P: ISSN NO.: 2394-0344 RNI No.UPBIL/2016/67980 VOL-4* ISSUE-2* (Part-2) May- 2019
E: ISSN NO.: 2455-0817 *Remarking An Analisation*

The Journey of Triple Talaq- From Shah Bano till Legislation

Chandrani Dutta
Assistant Professor,
Deptt. of Commerce,
Khudiram Bose Central College,
Kolkata, West Bengal, India

Abstract

Law, as a major institution in the society, should never propagate any discrimination whether it is on the ground of religion, caste, race or gender. But, unfortunately, it has been observed that Law, too, is not equally balanced to meet the needs and provide justice to all irrespective of religion, caste, race or gender, from time immemorial. In the given article, an attempt has been made to examine the context of Triple Talaq as per Quranic scriptures and then to trace the various movements undertaken by the Muslim Women specifically and Women generally to restore their long lost rights to equality. The article reflects the hurdles faced by them in this journey in the form of religious minority rigidity and sentiments, the political intentions of the parties and most importantly, the struggle with one another. The author, however, emphasises on hope in the form of the Supreme Court verdict inspite of all the obstacles faced and still hopes that the legislation and finally, proper codification of the Muslim Personal Law will restore the rights of the women to equality at all levels.

Keywords: Triple Talaq, Muslim Personal Law, Religious Minority, Muslim Women.

Introduction

A law is basically a set of rules and regulations which describe the legal rights and legal obligations and are recognised by the Courts. The various sources of law are Customs prevalent in different communities, societies, Statutes enacted from time to time, the Constitution of the nation, International conventions and Judicial Case decisions. Feminist Jurisprudence reflects that it is essential to fathom how the law is made and interpretated as an act of power. Any law which is made neglecting the women's representation and without considering the adverse effect on women affect and jeopardise women's right to equality. Hence, a gendered perspective should be taken on all laws and we should shift our focus from protection of women to empowerment of women in different laws (Vasanthi, 2012).

The origin of Personal Law can be traced back to the colonial period of the nation when Personal Laws were considered an area to protect the private realm of the household from the colonial power. At the time of independence, Personal Laws were retained by the Constitution though several amendments have taken place from time to time in the context of marriage, succession, divorce, adoption, etc. But, one may easily comprehend that the basic origin of the Personal Laws are rooted in the spirit of native patriarchy (EPW Engage).

Objectives of the Study

The study has been undertaken to attain the following objectives.

1. To understand the Muslim Personal Law in the context of Triple Talaq,
2. To highlight the legal status of Triple Talaq in international context,
3. To trace the journey of Shah Bano and others till the Supreme Court Verdict and the draft of the Triple Talaq Bill,
4. To understand the impact of the Supreme Court verdict on various stakeholders involved therein,
5. To identify the struggle of the Muslim women caught between the rigidity of the personal law rules and poilitical interests of various parties.

Muslim Personal Law in the context of Triple Talaq

Triple Talaq or instant divorce is mostly based on misinterpretations of the Holy Quran. The Holy Quran does not advocate instant utterances of talaq three times amounting to Triple Talaq as depicted in the scripture. According to the Prophet, the most heinous thing in the path of realisation of God is Divorce (Abu Dawud, 1863 as cited in

Mollah, 2017). But when the situation is not capable of being restored between a husband and a wife, then Talaq is a feasible option. Quran (3:34) requires a husband to discuss the matter of marital discord with his wife. If discussions turn out to be futile, then it is required to maintain sexual distance between the couple. This is done in expectation that temporary physical distance between them would induce them to reunite. If this second step fails, then the scripture advises the husband to again have a discussion with his wife for reconciliation. If the conflict still exists, then the Quran (4:35) states to place the matter before two arbitrators, one each from the families of the couple. After the failure of the above mentioned four steps, the Quran allows for the utterence of the first talaq. This is followed by a waiting period of three months named as Iddah. Maximum of two talaqs are permitted to be pronounced during this period of Iddah. If the matter does not improve during the period of Iddah, then and only then the third and the final talaq may be pronounced after the expiry of the Iddah. After the Iddah, still the scripture allows the couple to renegotiate and unite provided the terminal talaq is not uttered. Once, it is done, then the marital bond between the two parties stands revoked (Mollah, 2017).

Triple Talaq in the International Context

It is indeed an irony to find that majority of the Muslim majority countries have banned Triple Talaq and do not recognise it as a valid mode of divorce. Egypt was the first country to start the lead in banning Triple Talaq in the year 1929 and enacted a law where several talaqs would be considered as a single talaq and it would be a revocable one. Similar steps were taken in this aspect by Sudan in 1935, by Jordan in 1951, by Syria in 1953, Morocco in the year 1958 followed by Iraq and Pakistan in the years 1959 and 1961 respectively (ibid.).

In the year 2001, Bangladesh High Court gave the verdict that the utterance of the term 'triple talaq' in one sitting by an alienated husband would not constitute a valid divorce. Moreover, the verdict specified that the practice of issuing Fatwa or religious edicts would not be binding upon the Muslim population. The petition was filed by a Muslim woman Sahida who was pronounced Triple Talaq by her husband Saiful and was compelled to remarry his paternal cousin by issuing a fatwa from the local cleric. The Court of Law, immediately, revoked the divorce and gave the order for the arrest of the cleric. At the same time, the Court directed the government to enact a legislation whereby issuance of Fatwa would be considered a punishable offence. The Bangladesh historic judgement marked an end to the wrongful interpretation of the Holy Quran and the preachings of Prophet Mohammed. In another landmark judgement in the year 1995, Bangladesh High Court observed that the comprehension and the interpretation of the Holy Quran should not be a monopoly in the hands of the few individuals. Most of the erroneous interpretation is due to the fact that the roads to the interpretions are closed and the understanding of the scripture is controlled by some selected religious schools. This has eventually jeopardised the spontaneous growth and understanding of the Muslim Personal Law. Another neighbouring country from which India should draw inspiration from in this regard is Pakistan where the Court of Law, in the Kurshid Biwi case gave a trend setting judgement. The judgement was that in circumstances, when the opinions of the jurists and the religious commentators are found to be contradictory to the spirit of Quran and the teachings of the Prophet, it is inevitable for every Muslim to obey the teachings of the Quran and the Prophet (Ahmed, 2001).

It is truly a sorry picture for us where for many centuries, the Islamic Law that is followed in our country is the law laid down and interpreted by the colonial judges. Few reasons are attributed for this cause. One of them is that the Court of Law does not have the reach to the codified Muslim Law because it is primarily in Arabic or Persian. Hence, the Court has to rely on the understandings and the sayings of the religious preachers. Another principal reason is that any interference in the personal law may lead to mass agitations and backlash and this prompts the legislators to become wary of initiating any reform in the the context of personal law. In this connection, one has to remember that the Islamic Law and the Quran do not prohibit the future generations the right to interpret the religious and personal laws. There are built-in techniques in the Quran and the Islamic law where rigid and definite paths have not been advocated to deal with certain situations. The matters have been left on the independent reasoning and judgement of the individuals which is called 'ijtihad'. Another mechanism is 'takhayyur' where the Islamic law is prone to amendments based on the different schools of the Islamic Law followed in different parts of the globe. Hence, in the latter case, acceptance and implementation of benevolent principles should always be welcome among the Muslim community. This concept was utilised for the enactment of the Dissolution of Muslim Marriage Act, 1939 which codified nine grounds of divorce to a Muslim woman. Most of the grounds were borrowed from the Maliki school of the islamic law which is followed insome parts of the world and is distinct from the Hanafi school which is practised in India. Another notable thing in this aspect is that in Iran and in Jordan, both the acts of marriage and divorce should be registered and in the events of failure, may lead to penal actions (ibid.).

The Journey of Shah Bano and Others

In the year 1985, Shah Bano, a 73 year old Muslim woman, had to file a petition in the Supreme Court for being divorced by her husband and thrown out of his house after 43 years of abusive marriage. Her lawyer claimed for her right to maintenance under section 125 of the Code of Criminal Procedure. After the divorce, her husband had stopped her maintenance with the final settlement of Rs. 3000. The Supreme Court granted a meagre amount of Rs. 179 per month as the cost of maintenance of Shah Bano. In spite of the Supreme Court's verdict, Shah Bano's husband appealed to the Court of law with the justification that he was not bound to provide for his

wife after the period of iddah. The Supreme Court rejected his appeal and demanded him to provide the maintenance and the legal costs (Nanda and Singh, 2012, Vasanthi, 2012). The Supreme Court held that a secular law in the context of section 125 of the Criminal Procedure Code was not in contradiction with the Muslim Personal Law. This led to a nation-wide protest and mass agitations by the Muslims on the pretext of safeguarding their personal laws and hence, their identity from any form interference. Some remarks in the judgement regarding Prophet Mohammed led to massive agitations and this compelled Shah Bano to withdraw from the legal victory. As a result, Muslim Women's (Protection of Rights on Divorce) Act, 1986 was passed which prevented Muslim Women from claiming and enforcing any rights under Code of Criminal Procedure (Vasanthi, 2012). Just a year before in 1984, another Muslim woman named as Shehnaaz Shaikh who was the head of the first Muslim feminist group, Awaaz-e-Niswaan, went to Supreme Court to challenge Muslim Personal Law as it denied her the right to equality. In the year 1986, the then Prime Minister, Rajiv Gandhi, permitted the unlocking of Babri Masjid in Ayodhya as a matter to appease the Hindu sentiments. This was followed by aggressive campaigns by RSS eventually leading to the demolition of Babri Masjid in December,1992. Against this backdrop of communal tension and riots across the country, Shehnaaz Shaikh had to withdraw her petition from the Court of Laws she felt that the time was not appropriate to pursue the matter (Punwani, 2016).

The current controversy has its roots in the month of October, 2015 when the Supreme Court bench of Justices Anil R Dave and Adarsh Kumar Goel were hearing a matter relating to the rights of women under Hindu Succession Act, 2005. Lawyers arguing the case stated that Muslim women were also subjected to face discrimination. Soon, the apex court directed for filing a Public Interest Litigation (PIL) for the Muslim women who were experiencing denial of their fundamental rights due to the practices of triple talaq and polygamy prevalent under their personal law. In February, 2016, the PIL titled 'Muslim Women's Quest for Equality' appeared before the bench headed by the Chief Justice of India. The Court allowed Jamiat-Ulema- e-Hind (JEH) to be a party of the petition and at the same time wanted the Attorney General to guide it in this matter. The JEH stated bluntly that the Muslim Personal Law has been derived from the Holy Quran and it had not been extracted from the legislature. Based on this ground, the Muslim Personal Law cannot be challenged and consequently, All India Muslim Personal Law Board (AIMPLB) followed the same line (ibid.).

Against this backdrop, another PIL was filed by a lawyer from Bharatiya Janata Party demanding for a Uniform Civil Code (UCC) in December, 2015. The, then Chief Justice of India, did not entertain the PIL confirming the fact that drafting of UCC was a prerogative of the legislature. The, then Chief Justice of India observed that if any Muslim woman moved a petition concerning the fact that the practice of triple talaq was dicriminatory, then the same would be considered by the court of law. It was after two months from this incident, i.e. in February, 2016, the first of such woman filed her petition. The thirty five year old woman who initiated the revolutionary move was Shayara Bano of Uttarkhand. She filed her petition against the practice of triple talaq, halala and polygamy on the ground that such practices are unjustified and are obstacles in the way of fundamental rights of Muslim women. After thirteen years of struggle in an abusive marriage, she received triple talaq by speed post in her matrimonial home. In March, 2016, a Kerala based women's group named NISA approached the Supreme Court with the same plea. In the month of May, 2016, another woman aged twenty eight years old from Jaipur named Afreen Rahman, received the triple talaq by speed post in her matrimonial home after seventeen months of struggling, abusive marriage. Afreen Rahman started the move with the help of Bharatiya Muslim Mahila Andolan (BMMA). The BMMA conducted a survey in 2010 among 4710 women spread across 10 states where it was found that 88% of the Muslim women wanted a ban on the practice of triple talaq. BMMA filed an application requesting to be a party to the above case along with another seventy year old woman, Badar Sayeed who was Tamil Nadu's first woman advocate general in the year 2004. In August, 2016, a Kolkata based Muslim woman named Ishrat Jahan challenged the constitutional validity of triple talaq in the Supreme Court and enquired whether a divorced Muslim woman can be deprived of her rights in her matrimonial home and the custody of her children. She was divorced over phone by her Dubai based husband after fifteen years of marriage. There were two other women led organisations namely Bebaak Collective consisting of many feminist groups and All India Muslim Women Personal Law Board which also filed petitions to stop the practice of triple talaq on the ground that it is unconstitutional. The Central Government filed its affidavit stating that the practice of triple talaq is a violation of human rights and it is not an essential part of Islam (ibid.).

The struggle of the Muslim women received a historic climax on August 22nd, 2017, when the Supreme Court declared the pactice of instant and unilateral triple talaq as unconstitutional and unislamic (Bagriya and Sinha, 2017 as cited in Punwani, 2017). The judgement reached by a bench of five judges was a complicated one. Two judges gave the verdict that triple talaq was creating arbitrary discrimination against Muslim women and thus, should be scrapped as unconstitutional. The third judge was of the opinion that it was not a part of Shariat or Muslim personal law and hence, was non-islamic. The remaining two judges, however, observed that triple talaq is an essential part of personal law which is already protected by the Constitution of the country for the safeguard of the sentiments of the religious minority group (Munoth, 2017 as cited in Punwani, 2017). But these two judges declared an injunction against the practice for six months and asked the Central Government to frame a law that would nullify triple talaq. Though, this was a minority judgement, the

Central Government drafted the Triple Talaq Bill making triple talaq a criminal offence, punishable with a maximum sentence of three years. The Bill was passed in the lower house on December 28th, 2017 (Business Line, 2017 as cited in Punwani, 2017) but could not be passed in the upper house (Hindu, 2018 as cited in Punwani, 2017).

VI) Women caught between the tussle of Personal Law and Politics

Religious communities can be viewed from two perspectives namely as a political identity and as an anthropological and historical identity. Majority of the historical studies reveal that religious communities are generally constructed and are not natural entities. Personal Laws were codified long time back during the colonial rule for the sake of administrative convenience and they are always not backed by religious scriptures (Nanda and Singh, 2012). During the colonial domination and rule, most of the communities felt the dire need of protecting the sanctity of their religions against the liberal forces and outlook of the West. This induced them to frame stringent personal laws for protecting the sanctity of their religions on one hand and for preventing the liberal influence of the Western world on the women folk of the household. Hence, women are regarded as a significant component of the religious minorities. But their position is somewhat different from that of the men's. Men are considered as an important *constituent* of the religious minorities whereas the women are considered to *belong* to that community and often act as symbols of the community. The membership of the women in the religious minorities are dependent on their confirmation and acceptance to the established rules, norms and customs. In case of any disobedience to the same, the women are corrected with punishments like boycott, expulsion, violence. The obedience of the personal laws is generally compensated with the assurance of accommodation and protection (ibid.). Hence, there is a difference between an identity that is imposed on one and an identity which is a self consciously constructed space (Haraway, 1988 as cited in Nanda and Singh, 2012). This differentiation is relevant in the context of Muslim women in India whose identities are continuously evolving due to the political and economic pressures for being women and due to their belongingness to the Muslim community or more specifically Muslim minority. However, many attempts have been made, as is evident from the above account to redefine and establish Muslim women's rights since mid-nineteenth century but, in majority of the cases, the attempts had to succumb to the politcal pressures and interests of the vested groups. It is indeed depressing to observe how the logic of the communal politics compel the progressive movements to retreat and hold on to the traditional customs and practices for the sense of insecurity to the vulnerable community existence (Nanda and Singh, 2012).

In the context of the present controversy of Triple Talaq, an unique feature was identified in AIMPLB's attempt to stop the intervention of the Supreme Court in the matter of Triple Talaq. This time, the Board made an attempt to mobilise women against women in contrast to the era of Shah Bano when men were involved in the nation-wide street-level campaign. AIMPLB drafted forms and distributed the same among Muslim women where they declared that they did not want any change in their personal law or Shariat. This action was a direct response to the 50,000 signatures collected by BMMA, one of the interveners in the Supreme Court, against Triple Talaq (Paracer, 2016 as cited in Punwani, 2018). AIMPLB was able to collect roughly 48 million signatures out of which more than 50% constituted women (Telegraph, 2017 as cited in Punwani, 2018). Hence, this paved the way for the Board to claim that ban on Triple Talaq was not the true and proper reflection of the community's thinking. Another attempt was initiated by the AIMPLB to stop the ban on Triple Talaq where it tried to create an unnecessary link between the ban on Triple Talaq and the Central Government's intention to invoke Uniform Civil Code (UCC) (Ghosh, 2016 as cited in Punwani, 2018). Coincidentally, the ruling party paved the way to reaffirm AIMPLB contention when, in October, 2016, Law Commission of India drafted a questionnaire seeking online responses to the issue of desirability of UCC (FirstPost, 2016 as cited in Punwani, 2018).

Since the Bill was passed in the Lower House, AIMPLB has successfully organised rallies representing lakhs of women across the nation on the issue of "Islam in danger"(Iqbal, 2018 as cited in Punwani, 2018). They declared that their personal law cannot be challenged and changed despite the fact that they themselves had changed their personal law in the vent of Shah Bano controversy and made the Rajiv Gandhi Government to enact the Muslim Women (Protection of Rights on Divorce) Act, 1986 (Malhotra, 2017 as cited in Punwani, 2018)

Punwani (2018) had interacted with some of the Muslim women in the Mumbai rally held on March 31st, 2018 when she came to know that majority of the women participants were victims of misconceptions regarding the purpose for which they had assembled and the role of AIMPLB in their community. They thought that all forms of talaqs had been banned and they confirmed that triple talaq is a practice not allowed under Islam. They had been given wrong ideas regarding the functions of AIMPLB which they considered as a body advocating and protecting Muslim women's rights. They also had preconceived notions regarding the compulsory imposition of UCC and were made to believe that gender biased practices like sati, dowry, bride burning, etc. existed in Hinduism and Islam is the only religion that believes in the gender parity in every scenario. Moreover, the Muslim women were induced to think that if the Triple Talaq Bill would pass, then it would send the husbands to jail and that would stop any form of reconciliation in future or provision for future maintenance for his family.

The question that arises in our mind is that whether there was a need for a legislation separately even after the Supreme Court judgement. There had been some reduction in the incidence of triple talaq after the Supreme Court verdict as reported by the

women's organisations and lawyers practising in family courts. Somehow, it was a reflection of the seriousness and obedience of the Muslim men to the judgement of the apex court of the country inspite of the defiance raised by AIMPLB and the ulema against the verdict (ibid.).

A critical perspective of the judgement points out some grey areas left untouched like the solution available to the Muslim women pronounced triple talaq. It is in this perspective that the ruling party was also found to remain indifferent to look for solution and proper implementation of the verdict in the grass root level by spreading the awareness among the Muslim women. The post-judgement scenario emphasised the need to punish the Muslim husbands who would violate personal laws. Moreover, BMMA requested the concerned authorities to bring the Muslim wives pronounced triple talaq under the ambit of the Protection of Women from Domestic Violence Act, 2005. Another area that was demanded by BMMA was to bring codification in Muslim personal law. Bebaak Collective, a conglomerate of Muslim women's organisations on the other hand felt the need and demanded the need of law that would not only make triple talaq void but would uphold the constitutional spirit of equality irrespective of Quranic injunctions(ibid.). The government, somehow, did not pay heed to these inputs and thus led to the hurried drafting and passing of Triple Talaq Bill in the Lok Sabha on December 27th, 2017 . The suggestions given by the Opposition parties were not incorporated and the Bill was not sent to the Parliamentary Committee for closer observation and scrutiny (https://economictimes.indiatimes.com/news/politics-and-nation/lok-sabha-passes-triple-talaq-bill-after-over-3-hours-of-debate/articleshow/67274271.cms).

The bill makes triple talaq, a cognisable offence, which would attract three years' imprisonment of the husband pronouncing triple talaq with a fine. The offence will be considered as cognisable in nature if the offence is reported by the victimised wife or any of her relatives by blood or marriage. The offence has been made bailable on certain grounds. The fact of making triple talaq, a criminal offence alarmed various Muslim activists though the majority of the Muslim women accepted the move. However, according to Punwani (2018), they were of the opinion that three years' sentence was a mild punishment given the gravity of the mental torture they are made to subject due to triple talaq. Most of the Muslim women talked in favour of the imprisonment of their husbands pronouncing triple talaq as this would reduce the chance of their taking a second wife. Various objections were raised from different fronts on the Triple Talaq Bill like if a husband is sent to jail, who would provide for the wives and the children, the fact that the imprisonment would dilute all possibilites of reconciliation between the husband and the wife, the chances of Muslim men simply abandoning their wives instead of pronouncing triple talaq, etc. Most of the questions had been answered by some of the Muslim women. Like, in the instances of triple talaq, the chance of the husband to provide for his estranged wife and children unless it is inervened by the Court or arbitrator is very minimal. Rather she is thrown out of the house after the utterance is made. The chances of reconciliation occur when the husband regrets on his own or upon counseling (Punwani, 2018).

But, the Triple Talaq Bill placed in the Upper House on December 31 could not be passed due to the united opposition's demand to refer the Bill to the select committee for closer scrutiny. Majority of the opposition parties feel that the imprisonment of three years' to the husband should be reconsidered by the select committee for reaching to a consensus (https://timesofindia.indiatimes.com/india/triple-talaq-bill-stuck-in-rajya-sabha/articleshow/67460442.cms).

Conclusion

Women are considered as symbolic representation of their communities especially in case of minority communities. Any move taken that would impact the women in the long run is considered as an encroachment towards the personal laws and religious heads become keen to protect their personal laws and restrict any form of reform to take place. Women in the religious minority groups face double oppression i.e., firstly, on account of being a woman and secondly, on being a part of the minority section. In any situation, they will be at the losing end either in the form of deprivation of the rights to equality and non-discrimination or in the form of isolation from the community itself. Another predominant factor that controls the fate of the women in the path of liberation and reform is the politics of democracy where every party has one propaganda i.e., vote banks politics. In this scenario, taking advantage of the ignorance of some women, women are led against one another which weakens their power to strive for equality and stop discrimination on various grounds.

The Triple Talaq verdict by the apex court of the country is definitely a welcome move in the path of restoration of equality and justice for the Muslim women. The Triple Talaq Bill, though partially motivated by the political whims and fancies, is also a step taken in the direction of banning this practice which is a major form of domestice violence for the Muslim women in India. What is depressing to notice, as always have been, is the rigidity of the AIMPLB and the indifference of the society as a whole for some proactive action to uproot the basic roots of patriarchy embedded in these practices. Women still today, especially minority women, continue to remain subordinate to the men in the society in spite of their untiring efforts to spread the wings of equality.

References

Ahmed, A. (2001). Reforming Muslim Personal Law, Economic and Political Weekly,(February 24, 2001), pp 618-619

EPW Engage retrieved from https://iproxy.inflibnet.ac.in:2113/node/152995/pdf

https://economictimes.indiatimes.com/news/politics-and-nation/lok-sabha-passes-triple-talaq-bill-after-over-3-hours-of-debate/articleshow/67274271.cm

https://timesofindia.indiatimes.com/india/triple-talaq-bill-stuck-in-rajya-

sabha/articleshow/67460442.cms

Molla, H. R. (2017). Triple Talaq: A Distress to Muslim Women in India, Asian Journal of Research in Social Sciences and Humanities, Vol. 7 No. 8 (August, 2017), pp 244-249

Nanda, B. L. And Singh, N. (2012), Religious Minorities and Communalism, Gender and Power, IGNOU, ISBN No. 978-81-266-6156-5, pp 180-194

Punwani, J. (2016), Muslim Women Historic Demand for Change, Economic and Political Weekly, Vol. LI No. 42(October 15, 2016), pp 12-15

Punwani, J. (2018), Triple Talaq Judgement and After, Economic and Political Weekly, Vol. LIII No. 17 (April 28, 2018), pp12-15

Vasanthi, N. (2012), Gender and Law, Gender and Power, IGNOU, ISBN No. 978-81-266-6156-5, pp 240-255