

Gender Equality and Personal Law: Impact of ShayaraBano case on status of Muslim women in India

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ABSTRACT

From the cradle to the grave, females are the victims of numerous ruthless conducts of male-dominated society such as inequality, oppression, and violence not only in the family but also at the workplaces. Laws that restrict discrimination are nothing but a tough nut to crack. The denial of equal opportunity in education and employment, deprivation of sexual and reproductive rights, below standard domestic status plus the use of social forces and physical violence to intimidate women – all these violations against the right to equality. No community is spared this. The position of Muslim women claims much attention. They are subject to the interface between gender and community within a social, political and economic context. The path-breaking decision of the Supreme Court upholding the constitutional validity of the controversial Muslim's right to triple divorce. The positive interpretations by the judiciary have started a new era of protection of rights within the established principles of Muslim law, but still, many changes are yet to come. Legal or Judicial approaches are not the only way to root out the evil of inequality. Gender justice in reference to Muslim women is subject to personal awareness. The researcher shall advocate a uniform civil code to establish equality in matrimonial disputes.

1. Introduction

India is a land of different religions having a pluralistic society.¹ Since the early era, different faith and religious groups are the basis of living standards. Most of the communal and religious sects consider that Without religious spirit life has no value. Everyone has been free to follow their own religions since ancient times. As a result, different personal laws developed in this country to regulate the personal lives of the people in accordance with their beliefs.² It is but natural that in a secular country like India, people belonging to various religious dominations have been conceded to the constitutional freedom to be governed by their respective personal laws in certain sensitive matters like marriage, divorce, and succession.³ The policy of preserving personal law for Hindus and Muslims in family matters was so strictly adhered to, that the constitution proclaims in Article 372 that the law enforces in the country before the commencement of the constitution shall continue to remain in force until altered or repealed or amended by a competent legislature or any other competent authority.⁴ But this freedom has left some communal authorities uncontrolled to deal with their personal laws according to their wishes. The Personal law system, on one hand, enhances the autonomy of religious groups, but on the other hand, it has adverse implications on the autonomy of individual members and other identity groups, particularly women, within the larger group.⁵

As a consequence, the problem of gender justice has become the prime concern of the nation. The status of Indian women in general and Muslim women, in particular, has been fateful. Social thinkers have observed that the gender politics of minority have become more acute and complex for many years following the intensification of communal politics in India and the consolidation of fundamentalist factions across religion in the wake of the Shah Bano case⁶ Controversy (1985-86) and other religion-based issues. All these have significant consequences for the assertion of gender identity for Muslim

women in contemporary India. Muslim Women, entrenched by the trinity of multiple marriages, triple talaq and Purdah has become subject to hostages for so long that they have become difficult to dislodge. The path-breaking decisions of the Supreme Court in the Shamim Ara⁷ and ShayaraBano case⁸ are an engrossing study of the issue of gender justice. This article would try to locate crucial issues relating to triple divorce and gender justice especially in reference to Muslim women. There is a quite need to be focused to raise Muslim Women's struggle for justice and equality and discuss various possibilities as well as hurdles in the path of evolving alternative discourses.

2. The ShayaraBano case

A marriage of 15 years was dissolved in minutes unilaterally with her husband dispatching a 'Talaqnama' to her while she was at her parent's place in Kashipur, Uttarakhand recuperating from an illness.⁹ This happened with 37-year-old ShayaraBano a victim of social evils in man-made society. She opposed such anti-gender inequalities through a petition and raised a question of the constitutional validity of triple talaq.

The current concern regarding triple talaq is centred on the petition by Sharaya Bano and several other petitions, as well as Supreme court, own Suo moto PIL to consider whether certain aspects of Islamic personal laws amount to gender discrimination and hence violates the constitution. In this petition, the validity of triple talaq was challenged on the touchstone of Articles 14, 15, 21 and 25.¹⁰ The petitioner submits that religious officers and priests like imam, maulvis, etc. who propagate, support and authorise practices like talaq-e-bidat, Halala, and polygamy are misusing their position, influence to subject Muslim women to such gross practices which treat them as chattel, thereby violating their fundamental rights enshrined in Articles 14, 15, 21 of the Constitution. The petition goes on to explain the plight of the Muslim women who

are suffering due to the abhorrent practice of triple talaq. Further, it avers that the Muslim personal laws of India permit the practice of talaq-e-bidat or talaq-i-badai, which includes a Muslim man divorcing his wife by pronouncing more than one talaq in a single tuhr (the period between two menstruations), or in a tuhr after coitus, or pronouncing an irrevocable instantaneous divorce at one go. This practice of talaq-e-bidat (unilateral triple-talaq) which practically treats women like chattel is neither harmonious with the modern principles of human rights and gender equality, nor an integral part of Islamic faith.¹¹

Thus, through this petition, the constitutional validity of the triple talaq was challenged. It was the issue of prime concern that whether triple talaq is an essential part of the religious belief of the Muslims or not. The Apex court has critically analysed the practice of triple talaq, on the touchstone of constitutional norms, the Muslim Personal Law (Shariat) Application Act, 1937, judicial incisiveness both pre- and post-independence, and scholarly writings. The matter is adjudicated by the constitutional bench of five judges and decided by 3:2.¹²

The majority announced triple talaq unconstitutional. Though minorities observed the practice of triple talaq, as an essential part of one's faith and the same is constitutionally protected. J. S. Khehar, CJI, S. Abdul Nazeer, J were in minority, whereas Kurian Joseph, Rohinton F. Nariman, and U.U. Lalit, JJ. formed the majority.

Minority Verdict: Chief Justice J S Khehar and Justice S A Nazeer held that talaq-e-biddat is a matter of personal law of Hanafi School of Sunni Muslims and constitutes a matter of their faith as it has been practised by them for at least 14,000 years.

"We have examined whether the practice satisfies the constraints provided for under Article 25 of the Constitution, and have arrived at the conclusion, that it does not breach any of them. We have also come to the conclusion, that the practice being a component of 'personal law', has the protection of Article 25 of the Constitution," he said.¹³

Majority Verdict: Justice Kurian Joseph who penned a separate majority judgement, disagreed with CJI that the practice of triple talaq has to be considered integral to the religious denomination.

"Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible. The whole purpose of the 1937 (Muslim Personal Law (Shariat) Application) Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in section 2 which includes talaq," he said.¹⁴

The contention of the minority opinion was based on that in India practice of triple talaq is observed by 90% of the Muslims belonging to the Hanafi School and consequently treating the same having approval of particular religious denomination and thereby considering it as one's religious faith certainly does not find space under the constitutional jurisprudence relating to fundamental rights of freedom of religion.¹⁵ Although the Court's verdict is a bold and giant step towards attaining gender justice in India, particularly in the context of Muslim society, it raises deeper issues concerning the multicultural policies in the family law implemented by the

Indian State in order to eradicate inequality among different religion-based-identity groups, or to foster multiculturalism..

3. Impact of the Judgement: The Muslim Women (Protection of Rights on Marriage) Act, 2019

The judgment was celebrated by various Women's rights groups and other human rights and social justice organizations in India with a view to advancing the essential constitutional values of equality, dignity and secularism.¹⁶ The Bharatiya Muslim Mahila Andolan (BMMA), a rights-based mass organization led by Muslim women, and a party in the current case, conducted a study in 2015 which found that approximately 1 in 11 Muslim women were survivors of triple talaq, the majority receiving no alimony or compensation. This practice has left thousands of women destitute, at times rendered homeless overnight along with their children. This reality undermines the ability of women to realize their other human rights, including in relation to housing, land, and resources in general.¹⁷

The decision is particularly relevant because it addressed a practice within the ambit of personal law through the lens of structural equality and within the framework of fundamental rights. Now, in a limited way, it will be feasible to test and challenge other discriminatory personal laws against fundamental rights.

The decisions got an impact and the Parliament of India passed the unique legislation 'The Muslim Women (Protection of Rights on Marriage) Act, 2019', An Act to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto.

Section 3 of the Act prescribes

"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 prescribes

"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."

4. Conclusion and suggestions

Triple Talaq is found as a practice to dissolve a valid marriage among Sunni Muslims. This has been in existence for a long time i.e. 1400 years ago as a part of custom only in Hanafi school of Sunni Muslims.¹⁸ There is no evidence of triple talaq in the Quran and the Sharia law. From the Holy Quran and the Hadis, it appears that though the divorce was permitted, yet the right could be exercised only under exceptional circumstances. The Holy Prophet is reported to have said: "Never did Allah allow anything more hateful to Him than "divorce. "According to a report of Ibn Umar, the Prophet said: "With Allah the most detestable of all things permitted is divorce". (See the Religion of Islam by Maulana Muhammed Ali at page 671).

Muslim law is only a civil contract, yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of

the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution.¹⁹

When marital harmony cannot be attained, the Quran allows and advises the spouse to bring the marriage to an end although this decision is not to be taken lightly and the community is called upon to intervene by appointing arbiters from two families to attempt a reconciliation. The Quran establishes two further means to avoid hasty divorces, it prescribes two waiting periods of three months before the divorce is final in order to give the husband time to reconsider his decision, and a man who takes an oath not to have sexual intercourse with his wife, which would lead to automatic divorce, is allowed a four-month period to break his oath.²⁰ There are various norms in Muslim laws to maintain the dignity of Muslim women and to treat gender equality but the ill

practice of some sects set-asides these norms. The new legislation can help the Muslim community to establish gender justice and empowered status of Muslim women in society.

The Muslim Women (Protection of Rights on Marriage) Act, 2019 is a clear indication for the leaders of the community to initiate a process for reform. The Muslim Personal Law must be codified. Muslim Women and progressive organizations should create a mass movement for change. India is a democratic nation and the notion of democracy cannot be reduced to the papers only. We must be democratic as to protecting equality and equality always claims gender justice. It is not fair to abuse any religion but reforms cannot be avoided. Muslim communities should build a co-operation between Muslim women and their respective needs to live in a society with dignity.

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