

TRIPLE TALAQ: THE INDIAN CONSTITUTION

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ABSTRACT

Today, the issues of women rights in Muslim personal Law is highly controversial. Specially, Muslim women rights relating to triple talaq divorce, inheritance, maintenance has got much attention now a days. However, Indian Constitution has guaranteed equality and freedom from discrimination based on gender or religion, but still there are various practices which are based on heartless conservative culture. As we know a large part of Muslim Personal Law is still unmodified and most of the legal decision pronounces by the courts based on the norms mentioned in Quran and hadith. The central debate on interpretation of Muslim personal laws has both positive as well as negative aspects. Some authors has supported that, Muslim personal laws has given various rights to Muslim women such as choice in marriage, inheritance etc. Whereas, some are of the opinion that, there are various practices which is against the spirit of Indian Constitution. In this line this research paper attempts to analyse the on-going debate on the implications of Muslim Personal Law in India and suggests various solution to empower Muslim women. Therefore, certain anomalies need to eradicate by giving a true essence of Holy Quaran for the benefit of the Muslim women's rights.

Keywords-Women Rights,Muslim Personal Law,Triple Talaq,Indian Constitution.

INTRODUCTION

Many social practices that reflect social inequalities hide behind the cover of religion. Personal laws, under British administrators were drawn from diverse sources. It reflected the gender prejudices of its times since the interpreters of "religion" have been mostly men. The process of reforming regressive practices also began during the British rule. Reformers ended practices like Sati and child marriage. Conservative sections in the society opposed these reforms and insisted that these be preserved in the name of "defense" of religion. There is a rising people's movement within the community to get rid of triple talaq. The Bharatiya Muslim Mahila Andolan (BMMA), a group at the forefront of this campaign for equality, surveyed almost 5,000 women. The results were categorical; 78% of those polled had been divorces via triple talaq, and more than 90% wanted the practice banned. There has also been a conspicuous silence among lawmakers around the most abused practice of 'Nikkah Halala', which requires a woman to marry and have sex with another man before she can remarry a man who has divorced her thrice. The idea is not to essentialise Islam or any other faith –but to remove the orthodoxy of all religions and cultures which are tilted against women, girls and often children.

The personal law in India is a law for people of different religion and applicable according to the religion of the person. For many decades Muslim women are fighting for gender equality in the Islamic law that govern right related to marriage, divorce and property rights. All-India Muslim Personal Law Board is, is one of the main influential body in Muslim community. There are lots of supports as well as criticism about this board. Many time this board rejected the proposal to change the Muslim personal law as they believe it will infringe the basic principles of Islam. Further, there are many male members domination in that particular board. Whereas Quran does not support a system that is only managed by the patriarchy system. Muslim women rights of marriage, divorce, inheritance has encouraged many Muslim women activists to fight for their rights. The controversial Islamic divorce practice of instant triple talaq (Talaq-e-Biddat) has been struck down as arbitrary and against the tenets of Islam. The practice was against Article 14 of the Constitution, which guarantees the right to equality, the Supreme Court has ruled.

What is instant triple talaq

It is an instant divorce custom being practiced among the Muslim fraternity, conceding the balance of ending the matrimonial alliance, in the favor of their male counterparts, i.e., husbands, by simply pronouncing the word "TALAAQ" three times. The unfair practice does not take into account the intricacies of human nature governed by sudden emotional outbursts in the heat of the moment and sometimes giving them an easy way out to further their

desire of polygamy. Off late, there were growing innumerable instances of it gaining a tech savvy dimension as well, through the use of electronic media. Therefore, this chauvinistic and paternalistic practice, as declared by the Supreme court, shall ultra vires not only infringe the right to equality (Article 14) but also is gender discriminatory. Hence, no amount of argument that the judgment is an intrusion to the personal laws of the religion, can fairly justify its perpetual practice, profession, and propagation.

- There are three forms of talaq (divorce) in Islam: Ahsan, Hasan and Talaq-e-Biddat (triple or instant talaq). Ahsan and Hasan are revocable but Biddat is irrevocable.
- Triple talaq is a practice mainly prevalent among India's Muslim community following the Hanafi Islamic school of law.
- Under the practice, a Muslim man can divorce his wife by simply uttering "talaq" three times but women cannot pronounce triple talaq and are required to move a court for getting divorce under the Sharia Act, 1937.
- Triple talaq divorce is banned by many Islamic countries, including Pakistan, Bangladesh and Indonesia.

TRIPLE TALAQ AND ITS EFFECTS ON MUSLIM MARRIAGES

Some 50,000 Muslim women and men have signed a petition asking that the practice of talak- i-bidai (triple talaq) whereby the husband can dissolve the marriage by pronouncing talaq three times, in the presence of at least two persons, and not necessarily in the presence of the wife must be banned, along with polygamy as these practices goes against the sanctity of marriage. It was further supported by NISA (a women organization in Kozhikode) seeking to declare sections in the Muslim personal law dealing with the practice of triple talaq, polygamy, nikah halala (bar against remarriage with divorced husband without an intervening marriage with another man) and inequality in intestate succession (a person who has died without having made a will) as unconstitutional.

The petition also argued that practice of Muslim men being permitted to have up to four wives was unfair. It also stated that the succession rules in Muslim personal laws grossly violated the right to equality as it specified that if a Muslim man died leaving behind only a daughter, she has to share the property with father's brothers and sisters while such is not the case when the deceased is survived by an only son.

Bharatiya Muslim Mahila Andolan (BMMA), a Muslim women's advocacy group, also launched a campaign against triple talaq, which the organization said had no sanction in the Quran. A survey done by BMMA shows around 92% Muslim women are against to this abominable practice

These practices should go not only because they go against the Quran or many Islamic countries have done away with them but they must go because they violate democratic rights guaranteed by the Constitution. The triple talaq was rendered legally invalid by the Shamim Ara vs State of UP judgment of 2002 and subsequent orders from various High Courts. But this has not stopped the practice; many Muslim women are unaware of the judgments or have had to accept such pronouncements owing to pressure from conservative sections. Many women have undergone severe trauma after being thrown out of their homes. In practice, the rights of Muslim women are being subverted in the name of rights guaranteed to minorities by the Constitution. The issue is not whether a religious community has the right to live by its holy laws but whether any community has the right to live by rules that subvert the rights guaranteed to every citizen in the Constitution.

Hence the move is a positive sign because Muslim men and women have stepped into an area that was until now the preserve of only activists.

Among Muslims, it seems the **triple talaq provision has pushed up the share of female divorcees** to 5 per 100 compared to 2-3 per thousand for Hindus, Sikhs and Jains according to freshly released **Census 2011** data. A complex web of religious and social factors is responsible for these trends, which are similar to those discovered in the previous Census.

Although divorce is legally allowed for Hindus, it may still carry social stigma. This could be the reason why the separation rate for Hindus (unlike Muslims) was 5.5 per thousand married people, while the divorce rate was pegged at just 1.8 per thousand.

PERSONAL LAWS

Most people believe that we do not have common civil laws in this country. The reality is, all civil laws are common, except one law, namely the personal law which varies with the religious groups. The personal law relates to marriage, divorce, succession and inheritance, maintenance, custody of children and adoption. By tradition, the personal law is treated as religious, though religion has nothing to do with it. Personal laws have always been manipulated to preserve traditional male privileges by institutionalizing discriminatory characteristics and gender-unequal interpretations of major religious traditions. Thus, all personal laws, whether based on Muslim, Jewish, or Hindu laws, constructed through male-centric readings of sacred texts and traditions, which heavily discriminate women in familial matters such as marriage and divorce. They are inconsistent with the egalitarian principles in CEDAW (Convention on Elimination of All forms of Discrimination Against Women, 1979) and also the Indian Constitution, which prohibits the State from discriminating against women as a class.

In case of Triple Talaq issue, neither does the Quran sanction this form of divorce nor was it legally held permissible by the Constitution. Such a practice violates the fundamental principles of gender justice, gender equity, good conscience and the dignity of women strongly enunciated in Islam.

But on the issue of triple talaq the court had reserved its right to pronounce on the matter because it viewed the issue as one concerning fundamental rights and not one of legislation. Their fight is not about the desire to remain married; the protest is against gross inequality- the fight is for basic dignity. There is no doubt that all personal laws have to be just and equitable to both men and women and, hence, the good from all personal laws has to be accepted and the bad to be discarded.

Hence the uniform code, if and when enacted, will have to be a different one from the personal laws of all religious communities. It will have to be framed by consensus among all the religious groups and will have to conform to the norms of modern values of freedom, equality, rationality, justice and humanism, for both men and women.

CRITICISMS FROM OTHER COUNTRIES

Needless to say talaq-i-bidat has devastated the lives of many women and children. Deprived of any opportunity for settlement, this mode of divorce has been subject to criticism in several Muslim countries and have brought about reform through codification. Countries like **Turkey, Tunisia, Syria, Egypt, Morocco, Iran, Iraq, Malaysia, Indonesia and Pakistan** have either reformed the law completely or brought about legally stringent preventive measures in this area. If Muslim countries can bring about reform in family laws India must follow suit. In the words of Justice Hidayatullah: "If the lead is coming from Muslim countries, it is hoped that in the course of time the same measures will be applied in India also."

Background:

The issue has been making news since a Muslim organisation, Bharatiya Muslim Mahila Andolan (BMMA), launched a campaign to ban triple talaq and "nikah halala" - a practice where divorced women have to undergo second marriage to retain the first marriage.

- In 2015, Shayara Bano, a resident of Uttarakhand, filed a petition in the Supreme Court seeking a ban on the practice after her husband ended 15-year marriage by sending a letter pronouncing the word talaq thrice. Her petition seeks the Supreme Court to declare talaq-e-bidat, polygamy and nikah halala illegal and unconstitutional on the grounds that they violate the rights guaranteed by the Constitution under Articles 14, 15, 21 and 25.
- In 2015 only, the SC registered a suo motu public interest litigation (PIL) petition titled '*In Re: Muslim Women's Quest for Equality*' to examine if arbitrary divorce, polygamy and nikah halala violate women's dignity.

Several other women lined up with their petitions over the following months. Women cannot pronounce triple talaq and are required to move a court for getting divorce under the Sharia Act, 1937.

Triple Talaq and the Indian Constitution

- Article 25 of the Constitution guarantees religious freedom as Freedom of Practice and Propagation of Religion.

- Like all other Fundamental Rights, it is subject to restrictions and does not protect religious practices that can negatively affect the welfare of citizens.
- Hence, Article 25 is overridden by Article 14, which guarantees the Right to Equality as triple talaq denies a Muslim woman's equality before the law.
- Article 25 is also subject to Article 15 (1) which states that the State "shall not discriminate against any citizen on grounds only of religion, race, caste, sex..." Since triple talaq does not work in the favour of women, it violates Article 15 (1) of the Constitution.
- However, section 2 of the Muslim Personal Law (Shariat) Application Act of 1937 recognises triple talaq as a statutory right, bringing it under the ambit of Article 13 of the Constitution. Article 13 defines 'law' and says that all laws, framed before or after the Constitution, shall not be violative of the fundamental rights.

Triple talaq as a statutory right:

Section 2 of the Muslim Personal Law (Shariat) Application Act of 1937 has already recognised triple talaq as a statutory right. Therefore, Instant talaq was no longer a personal law to remain free from the rigours of the fundamental rights as it comes under the ambit of Article 13 of the Constitution. Article 13 mandates that any law, framed before or after the Constitution, should not be violative of the fundamental rights.

Past Supreme Court Rulings:

- In the Shah Bano Case (1985), the SC gave 62-year-old Shah Bano the right to alimony from her husband by invoking a provision in the Criminal Procedure Code, 1973, a legislation for compensation that is to be given by the husband as maintenance to his divorced wife.
- However, The Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed by the then Central government which was seen as an attempt to dilute the effect of Shah Bano Case judgement.
- In 2001, Danial Latifi & Anr v. Union of India case, SC reiterated the validity of the Shah Bano case judgement upholding Muslim women's rights.
- The Supreme Court in June 2016 decided to examine if Islamic laws governing marriage and inheritance violated the fundamental rights of women and take a call on how far it can intervene to modify the existing laws.

Recent Supreme Court Verdict

On 22nd August 2017, a five-judge bench of the Supreme Court in a split verdict ruled that the practice of instant triple talaq in the Muslim community is unconstitutional. The bench set aside the practice by a majority of 3:2.

Key Points of the SC ruling:

Majority Verdict

- Three judges of the bench said that triple talaq must be struck down as it goes against the constitution and is unacceptable.
- They said that the Muslim Personal Law (Shariat) Application Act of 1937 recognised and enforced triple talaq, therefore, it should not be considered a personal law but a statutory law. Hence it comes under the ambit of Article 13(1) of the constitution.
- Article 13 mandates that any law, framed before or after the Constitution, should not be violative of the fundamental rights.
- Triple Talaq is manifestly arbitrary and was violative of Article 14 (the Right to Equality) and did not enjoy the protection of Article 25(1) of the Constitution.

Minority Verdict

- Two judges ruled that triple talaq enjoys the status of fundamental rights as it is a part of Muslim personal law.
- They were in favour of putting the practice aside for a period of six months allowing Parliament to legislate on it.
- They asked political parties to set aside their differences and introduce a new law on the practice, taking into account concerns of Muslim bodies and the Sharia law.

SOLUTIONS/SUGGESTIONS:

The time has come for major steps to be taken to bring about reform and change in the Muslim Personal Law in India. In order to accomplish these following steps must be taken:-

CODIFICATION OF THE MUSLIM PERSONAL LAW: The process of codification of Muslim Law is an imperative and now must be seriously undertaken by a group of legal experts, liberal ulema and scholars in the field. Gender-just laws must be the common denominator. Alongside Muslim women, Muslim men's organizations must push for change.

ROLE OF THE STATE: Parliament should step in with measures not for a Hindu code or a Muslim Code but a **secular code**, drawn from basic principles of personal freedom, human rights and justice in the country. Strict measures must be taken against if the Muslim Personal Law (Shariat) Application Act violates democratic rights guaranteed to the individuals by the Constitution.

ENCOURAGING THE IDEA OF A UNIFORM CIVIL CODE: It will help the cause of national integration by removing the contradictions based on ideologies and traditions. It will also help in eradicating many evils, unjust and irrational practices prevalent across the communities, and will also strengthen the unity and integrity of the country. These norms have to be observed in all human transactions in any civilized society.

INTRODUCTION OF GENDER JUST PERSONAL LAWS: Since most personal laws reflect the hierarchical notions of society and thereby accord secondary status to women. So what we need are gender just personal laws. The gender just code in turn has to be the same for all the communities and hence, it will be uniform. Gender justice has to be the basis of uniformity; blind uniformity may turn out to be most unjust for women.

PRIORITISATION OF GENDER EQUALITY: Priority must be given to the equality between men and women in terms of their fundamental rights over conservative interpretations of religious scholars. This can be done by saying a big no to triple talaq and polygamy. The personal law question needs to be understood in the context of patriarchy and laws that accord secondary status to women need to be reformed.

SUPPORTING ALL REFORM MOVEMENTS THAT CHALLENGE PATRIARCHY: Every citizen should join hands with the government to eradicate the injustice against women which will lead to the overall growth and development of entire nation. We have to try to lead traditions out of darkness into light and not allow them to lead us into darkness.

Policies on women's empowerment exist at the national, state, and local (Panchayats) levels in many sectors, including health, education, economic opportunities, gender-based violence, and political participation. However, there are significant **gaps between policy advancements and actual practice** at the community level. So the main effort of the state and all the law-making bodies should be to fill this gap between ideology and practice of law making. They should try to abandon all those laws (like Triple Talaq, polygamy etc.) which are against constitutional ethos. The Constitution guarantees minority communities the right to freely practice and propagate their religion, own property and establish places of worship and run educational institutions. This constitutional protection draws strength from a framework of liberal democracy. Moreover, in a secular democracy religious laws cannot trump the constitutional right to equality. Given that Hindu personal laws have evolved to empower Hindu women, there's no reason why Muslim women have to suffer from patriarchal religious practices. Triple talaq and polygamy fail the test of Indian constitutionality.

Thus, the rights of women should be respected across nations which are denied through power structures and social customs like Triple Talaq and polygamy. The women should not be deprived of their basic dignity of life which they deserve. Introduction of a secular code drawn from the principles of personal freedom, human rights and justice will not only strengthen secularism but will reinforce women empowerment.

Conclusion

The Judgment is historic for women empowerment in the country granting equality to Muslim women. The court has opened a golden window for all communities to push for progressive reform in personal laws that impact all women, men and children and other reforms like the Uniform Civil Code (UCC).

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