Triple Talaq Decision: Finally, Some Justice for Muslim Women

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Triple Talaq for over 65 years has been an issue of concern for Muslim women who holds approximately 8% of the India's population. In August, 2017 one of the most significant women's rights cases in the country, five judges from five faiths representing Hinduism, Christianity, Islam, Sikhism and Zoroastrianism had asked the question whether Triple Talaq is an integral part of Islam.

First time on April 18, 1966 in Maharasthra to protect the right of Muslim women the social justice movement against triple talaq started. Parliament enacted Muslim Women (Protection of Rights under Divorce) Act passed by the Rajiv Gandhi government in 1986 to overturn and subvert an earlier Supreme Court ruling in Mohd. Ahmed Khan vs Shah Bano Begum And Ors[1] to grant maintenance to Shah Bano, a 62-year-old Muslim mother of five who had been divorced by her husband. Though, Parliament after this ruling limited divorced Muslim women to maintenance only for the iddat period (roughly three months) after which they would have to depend on the charity of relatives or Waqf boards. For last 33 years till this August, 2017 however Hon'ble Supreme Court has constantly protected the Muslim Women Rights as when approached, the Supreme Court has ruled that the Muslim Women Act had to be read in conjunction with the Constitution that guarantees dignity and equality to women. Still, in the Shah Bano case, the court merely urged the government to frame the Uniform Civil Code. Also, In the Daniel Latifi and Anr v. Union of India[2] Supreme Court has also only upheld the right of Muslim women to maintenance till re-marriage.

Therefore, On October 16, 2015, the Supreme Court which has missed opportunity in both the Shah Bano and Daniel Latifi cases to address gender inequality has taken a rare move in this regard. The Court registered a suo moto public interest litigation (PIL) petition titled 'In Re: Muslim Women's Quest for Equality' to examine the validity of 'talaq-e-biddat' (Triple Talaq), polygamy and nikah halala (where a Muslim divorcee marries a man and divorces him to get re-married to her former husband) violate women's dignity permitted under the Muslim Personal Law by virtue of S.2 of Muslim Personal Law (Shariat) Act of 1937. The Constitution bench formed for this issue though has confined itself to examine triple talaq and not polygamy and nikah halala.

After proper examination on validity of this arbitrary divorce, this recent historical judgement of five constitutional bench has declared the practice of unilateral divorce unconstitutional, it is now unequivocally established that the practice which runs counter to the gender jurisprudence evolved by the Supreme Court, the principles of equality as ordained in the constitution, international human rights law and the Quran is not fundamental to the religion of Islam in India.

So, what is truly historical about this decision?

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[1] 1985 SCR (3) 844
[2] 2001(7)SCC 740

In 22 countries including Pakistan and Bangladesh, Triple Talaq has been banned but in our country, when confronted by the religious men like All Indian Muslim Personal Law Board (AIMPLB), a non-governmental organisation "defends" the application of Muslim personal law, and putforth the argument that the Triple Talaq is an integral part of Islam and the courts should be altogether excluded in interfering with the personal laws of the Muslim community. During the arguments in the present case, appearing on behalf of AIMPLB, former law minister, Kapil Sibal had argued that it is the Muslim Community which will initiate the change themselves by enacting the laws and not by intervention of Supreme Court. On the other hand, Lawyers, human rights activists and members of civil society who oppose triple talaq had argued that Muslim personal laws should not be immune to change and that the practice of instant divorce is unconstitutional because it violates the fundamental rights of Muslim women. While religious leaders say that the Koran carries various stipulations to ensure that triple talaq is practiced in a manner fair to both sides, the other side rejects that argument as irrelevant. In reality, all that instant divorce involves is the husband saying the word "talaq" three times. In the age of information technology, there are horrific instances of Muslim men divorcing their wives via text and over messaging platforms including Skype and Whatsapp. This case has raised the prime issue which was proposed on its very first hearing before the Constitutional bench "Does the Constitution stop where family laws begins?"

The primary question before the Supreme Court was whether the practice, which authorizes a Muslim man to unilaterally, irrevocably and instantaneously divorce his wife by saying the word ‘talaq’ three times in succession was constitutionally valid or violated the fundamental rights guaranteed under the Constitution of India, particularly Articles 14 (equality before law), 15 (protection against discrimination) and 21 (protection of life and personal liberty).

To answer this question, the Supreme Court first examined whether this Triple Talaq practice is codified or a statutory law under the Muslim Personal Law (Shariat) Application Act, 1937) or merely an uncodified religious practice or ‘personal law’. This is important because of the existing position of law as had been laid down by the Bombay High Court in 1951 in the case of State of Bombay versus. Narasu Appa Mali[3]. In Narasu, the high court held that personal laws were not subject to judicial scrutiny and cannot be examined for violating fundamental rights. Therefore, if the Supreme Court found that triple talaq was a practice sanctioned by a statute, the 1937 Act, it could be examined for violation of fundamental rights. On the other hand, if it found that triple talaq was a part of uncodified ‘personal law’, it would have to revisit the decision in Narasu and answer a second question as to whether uncodified personal law could be subject to a scrutiny for violating fundamental rights and whether the practice of triple talaq did in fact violate any fundamental rights.

The majority outcome

While the majority judges agreed on the outcome of striking down instantaneous triple talaq as unconstitutional, they took two different routes to arrive at that outcome.

Justice Rohinton Nariman, with whom Justice UU Lalit concurred, held that the practice of triple talaq derived statutory sanction from the 1937 Act, and could therefore be subject to a challenge for violating fundamental rights. Having so found, their judgment sought to analyse whether the practice of triple talaq would be protected by Article 25 of the Constitution (freedom of conscience and free profession, practice and propagation of religion). They held that instantaneous triple talaq is not essential to the practice of Islam and does not therefore benefit from the constitutional protection granted by Article 25.

The judgment then went on to examine whether triple talaq is inconsistent with any of the fundamental rights. While doing so, the judgment upheld the doctrine of manifest arbitrariness as a valid touchstone for examining the constitutionality of a practice, overruling a series of decisions that held the contrary view. The doctrine of manifest arbitrariness allows the striking down of a law under Article 14 on account of being capricious, irrational, disproportionate or excessive. The judges went on to hold that the practice of triple talaq violates Article 14 of the constitution for being manifestly arbitrary. Specifically, Justice Nariman held:

[3] AIR 1952 Bom 84

"…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…"

Justice Kurian Joseph, in a separate opinion, held that triple talaq is bad in theology and therefore bad in law and lacks legal sanctity. Justice Joseph differed from Justices Nariman and Lalit, inasmuch as he held that triple talaq was not regulated by the 1937 Act, rather it fell within the domain of 'personal law'. He, however, relied on the earlier Supreme Court decision in Shamim Ara versus State of UP[4] and concluded that triple talaq was not integral to Islam, was against the tenets of the Quran and Shariat, and therefore constitutionally void.

The dissenting opinion

The two judges who delivered the minority opinion, authored by Chief Justice J S Khehar with Justice Abdul Nazeer concurring, took the position that triple talaq is not regulated by the 1937 Act, rather it is an integral and constituent part of personal law. They went on to hold that since the practice of triple talaq was not contrary to public order, morality and health, it enjoyed the constitutional protection granted by Article 25.

They also held that this practice is not violative of Articles 14, 15 and 21, because these provisions are limited to State actions, whereas the practice of triple talaq regulated the conduct of private parties. The minority opinion held that this practice is not in derogation to the constitutional values and fundamental rights, and directed the government to consider legislating on the issue.

With due respect, we believe that this dissenting opinion is based on rhetoric rather than sound jurisprudence or legal analysis. Also, despite observing on the consitutional violation/infirmity with this arbitrary practice compelled to grant a 'relief' injuncting the practice of triple talaq for an initial period of 6 months till the new legislation is enacted by Government.

However, the prevailing decision by the majority judges has stood on the correct stand of the customs and practices of Sunni Muslims while striking down the age old practice of Instant divorce called triple talaq. This verdict is not against any this judgment is any institution, organisation or against Islam religion. On the other hand, this decision has reinforced the true meaning and spirit of Quran. It has also traced the rule of law and human rights enunciated in our constitution. It is a judgment in favour of justice based on women's rights as human rights that have been denied to Muslim women for centuries despite Quranic provisions relating to gender and spousal equality in wedlock and beyond.

This judgement should now put into rest any political discourse on triple talaq without fuelling any pressure from AIMPLB who played the politics of procrastination on this issue. The AIMPLM should follow this Hon'ble Supreme Court's judgement in true letter and spirit as the AIMPLB is not an elected body and does not represent the diversity among the Indian Muslims in their religious practices and beliefs. Moreover, this verdict has stated very clearly that all the personal laws must conform to the constitution and its mandate on matters relating to marriage, divorce, property and succession. Our Government should also take necessary measures for enforcement of this judicial decision.

We can say the August 22, 2017 will always be considered as a monumental moment in judicial history of India which overturned the status of gender equality for Muslim women. With the help of our esteemed judges of Hon'ble Supreme Court, India's Muslim women have achieved equality which was sought as unattainable since India's independence. This decision has established a sound relationship between Constitutional guarantees given to all irrespective of gender and religious structures of Islam.

[4] (2002)7 SCC 518

But surely we should also ask the Hon'ble Supreme Court that why it chose to ignore other heinous practices like nikaah halala and polygamy raised by the petitioners with the issue of Triple Talaq. Also, we are concerned about the lack of gender diversity within the august benches of our Supreme Court. Inclusion of Women judges and their perspective should have been welcome to arrive at holistic conclusion on this matter.

As we celebrate this judgment but still there might be several claims and debates against intrusion/intervention of the Courts in the personal laws of the Muslim Community and the way Islam accords women. However, we think that any interpretation of any faith based on personal laws that degrades and emphasis on any anti-women practices should be fought with courage just like petitioner Shayara Bano has done in this case. There are rays of hope that Supreme Court in future will again give fair consideration with respect to sex. India since three decades has been changed after the Shah Bano judgment in the domain of the Muslim Women Rights. The same difference and changes can be seen in future after this historic judgment which has in response to a new generation of women who will not suffer in silence any longer irrespective of the religion or community in which they are born.
