAZETTE (Sept. 17, 2015), <http://www.milligazette.com/news/13003-the-percentage-of-indian-muslims-living-below-poverty-line> [https://perma.cc/PCQ6-GYSD].

¹⁸⁸ Haq, *supra* note 187.

¹⁸⁹ *Triple Talaq: India Court Bans Islamic Instant Divorce*, *supra* note 77.

¹⁹⁰ *AIMPLB Asks Muslim Men to Take Pledge Against Triple Talaq*, INDIA (Feb. 6, 2018), <http://www.india.com/news/india/triple-talaq-aimplb-asks-muslim-men-to-take-pledge-against-instant-divorce-in-marriage-contract-2879737/> [https://perma.cc/MW74-YP7L] ("The All India Muslim Personal Law Board (AIMPLB) is all set to make it necessary for all Muslim men to pledge against the controversial Islamic practice of triple talaq and commit in the *nikahnama* (Islamic marriage contract) that they will not practice the instant divorce to end their marriages.").

need protection from this practice.¹⁹¹

From a public policy perspective, the government has an interest in keeping marriages intact when possible and in protecting individuals that may be severely disadvantaged if husbands decide to end their marriages on a whim.¹⁹² In particular, the unequal impact based on gender would have left women in vulnerable positions without any notice if the law had continued to stand. Additionally, religion encourages marriages to remain intact and to avoid divorce when possible.¹⁹³ After all, the original reasoning behind encouraging a “*triple talaq*” was so that the husband was sure of his decision, hence the requirement of saying it three times.¹⁹⁴ Both government and religious leaders should have a stake in promoting gender equality and preventing the destitution of women suffering the consequences of *triple talaq* in India.¹⁹⁵

The government also has an interest in preventing husbands from abandoning their wives through a means of instant divorce— if not from a humanitarian perspective, then at least from an economic perspective since many instantly divorced women become wards of the state.¹⁹⁶ Bano was fortunate her parents could care for her after the abuse she received and the dowry demands placed on her family.¹⁹⁷ Instant divorce often results in cases where the family of the divorced woman is unwilling or unable to take them in after a *triple talaq* divorce.¹⁹⁸

Despite the benefits, not all Muslim women in India are in favor

¹⁹¹ *Id.* (“[A]lthough AIMPLB initially maintained that the issue is outside the realm of the judiciary, it agreed that protection could be given to the women at the time of the *nikahnama* execution . . . ‘This will be a wonderful step towards fulfilling a long-standing demand of women and many educated, enlightened men in the community. It is the need of the hour,’ president of All India Muslim Majlise Mushawarat, Naved Hamid, was quoted as saying by *Times of India*.”).

¹⁹² *See Triple Talaq: India Court Bans Islamic Instant Divorce, supra* note 77 (“Campaigners say over the years thousands of women, especially those from poor families, have been discarded by their husbands in this manner. Many have been rendered destitute, with nowhere to go, or have been forced to return to their parental homes or fend for themselves.”).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See Bano, supra* note 15, at 25.

¹⁹⁷ *Id.* at 6.

¹⁹⁸ Neuman & Domonoske, *supra* note 10.

of a bill outlawing the *triple talaq* practice.¹⁹⁹ In February 2018, Muslim women mobilized in “an unprecedented mammoth and historic silent rally” with the aim to protect personal law in India.²⁰⁰ The women stated that the proposed *Triple Talaq* Bill would convert a “civil matter” into a “criminal offense” and that outcome is not preferred.²⁰¹ These women were connected to the AIMPLB,²⁰² which argued that a bill like the one currently proposed would be “anti-Constitutional, anti-Shariah and anti-women[.]”²⁰³ In addition, it would violate Article 14 and 15 of India’s Constitution, which protect religious equality and prevent religious discrimination (in addition to protecting gender equality and preventing gender discrimination).²⁰⁴ The AIMPLB is against making instant *talaq* a criminal offense because it believes the criminalization of the practice would infringe on personal law religious protections afforded to Muslim groups by India’s constitution.²⁰⁵ In August 2018,

[s]eeking to allay fears that a proposed law which makes the practice of instant triple *talaq* illegal and imposes a jail term of up to three years on the husband could be misused, the [Indian] government . . . approved certain safeguards in it such as adding a provision of bail for the accused before trial.²⁰⁶

¹⁹⁹ Pervez Bari, *Muslim Women in Huge Number Take on to Jaipur Streets to Protest Against Triple Talaq Bill*, E NEWSROOM (Mar. 7, 2018), <https://enewsroom.in/triple-talaq-bill-muslim-women-jaipur/> [<https://perma.cc/6LMQ-TNGV>].

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* (“It is common knowledge for any student of Shariah that the above Definition forbids even *Talaq bain* as a cognizable act. For there is no room for revocation in this form of divorce and it is with immediate effect. Divorce arising out of *Khula* is forbidden according to this Bill. Its consequence will be that if a wife who is keen on seeking a separation from her husband will be forced into liv[ing] with him, without her will.”).

²⁰⁴ *Id.* See generally INDIA CONST. art. 14 (“Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”); see generally INDIA CONST. art. 15. (“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”).

²⁰⁵ Bari, *supra* note 199.

²⁰⁶ See *Provision of Bail Added in Triple Talaq Bill*, ECON. TIMES (Aug. 9, 2018), <https://economictimes.indiatimes.com/news/politics-and-nation/provision-of-bail-added->

Parliament should reconsider the criminalization of misconduct by husbands who continue to invoke *triple talaq*.²⁰⁷ Prime Minister Narendra Modi “made a ‘humble request’ to all political parties . . . to help pass the bill in the current session of [P]arliament.”²⁰⁸ The Muslim Women (Protection of Rights on Marriage) Bill 2017 proposed to imprison men for three years who did not abide by the law. However, the upper house initially blocked the bill, despite it passing through India’s lower house of Parliament without any problem.²⁰⁹ While the bill passed, groups on both sides of the issue of regulating Muslim law by the government have called for amendments to the bill and/or a repeal.²¹⁰ The All India Women Muslim Personal Law Board is outright protesting the bill.²¹¹

Despite the controversy, without a deterrent, the practice will likely continue.²¹² If legislation involving a jail sentence cannot be passed, perhaps civil fines could be considered. However, both jail sentences and civil fines could impose on the husband’s ability to support the family, which could become a major issue when children are involved and the wife does not have a means to support herself and her family.²¹³ The societal issues surrounding how this practice has left wives destitute may continue on if the Parliament

in-triple-talaq-bill/articleshow/65338150.cms [https://perma.cc/6BUV-VGU6] (“The proposed law would only be applicable on instant triple talaq or ‘talaq-e-biddat’ and it would give power to the victim to approach a magistrate seeking ‘subsistence allowance’ for herself and minor children.”).

²⁰⁷ Hasan, *supra* note 1.

²⁰⁸ *Id.*

²⁰⁹ Pasricha, *supra* note 174 (“However it was blocked last week in the upper house of parliament by opposition parties who say that proposing jail time for men who resort to the age old practice to end their marriage overreaches by putting what is essentially a civil contract in the ambit of criminal law. They say that a clause that an offender should continue to support his wife is meaningless since he cannot do so from jail.”). *See also* Danielle Deavens, *In India, These are the First Female Judges Protecting Married Women*, BRIDES (Jan. 4, 2018), <https://www.brides.com/story/in-india-these-are-the-first-female-judges-protecting-married-women> [https://perma.cc/WG52-ZHCR] (indicating that female judges are stepping up into the decision-making process).

²¹⁰ *See* Khan, *supra* note 89.

²¹¹ *Id.*

²¹² Pasricha, *supra* note 174.

²¹³ *See id.*; *see also* *Instant Triple Talaq Illegal: 3-yr Jail Term for Husband: Draft Law*, INDIAN EXPRESS (Dec. 1, 2017), <https://indianexpress.com/article/india/instant-triple-talaq-illegal-3-yr-jail-term-for-husband-draft-law/> [https://perma.cc/SW83-JLR3].

of India does not address how these Muslim wives will be able to provide necessities for their families.²¹⁴

Women's rights groups also opposed the bill due to its "ambigu[ity]."²¹⁵ Most members who voted against the bill did so because it was "being passed in a rush."²¹⁶ While the groups fundamentally disagree on why, perhaps the bill does need more analysis and structure before being put up for a vote in the legislative body again.²¹⁷ The bill should be clear-cut so the government has the ability to enforce the law, with constitutional protections for the Muslim women population in India.

In addition to changing the social and legal landscape in India, it is possible the ramifications of the Court's decision will transcend the nation's borders. Five other major Muslim countries have already reacted to the decision by abolishing their own antiquated practices pertaining to instant divorce.²¹⁸ Perhaps they will continue to follow suit and take broader steps towards promoting gender equality.

V. Conclusion

While India's highest court's decision is a good start, more is needed to protect women's rights in India. Courts must tactfully handle issues of intersecting and competing rights. In this case, the Court was faced with an intersection of religious and gender equality issues.²¹⁹ Overall, the public opinion is that men should abstain from the instant divorce practice.²²⁰ The only differences in public opinion stem from which type of organization—the government or religious groups—should regulate and enforce the prohibition on instant divorce law.²²¹

²¹⁴ Pasricha, *supra* note 174.

²¹⁵ *Triple Talaq Bill Draconian, Ambiguous: Women Activists*, INDIA TODAY (Jan. 29, 2018), <https://www.indiatoday.in/pti-feed/story/triple-talaq-bill-draconian-ambiguous-women-activists-1156550-2018-01-29> [<https://perma.cc/8ER4-VC96>].

²¹⁶ Hasan, *supra* note 1.

²¹⁷ *See* Pasricha, *supra* note 174.

²¹⁸ *Here's How Five Major Muslim Countries Handle Divorce After Abolishing Triple Talaq*, SCOOP WHOOP (June 9, 2016), <https://www.scoopwhoop.com/With-Triple-Talaq-Abolished-Heres-The-Process-Of-Divorce-Among-Muslims-Followed-In-Other-Countries/#.jb4qke9g8> [<https://perma.cc/9U5K-3AGT>].

²¹⁹ *See* Neuman & Domonoske, *supra* note 10.

²²⁰ *See id.*

²²¹ *See id.*

The movement to put pressure on Parliament to pass a law that would make a husband's instant divorce a punishable offense (without bail) is the necessary second step needed to end the abuse of the practice in India.²²² While the path to an enforceable law feels like it is moving too slowly, a sweeping change cannot be expected overnight when the practice has been in place in the Muslim community for 1,400 years.²²³ The slow changes allow activist groups to mobilize and assemble resources to assist the women who have been impacted by the practice.²²⁴ However, women's rights advocates can and should continue to put the pressure on Parliament to pass the law. Their efforts do not go unnoticed and the changes are admirable given the entrenchment of the practice over so many years.²²⁵

There are still gender equality issues that put women in subordinate positions and inevitably force them to surrender all of the marital power to their male counterparts. Was the law "nothing but patriarchy masquerading as religion"?²²⁶ The marginalization of Muslim women in India still plays a role in their daily lives.²²⁷

As a result, five other discriminatory areas need immediate attention for gender equality in India, including:²²⁸

- To criminalize marital rape

²²² Zeenat Saberlin, *India Seeks to Criminalize Instant Triple Talaq Divorce*, AL JAZERRA (Dec. 28, 2017), <https://www.aljazeera.com/news/2017/12/house-passes-bill-criminalise-triple-talaq-171228113118141.html> [<https://perma.cc/3567-VS5N>].

²²³ See Hasan, *supra* note 1.

²²⁴ See Ambika Pandit, *Triple Talaq Bill: Activists Seek More Talks Before Draft Becomes Law*, TIMES OF INDIA (Dec. 27, 2017), <https://timesofindia.indiatimes.com/india/triple-talaq-bill-activists-seek-more-talks-before-draft-becomes-law/articleshow/62260090.cms> [<https://perma.cc/N3RG-E7S9>].

²²⁵ See *id.*

²²⁶ *Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle*, *supra* note 27.

²²⁷ See generally Yasmeen Jahan, *Intersectionality of Marginalization and Inequality: A Case Study of Muslims in India*, 4 J. OF POL. SCI. & PUB. AFF. (2016) ("Of course, through the lens of women, they are at most disadvantage due to cultural norms as well as family livelihood strategies through making the very socialization of women. Through the Case Study of *Jammu & Kashmir* where majority of population is Muslims shows that the educational status of Muslims in general and Muslim women in particular is quite dismal.").

²²⁸ Alison Saldanha, *5 Laws That Women Need as Urgently as the Ban on Triple Talaq*, QUINT (updated Sep. 19, 2018), <https://www.thequint.com/news/india/triple-talaq-women-rights-marriage-government> [<https://perma.cc/J2C6-Q3L5>].

- To redefine cruelty
- To end the anti-dowry loophole
- To end age discrepancies between men and women
- To outlaw cultural traditions which have prevented women from choosing who they marry.²²⁹

Overall, human rights issues should be at the forefront of the concerns of the government in India and around the world. In countries that practice personal law, the government may need to intervene when that law allows for the severe marginalization of a quasi-suspect class. In this case, India is setting an example for other countries in similar situations with issues of gender inequality.

229 *Id.*

