NOTES AND COMMENTS

Pros & Cons of Triple Talaq: Post Shayara Bano Judgment

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Abstract

"We are the nation which proudly professes about it being the largest democracy and ensures to both men and women equal rights meanwhile it claims itself to be a secular state. However, under all these pretty claims there lies heinous and discriminatory laws which jeopardize the lives of many people who are in most cases unable to earn a living for themselves. The different courts in India have passed various judgements in the cases of Triple Talaq which is not helping the Muslim women as well. Triple Talaq, a patriarchal practice should be banned because first, it is unconstitutional; secondly, it leaves the women who are divorced and dependent in acute poverty; thirdly, it is un-Quranic.

Key-Words: *Triple Talaq, Equality, Democracy, Unconstitutional etc.*

I. INTRODUCTION

In *Shayara Bano v. Union of India*[3], the Indian Supreme Court pronounced a split, though bold and progressive verdict setting aside the practice of *instant triple talaq* or *talaq-e-biddat*. Against the backdrop of this judgment, this paper traces the jurisprudence evolved by Indian courts vis-à-vis personal laws and therefore the right to spiritual freedom. Two central arguments are presented within the course of this paper. First, the courts haven't adopted a uniform approach when handling issues connected to non-public laws. Second, the courts by means of the doctrine of essential religious practices have, besides interfering within the domain of private laws, attempted to

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[3] (2017) 9 SCC 1.

fashion the faith specific personal laws as per the understanding of the respective judges. In reference to this, the paper briefly considers the efficacy of the top-down approach of private law reform which has been practiced in India within the post-independence period. While showing that the top-down approach of private law reform has not fared well within the Indian context, the paper suggests a special and more inclusive approach which may be adopted within the endeavour to reform personal laws. During this paper, I try to analyse the recent developments against the populist grain by clearing a number of the misconceptions surrounding the rights of Muslim women under the Muslim personal law regime.

II. RELIGIOUS BASIS OF INSTANT TRIPLE TALAQ

Unlike other religions where marriage has been traditionally viewed as a sacrament, under Muslim law, marriage is a civil and social contract. Talaq-ul-Sunnat of the divorce sanctioned by Prophet is sub-divided into: (i) Talaq-e-Ahsan (ii) Talaq Hasan (iii) Talaq-e-Biddat.

In the Talaq- e- Ahsan form, once the husband pronounces talaq, there has to be a three-month iddat period to factor in three menstrual cycles of the woman. This time is meant for reconciliation and arbitration. During this period, if any kind cohabitation occurs, the talaq is considered to have been revoked.

In Talaq–e-Hasan (Proper), there is a provision for revocation. The words of Talaq are to be pronounced three times in the successive periods after menstrual cycles. The husband has to make a single declaration of Talaq and then waited for another menstrual cycle to pronounce another declaration. The first and second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, the words of Talaq become ineffective as if no Talaq was made at all. But if no revocation is made after the first or second declaration then lastly the husband is to make the third pronouncement in the third period the Talaq becomes irrevocable and the marriage dissolves.

The Talaq-e-Biddat which allows men to pronounce talaq thrice in one sitting, sometimes scrawled in a written talaqnama, or even by phone or text message. Thereafter, even if the man himself perceives his decision to have been hasty in hindsight, the divorce remains irrevocable. It is a disapproved mode of divorce. The Talaq-ul-Biddat has its origin in the second century of the Islamic-era. According to Islamic scholar and jurist Ameer Ali, (1849–1928), this mode of

Talaq was introduced by the Omayad Kings because they found the checks in the Prophet's formula of Talaq inconvenient to them.

The **Talaq-e-Biddat was declared unconstitutional by the Hon'ble Supreme Court in the case of *Shayara Bano Vs Union of India* in Original Civil Writ Jurisdiction in Writ Petition (C) No. 118 of 2016 and violative of fundamental rights and to the extent the Section 2 of the Shariat Act was held to be void.**

Then the Parliament has enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019 (Hereinafter referred to as 'Act') and the Act was notified on 31.07.2019 in the Gazette of Government of India wherein the Section 2(c) of the Act defines the talaq means s talaq-e-biddat or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband.

Section 3 of the Act specifies that any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.

Section 4 of the Act specifies that Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

III. CONSTITUTIONAL RIGHTS OF EQUALITY FOR MEN AND WOMEN & IT'S IMPACT ON THE SOCIETY

The Constitution of India grants equal protection of law to all the people in India. But when it comes to religious matter and their related matter (marriage, divorce, custody of children, etc.), Muslims in India are subjugated by the Muslim Personal Law which came into action in 1937. The changes in the laws of the religious minorities were surprising, as preservationist elites had impressive roundabout impact over these laws. Arrangement elites changed minority law just in the event that they found valid legitimization for change in gathering laws, bunch standards, and gathering activities, not just in protected rights and transnational human rights law. Muslim support and separation laws were changed on this premise, giving ladies more rights without relinquishing social convenience. Lawful assembly and the standpoint of arrangement creators - explicitly their way to deal with managing family life, their comprehension of gathering standards, and their regulating vision of family life- moulded the

significant changes in Indian Muslim law. More gender-equalizing lawful changes are conceivable dependent on similar sources.

Constitution of India provides that for women and children special provision can be made by the state and the women empowerment enjoys constitutional protection.[4]Constitution of India lay down certain principles of policy that are to be followed by State. Men and Women citizens shall enjoy equal right to an adequate means of livelihood.[5] Constitution of India also provides that 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'[6]

Among Muslims, where photography was a taboo as was loudspeakers being used for *azaan*, but slowly they have given way. What is non-negotiable is the constitutionally endowed right to profess, propagate and practice one's religion while living within the ambit of the rules and laws that define a civilized society. But then again, the constitution is just reconfirming to what is already rejected and treated as a sinful act in Quran and Sharia alongside. In that context, the demands for abolition of triple talaq first arose among the educated class of Muslims as they understand the rigidness behind this idea and also, they have a fair idea what kind of people still practices this gruesome custom. Illiteracy and the lack of knowledge is clearly visible within this community.

Statistics show that triple talaq is not the preferred mode of divorce among Muslims. Advent of technology has complicated things further. Talaq by messaging service or email or by voice-mail have showcased the fault-lines that have always existed between a 1500-year-old religion and 21st century. Although surveys show that only 0.75 out of 100 divorces among Indian Muslims have been accomplished through Triple Talaq, even that small number is undeniably a matter of concern.

Definitely the banning of instant triple talaq has been a relief to the women who has suffered this cruelty. But the biggest factor is that at first place when the case of triple talaq occurs, the community or the leader of the community doesn't cooperate and support the victim. Because of their typical conservative mindset, that if this thing has happened then there is nothing can be undone has made the

[4] Article 15(3), Constitution of India.
[5] Article 39, Constitution of India.
[6]Article 44, Constitution of India.

women feel helpless and therefore pleaded to the Supreme Court. When it comes to triple talaq the victims of triple talaq suffers because family, friends and other people around them have already made up their mind that they couldn't help in any way if the word talaq has been pronounced thrice. The fact is that that no one proper knows the laws of Islam made for divorce process. Not even all of the religious leaders know the proper way of divorcing. Mainly the illiterates or those who doesn't know what is written in Quran are the only ones who choose this type of divorce. Instant triple talaq is not only due to Illiteracy but also due to its social acceptance, although Prophet Muhammad and the second caliph made it a punishable offence.

IV. ROLE OF JUDICIARY IN PARADIGM SHIFT OF JURISPRUDENCE

The current scenario around triple talaq is centered on the Sharaya Bano and several batches of petitions as well as Supreme courts own suo moto PIL to consider whether certain aspects of Islamic personal laws amount to gender discrimination and hence violates the constitution. The petition hence challenges the validity of triple talaq on the touchstone of Article 14, Article 15, Article 21 and Article 25.

In the case of *Shahid Azad v. Union of India* on 28 September, 2018, the Hon'ble Supreme Court has crystallized the law after detailed deliberations in such manner that Given 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. Also, as understood by the Privy Council in*Rashid Ahmad v. Anisa Khatun*[7], such **Triple Talaq** is valid even if it is not for any reasonable cause, which view of the law no longer holds well after *Shamim Ara v. State of U.P*.[8]. This being the case, 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. This form of **talaq** must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce **Triple Talaq**, is within the meaning of the expression

[7]1931 SCC OnLine PC 78: (1931-32) 59 IA 21: AIR 1932 PC 25.
[8](2002) 7 SCC 518: 2002 SCC (Cri) 1814].

"laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces **Triple Talaq**. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him."

The Kerala High Court in the case of *Kayyumparamb Ummer Farooque v. Peredath Naseema*[9], has also considered the same provisions, the decisions of various High Courts and the Supreme Court and has approved the proposition to the effect that the instant dissolution of marriage by the husband without any effort for reconciliation is not sufficient to affect a divorce under the Mahomedan Law. Even a Bench of this Court in the case of *Masroor Ahmed v. State (NCT of Delhi)*[10]after following the law laid down in the case of *Shamim Ara vs. State of U.P*[11] has approved the aforesaid principle of law. In the case of *Shayara Bano*[12] before declaring the practice of **triple talaq** to be unconstitutional, as detailed hereinabove, the provisions of Article 25(2) of the Constitution have been considered by His Lordship Justice Kurian Joseph in his opinion and His Lordship goes on to hold that there cannot be any constitutional protection to such a practice and he declares it to be ultra vires the Constitution and the fundamental rights available to a citizen. His Lordship Justice Rohinton Fali Nariman before finally declaring the law (by majority) as detailed hereinabove in para-104 has analysed various judgments not only of the Constitutional Bench of the Supreme Court and other Division Benches but judgments of various High Courts, the importance of gender discrimination, safeguards against arbitrary divorce, various forms of **talaq** prescribed in the Muslim Personal Law, the constitutional protection available under Section 25 and the conclusion arrived at para-104 is a result of all those discussions and analysis. Before doing so, Justice Nariman also refers to concept of arbitrariness as envisaged under Article 14 of the Constitution, the law laid down in the case of *Shamim Ara*[13] and the judicial precedents with regard to declaring a law to be constitutionally ultra vires invalid and comes to the

[9](2005) SCC Online Ker. 471.
[10](2008) 103 DRJ 137.
[11] (2002) 7 SCC 518.
[12] (2017) 9 SCC 1.
[13] *Supra* Note 1.

conclusion that the system of **triple talaq** is unconstitutional, arbitrary and violative of Article 14 of the Constitution.

V. CONCLUSION

What the Supreme Court does within the case of *Shayara Bano* [14]could also be a declaration to the effect that the practice of triple talaq is unconstitutional, arbitrary, and can't tend effect to or practiced. If in spite of such a declaration of law by the Supreme Court to prevent the use of this system of talaq is still practiced, the legislator/Union of India, as a measure of deterrent in its own wisdom, legislates a law to declare it to be an offense and makes it punishable, we see no reason to hold that this is often an arbitrary or an unreasonable act or a colorable exercise of power. In fact, in furtherance to the law declared by the Supreme Court within the case of *Shayra Bano*[15]the ordinance in question is for shielding the right available to a Muslim woman and to enforce the law declared by the Supreme Court in its right earnest in letter and spirit. If we undergo the aims and objects which compelled the legislation to be brought into force, we discover that the legislature/Union of India was of the opinion that in spite of the practice of triple talaq being declared as unconstitutional, the said practice continues unabated and, therefore, to curb the same the impugned ordinance in question has been brought into force. That being the factual position, the contention of the petitioner that it had been not necessary to bring any such legislation or ordinance, in our considered view could also be a misconceived submission that cannot be accepted. Generally, human rights are equated with more freedom and progress. However, it becomes pertinent to note that conferring rights don't always end in emancipation. The most reason behind this exclusionary nature of human rights is that the universal assumption on which it's based. The darker side of human rights most apparently manifests itself just in the case of women as they are caught at the intersection of community identity and thus the narrative of modernity. One such Universalist subject is that the image of thoroughly victimized Muslim women who is in need of protection through the liberal rights discourse. This debate around triple *talaq,* centered on the *Sharaya Bano* and a variety of other batches of petitions also as Supreme courts own *suo moto* PIL considers certain aspects of Islamic personal laws which

[14] (2017) 9 SCC 1.
[15] (2017) 9 SCC 1.

amount to gender discrimination and hence violates the constitution misses the aim of intersectionality. As per the liberal understanding of rights for the empowerment of women we'd wish to subordinate the category of religion and culture. However, constitutional rights would remain a dead letter if we don't understand the way during which identity politics unfolds especially just in the case of women. The whole *triple talaq* issue has become a battleground for the culture versus modernity debate. It is vital to know that women's experiences cannot be understood in these reductive binaries as "she" is produced from the very power relations which subordinate them. During this paper, the author deals with the question of triple *talaq* in the light of the recent petition filed within the Supreme Court for declaring such *talaq* invalid. The author says that there is an already existing legal precedent established by the apex court with respect to triple *talaq* which should be followed instead of resorting to a confrontational approach that may become hegemonic to Muslim women themselves. The author shall advocate that taking a cue from third-wave feminism, the identity of Muslim women must be understood at the intersection of gender and religion. The violence Muslim women endured itself isn't important; it's her Muslim-ness and thus the projection that she is that the victim of archaic and oppressive personal laws which alone can give her that special status and set her apart from all other victims of domestic violence.