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ROLE OF JUDICIARY IN UPHOLDING GENDER EQUALITY IN MUSLIM LAWS

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ABSTRACT

Turning the pages of Islamic law, we can find that there is gender inequality and time to time, such issues have come up before the court. The court has settled down such issues so as to uphold the constitutional norms of Art 14, 15 and 21. It tried to bring in equality and safeguarded women's right. One such issue was conflict of maintenance under secular law and Muslim personal law. It was settled twice in the cases of Mohd. Ahmad Khan v. Shah Bano and Danial Latifi v. UOI. These cases will be studied in this paper. Such decision was then reiterated in Iqbal Bano and many other cases. Another equally significant and contentious issue was of Talaq- e- biddat (triple Talaq). It subjected women to whimsical and capricious nature of instantaneous divorce by men. This issue was settled by Supreme Court in the case of Shayara Bano v. UOI. Not only this landmark case tried to bridge the gender imbalances, but upheld the Constitutional norm of gender equality. But the matter did not get settled here, it continued till 2019, when Parliament enacted a bill criminalising triple talaq.

INTRODUCTION

Muslim law is based on the teachings of the Holy book Quran and the messenger of God, the Prophet Mohammed. There are many great scholars who interpret these teachings and at times conflict arises among them. Consequently, different branches of Muslim Law developed with each school having its own explanation and logic behind it. There are two broad schools (Shias and Sunnis) and around 7 sub schools.

When we traverse back the paths of development of law of maintenance under Islam, we can see that it is considered as the primary duty from age old days. Regarding maintenance, the Holy Quran says –

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"Men are protectors and maintainers of women, because Allah has given the one more strength than other."

Maintenance under Urdu is Nafqah which literally means 'what a person spends over his family' and it includes all those things like food, shelter, clothing, which are the basics for survival. It may also include payment of Kharch-i-pandan, guzara etc.

Scholars have spoken volumes on the obligation of a Muslim husband in maintaining his wife but the traditional law has always been uncomfortably quiet when it comes to maintenance of divorced wife beyond iddat period. Though the holy Quran emphasizes on Gender equality, but at the same time, the husband is given almost absolute power to dissolve the marriage at his whim and turn blind eye towards the wife after talaq.

Then came the Indian judiciary who acted as a saviour and meticulously reshaped the legal framework and has done a commendable work in eliminating the whim at dissolving the marriage and removing the ambiguities in the law regarding maintenance of divorced Muslim women beyond iddat period. They have attempted to improve the socio-economic status of the married and also divorced Muslim women. One such giant leap was the Shah Bano case judgement, where the court explicitly decreed that Section 125(1) Criminal Procedure Code, 1973 (hereinafter referred to as "CrPc") is applicable to all women irrespective of their religion. It further extended that the divorced Muslim wife has the right to claim maintenance from her ex husband till remarriage or her death. But soon after this, Muslim women (Protection of Rights On Divorce) Act 1987, was passed which became the base for controversies. Such act deprived the woman of her right to claim maintenance beyond iddat period. But a careful and meticulous interpretation by the court saved the divorced Muslim women from being destitute. And this was from the case of Danial Latifi which is an extension of the Shah Bano case. These will be discussed elaborately in detail.

The question of maintenance arises from the divorce, which is an almost absolute power at hands of husband, this snag was resolved in the year 2017 in Shayara Bano v. UOI.

A GIANT LEAP- THE SHAH BANO CASE[2]

Shah Bano case was that landmark case which came up before the Supreme Court as a special leave with the contentions that whether Sec 125CrPC[3] is applicable to the Muslim women or

[2] A.I.R 1985 S.C 945

not, whether the Mehr amount given by husband is sufficient for him to get rid of his liability to maintain his wife.

In this case, Shah Bano (the petitioner) was married to Mohd. Ahmad Khan (a renowned lawyer) and from this wedlock, in toto 5 children were born. In the year, 1975, i.e. 43 years after her marriage, she was disowned by her husband and was forced to leave the matrimonial home. He was giving Rs. 200 as maintenance to her which he suddenly stopped in the year 1978 and that's when she filed a suit. The husband then divorced her by uttering Triple Talaq, which was irrevocable. Thereafter, he used this as a defence that after divorce he is not obligated to maintain his wife. But the local court ordered Mohd. Ahmad Khan to give a paltry sum of Rs. 25 to wife for maintenance. Dissatisfied with this petty amount which could not maintain her, she appealed in Madhya Pradesh High Court to increase the amount to Rs. 179 pm. Then it went to the Supreme Court with the issues which were already been raised and laid down (though not very clearly) in two important cases i.e. Bai Tahira v. Ali Hussain Fissali Chothia[4] and Fuzlunbi v. K.Khader Vali[5] & another. In the first case, the court without any doubt or ambiguity upheld the right of a divorced Muslim Woman to claim maintenance under CrPC. It was further held that the section was introduced with the noble purpose of preventing the divorced wives from being ill-used and destitute. It reiterated that if legislature had any intention of excluding Muslim Women from its purview, then definitely it would have been noted in black and white. While deciding Fuzlunbi v. Khader khan, Krishna Iyer J. upheld the secular nature of the CrPC and the concerned provision. It was also pointed out that Sec 125 to sec 127 are deliberately formulated to protect the destitute women, who are now victims after divorce. The only purpose of sec 127(3) (b) CrPC[6] was to prevent such wife from taking double benefit by acquiring maintenance under Personal law as well as secular law.

Though these cases were correctly decided, but they were not quite clear in the context of Sec 127(3) (b), which laid down that a woman shall not be entitled to maintenance, when she has remarried or has received the whole sum under any personal law or she has voluntarily surrendered her right. Due to this ambiguous decision, it was referred to the Chief Justice to be heard by a larger bench.

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[3] Criminal Procedure Code, 1973 (Act 2 of 1974), s.125
[4] AIR 1979 SC 362
[5] AIR 1980 SC 1730
[6] Criminal Procedure Code,1973 (Act 2 of 1974), s.127(3)(b)

The concerned provision of CrPC i.e. sec 125 was described as much needed relief to prevent vagrancy and a measure of establishing social justice within meaning of Art 15(3) and Art 39.[7] It was introduced in Constitution to protect the weaker sections like children, women (as was said in Captain Ramesh Chander Kaushal v. Veena Kaushal & others[8]). But the question of applicability of sec 125 CrPC was left hanging mid- air. But in the case of Khurshid Khan v. Husna banu, Bombay High Court held that the concerned section was enacted to be made applicable to Muslims as it is to all others. The Parliament was absolutely within its power while enacting such provision under Art 15 read with Art 14 of Indian Constitution. The unresolved question was resolved in this Shah Bano case, where Supreme Court had banished the plea of the husband and validated the verdict by the High Court. It further held that Sec 125(3) CrPC is equally applicable to Muslims like all other women. The rule that responsibility of the husband extends only till iddat period is against humanity and it concluded that the legal liability of the husband ends with end of iddat period only if the wife is competent to maintain herself. Otherwise the situation would be reverse and the husband will have to continue to maintain and finance her after the iddat period as well. The earlier decisions were reconsidered in Shah Bano case on two different grounds.

The division bench had said that the sec 127 (3)(b) CrPC protects Muslim women. But the exception to this section applies where dower is paid and iddat period is over. Secondly, the decisions were against the traditional concept of talaq which was protected till then.

The Supreme Court held that Sec 125 CrPC was a quick remedy to those persons who are not able to maintain themselves but have such near relatives who have sufficient means to maintain them. The liability imposed by Sec 125 CrPC was to prevent vagrancy and destitution. It was further held that sec 125 (1)(b) explanation is applicable to all women and a Muslim also can take recourse to it until her death or remarriage. It was not settled that there is no conflict between sec 125 CrPC and the Muslim Personal Law. It even cited some relevant ayats.

This judgement became highly politicised and resulted in riots and vitriolic attacks. What further antagonised the Muslim Conservatives was that the interpretation of Quranic verses by persons who themselves had very less idea about Islamic Jurisprudence.

[7] The Constitution of India, art 15(3) & 39
[8] AIR 1978 SC 1807

There was a storm of controversies raised by such judgement and it led to culmination of another controversial act (Muslim women protection of rights on divorce act 1986) to quiet the conflicts and to acquire the vote bank.

AFTERMATH OF THE SHAH BANO CASE- THE MUSLIM WOMEN PROTECTION OF RIGHTS ON DIVORCE ACT, 1986

The enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter said as the "Act"), ignited a lot of controversies as to whether the act was brought in just to appease the vote bank from Muslim community. The preamble to the Act claimed it to be pro- woman statute but it turned out to be an act which was trying to nullify the judgement of Shah Bano case. The act within no time raised the storm of controversies as it deprived the Muslim woman of her right to claim maintenance from her ex husband post iddat period. The wordings of Sec 3(1)(a) of the act[9] lays down that the husband is excused from maintaining their divorced wife post iddat. It attempted to exempt the Muslim women from the purview of sec 125-128 CrPC. To claim under the secular code, the divorced woman will have to file the petition together with her former husband as laid down in Sec 5 of the act[10]. It turned down women to a second class citizen and gave them fewer rights. As per sec 4 of the act[11], the Muslim woman has to either sue her relatives for maintenance and if they do not volunteer, then she will have depend on the state waqf board for her financial security. In short, this act aimed at making the Shah bano judgement ineffective and appease vote from the Muslim sections of the society.

Several cases came up concerning this act but the judgements were quite discouraging and created a fear. In the case of Md. Yunus v. Bibi Phenkani @ Tasrum Nisa[12] and also in Abid Ali v. Mst. Raisa Begum[13], the concerned high court have held that the act curtailed the right of the divorced Muslim woman to get maintenance after iddat period is over and it did not have any saving clause. Another pertinent case on the list is Usman Khan Bahamani v. Fathimunnisa Begum & others[14]. Wherein, the court in clear words said that a divorced Muslim woman shall be entitled to maintenance only till her iddat. The court gave a narrow interpretation to the Sec3 (1)(a) of the act. But a positive change was seen in the case of

[9] Muslim Women (protection of rights on divorce) act, 1986 (Act 25 of 1986) s.3(1)(a)
[10] Muslim Women (protection of rights on divorce) act, 1986 (Act 25 of 1986), s.5
[11] Muslim women (protection of rights on divorce) act,1986 (Act 25 of 1986), s.4
[12] (1987) 2 Crimes 241(Pat)
[13] (1988) 1 Rajasthan LR 104
[14] AIR 1990 AP 225

A.Abdullah v. A.B.Mohmuna Saiyadbhai[15], wherein the court held that the term 'within' of section 3 (1)(a) should not be construed as only 'for' or 'during' iddat. It gave a new interpretation and said that the term 'within' means that the husband has to make arrangements during that time period. This positive interpretation was taken a step further in the case of Karim Abdul Rehman Sheikh v. Shehnaz Karim Sheikh & others[16]. In this case the Bombay High Court gave the distinction between provision and maintenance. It was said that the term 'provision' holds a meaning in future context, an amount which has to be kept aside to meet a known liability but it can't be calculated exactly. It has been described as an amount which the divorced wife will require after her iddat period. The court also held that till husband make fair and reasonable provision the magistrate may direct a monthly payment to be made to the wife beyond iddat. The Andhra Pradesh High Court also acquired the same view as was done by the former court.

This debate then arrived at the Supreme Court in Danial Latifi v. UOI[17].

JUDICIARY AS A SAVIOR – DANIAL LATIFI CASE

The 1986 act's constitutionality was challenged in the year 2001 and this case was brought in by Danial Latifi who was Shah Bano's lawyer. It was argued that the act violated Article 14,15 and 21.[18] Also, it was contended that women's right to claim under secular code is affected. This case reflected tensions between certain associations from Muslim community and pro- woman organisations. The concerned act made the following provisions-

1. The Muslim divorced woman shall be entitled to reasonable-fair provision and maintenance during her iddat period.
2. In case, she has a child born (below 2yrs of age) then such provision would be extended till the child attains 2years. She shall also be entitled to dower and if she is not provided with it, then she can apply to the magistrate claiming such delivery.
3. Where the women is unable to maintain herself after iddat, the magistrate can make an order to her relatives to pay for her maintenance (such relatives who would be entitled to her property's share after she dies)
4. If the relatives do not have means to maintain her, then state waqf board will be approached to pay her maintenance.

[15] AIR 1988 Guj 141
[16] (2000) DMC 634
[17] 2001 (6) Scale 357
[18] The Constitution of India, art 14, 15 & 21.

These aforementioned Sec 3 and 4 of the act was challenged on the following grounds (issues of the case)-

1. Exclusion of Muslim women from the purview of secular code would lead to discrimination between women and women.
2. The act aims to nullify the Shah Bano judgement and denies equality under Art 14 and 15 of the constitution.
3. The act has the potential to undermine the secular character of the CrPC by removing Muslim women from its scope.

The court analysed the Shah Bano case judgement and also the act. It then said that the act prima facie appears to be violative of Art 14 and 15 and it has to be interpreted in a manner to uphold the validity of the act as the legislature does not intend to enact unconstitutional statutes.

The court further said that the sec 3 of the act lays down two distinct and separate obligations on the husband-

1. Make fair- reasonable provisions for the wife
2. To provide her maintenance.

The focus is laid on the duration within which arrangements for the provisions are made and maintenance should be concluded i.e. within the iddat period. The act excludes from liability such husband who has already discharged his obligations by paying the requisite amount in lump sum and additionally he has even restored the mehr amount.

The position available to the parliament is two different things i.e. the use of two different verbs ‘ made’ and ‘paid’ makes it clear that there are two obligations. Also, section 4 issues power to the magistrate to order payment of maintenance from the relatives of the women.

The right to have a fair and reasonable position in her favour is her right enforceable against her husband in addition to what he has paid.

The court summed up the decree in following points-

1. The Muslim husband is obligated to make reasonable –fair provision for the divorced wife. Such provision is to be extended beyond iddat period and the arrangement for the provision is to be made within the iddat period.

2. The liability of such Muslim husband towards his divorced wife is not just confined to iddat period (as per sec 3(1)(a) of the act).
3. Such divorced Muslim woman who has not yet remarried and is unable to maintain herself after iddat ,can apply to the magistrate to claim maintenance from her relatives (who are entitled to share from her property) in proportion to such share. (As per sec 4 of the act)
4. If the relatives do not have sufficient means to maintain the divorced Muslim women, then the magistrate can direct the state waqf board to pay maintenance under sec 4 of the act.
5. The provisions of the concerned act do not offend the Art 14, 15 and 21 of the Indian constitution. Therefore it is not unconstitutional.
6. The concerned act prima facie appears to be discriminatory and creates a gender bias, but interpretation of the relevant sections shows that the gender bias can be removed.

This judgement has then been reiterated in cases like Shabana Bano v. Imran Khan[19], Noor Saba Khatoon v. Md. Qasim[20], Iqbal Bano v. State of Uttar Pradesh[21]

BACKGROUND OF SHAYARA BANO CASE

Another landmark judgement to secure Muslim women's right is the Shayara Bano case, where the apex court had made a successful attempt in removing the essence of patriarchy from divorce. Unlike Hindu law where there is one kind of divorce, in Muslim law, there are around ten types of divorce. These types are listed below.

1. Divorce by husband
   a. Talaq- ul- sunnat
      i. Talaq –e- ahsan
      ii. Talaq-e- hasan
   b. Talaq –ul- biddat
2. Divorce by wife
   Talaq –al- tafwiz
3. Mutual divorce
4. Judicial divorce

[19] (2010) 1 SCC 666
[20] AIR 1997 SC 3280
[21] AIR 2007 SC 2215

5. Ila
6. Zihar

However, not all these types of divorce are relevant. Talaq –ul- biddat is the concern in this discussion. It has been considered as one of the sinful forms of divorce, while talaq –e- ahsan is considered the best form. Apex court in Shayara Bano case had recognised how unequal provisions are clothed with religious norms and attempted to un-constitutionalise the ghastly form of instantaneous divorce by Muslim men. This provision should have been done away with long time back, but it persisted under the tutelage of religion. It seems unreasonable that minority religions continued to take precedence over one of the basic aim of Indian constitution i.e. gender equality. Muslim women have been oppressed and deprived from enjoying their full range of human capability. The reason is whimsical divorce laws governing Muslim women. The celebrated Shayara Bano judgement which had put an end to this arbitrary provision has been discussed here. Prior to this case, court had the opportunity to discuss about triple talaq in the case of Shamim Ara v. State of UP.[22] The court here did not rule out Talaq –ul- biddat absolutely, but had put reasonable restrictions on it. Court had made it clear that unilateral talaq by husband can be valid only when there is a reasonable cause and it is sufficiently communicated. It was even said that efforts should be made to reconcile the differences. The contention of triple talaq became grave because it was a part of personal law and they cannot be challenged in court. This view was laid down in State of Bombay v. Narasu Appa Mali[23] and then reiterated in Sri Krishna Singh v. Mathura Ahir[24]. In these cases, it was held that personal laws cannot be invalidated even if they are violative of fundamental rights as Art 13 stipulates that personal laws are not laws in force.

However, this view was rescinded in the case of Masilamni Mudaliar v. Idol of Sri Swaminath Swami Thirukoli[25], where it was held that personal laws can also be challenged if they are inconsistent. This debate shows that there is inconsistency and judicial flip flops in determining validity of triple talaq. The practice of Triple Talaq is like a sword hanging over the Muslim married women.

CELEBRATED JUDGEMENT- SHAYARA BANO CASE

[22] (2002) 7 SCC 518
[23] AIR 1952 Bom 84
[24] 1980 AIR 707
[25] 1996 AIR 1697

This case arose out of slew of petitions filed challenging the validity of triple talaq and one among such petition was of Shayara Bano. She was married to Rizwan Ahmed for around 15 yrs, however in 2016 he pronounced triple talaq which got challenged in the apex court. She challenged the unhealthy practice of triple talaq as violative of Art 14, 15, 21 and 25[26]. Along with it, she questioned constitutionality of two more practices under Sharia law and they are-

a. Nikah Halala
b. Polygamy

Five judge bench was constituted to address this issue and they were CJI Jagdish Khehar, J.Abdul Nazeer, J.Rohinton Nariman, J. Kurian Joseph and J. U.U. Lalit. The whole case was addressed after framing it into two main issues and they are-

a. Whether triple talaq is violative of Fundamental Right?
b. Whether triple talaq is an essential religious practice?

The second issue arose because it had been laid down earlier that judiciary cannot intervene into such religious matter which forms an essential part of such religion. Hence, Supreme Court can decide constitutional validity of this practice only after it is established that triple talaq is not an essential feature.

The judgement delivered was in the ratio of 3:2, with CJI Khehar, Nazeer J. delivered the minority judgement. Speaking for themselves, they were of the opinion that there is no unanimity in making talaq –e- biddat vogue. Moreover, almost 90% of Indian Muslim resort to this technique for severing their matrimonial ties, hence it has the sanctity and approval of Muslim community. They were of opinion that it forms a part of Muslim personal law, thereby protected under Art 25[27]. It protects the faith and religion of a human which cannot be invaded except for being contrary to public order, morality and health. CJI Khehar said none of these aforementioned grounds have been impinged. While concluding they said personal law being a matter of personal faith, it cannot be checked on the touchstone of constitutional validity. Kurian, J. while speaking for majority held the view that triple talaq closes the scope of reconciliation which is held significant in quranic verses and other settled forms of divorce. Hence it is against basic tenet of Quran and violative of Sharia law. The practice is continued for long time and this does not make it valid. Additionally he said, it is

[26] The Constitution of India, Art. 14,15,21 & 25
[27] The Constitution of India, art 25

un-Islamic practice as it lacks two pre- requisites i.e. arbitration and re- conciliation. He re-iterated the proposition of Shamim Ara case which held that 'what is bad in theology cannot be good in law'[28]. Justice Nariman and Jusitce Lalit, tested the ghastly practice on ground of arbitrariness and arrived at the conclusion that is arbitrary under Art 14 which restricts discrimination on grounds of gender. They added that triple talaq, gives Muslim women the power to severe marital ties capriciously.

Finally, the bench came to the conclusion that instant triple talaq is illegal whether it is practiced orally, through letter, mail, text message.

It has become milestone in history of Indian judiciary. This did not only safeguard women's dignity but also exhibited that Indian Constitution stands on higher pedestal.

This judgement paved way to enactment of triple talaq bill as court had directed Parliament to enact such a bill.

AFTERMATH OF SHAYARA BANO

The matter did not end with the judgement, there were several noteworthy legal developments which took place. They are discussed very briefly hereinafter. Subsequent to the judgement in August 2017, there were repeated instances of violence mostly by the orthodox Muslim community. On Dec 28, 2017, Mr. Ravi Shankar Prasad (Minister of Law and Justice) introduced the Muslim Women (protection of rights on marriage) bill 2017 in Lok Sabha. It made the declaration of Talaq –e –biddat or any similar form of talaq as void. It defines talaq -e– biddat as a practice under Muslim personal law where three time pronouncement of 'Talaq' in one sitting leads to irrevocable dissolution of marriage. Such pronouncement of marriage was made criminal offence. However this bill lapsed in Rajya Sabha.

Thereafter in July 2019, Muslim Women (protection of rights on marriage) act, 2019 was introduced in Lok Sabha. The bill was passed as the opposition walked out. This time, bill even passed the hurdle of Rajya Sabha with 99 to84 votes. Thereafter it went to President for its consent and became law. The act declares triple talaq in any form as void and illegal. The act makes it a cognizable offence with maximum 3 yrs imprisonment along with fine. The

[28] (2002) 7 SCC 518

woman or even any of her blood relatives have the liberty to lodge a complaint. However, it has been made a bailable offence, but bail can be granted after hearing the woman.

FINDINGS FROM THE CASE ANALYSIS

On a whole, Danial Latifi case can be seen as a continuation of the effort of Supreme Court in creating harmony between secular law and Muslim personal law. The court attempts to interpret the personal law in a way to tandem with conventional religious law. Additionally, it attempts to avoid conflict between the two. The court assumed that Shah Bano case's judgement concerning maintenance is correct and decided to extend it in the context of the concerned act. At a first instance, the court's ruling might seem like a repetition of the earlier few cases, but a closer look at it shows that it solves the conflict concerning the controversial act, which prima facie violates Art 14,15 and 21 of the Indian constitution. It discriminates women from women in the meaning that women from all religious communities are allowed to claim maintenance under the secular code except for the divorced Muslim women. A divorced woman who is unable to sustain herself affects her financial stability, which in turn affects her rights to live with dignity (in Maneka Gandhi case, the Supreme Court has widened the arena of the Art 21 and included in it the right to live with dignity). Court cited that the remedy of such divorced wife seeking support from relatives and then state waqf board is illusory. The court further acknowledges that a plain reading of the concerned provisions would make the Shah Bano's judgement ineffective and that's why the act was meticulously interpreted as it is the role of judiciary to interpret the statutes in a manner which would make it stand the constitutional norms (in case two distinct interpretation can be made, one of which makes it unconstitutional while the other one makes it a valid statute).

This case can be seen as an attempt by the apex court to harmonize the right of a Muslim divorced woman with the traditional Muslim law. It can also be seen as a political effort to create a Uniform Civil Code as it tried to act as a saviour and spoke strongly of gender equality. The case points towards the danger which any conventional law may face if they do not meet the constitutional standards set up.

Another significant case in history of Indian judiciary is that of Shayara Bano which attempted to bridge the inequality and brought in a safer life for married women. In the context of this case, it is pertinent to mention that religious freedom is not absolute and constitutional values stand on a pedestal higher than it. Courts are allowed to interfere in

religious matters however only in reasonable matter to give contemporaneous interpretation to the personal laws. This case tried to at least reduce the essence of patriarchy in a country which values gender equality. Hence by criminalising triple talaq, court has taken another giant leap in favour of Muslim women.

In short, in this case, judiciary acted as saviour for the divorced Muslim woman in distress, firstly, by saving them from the whimsical nature of talaq, secondly, by providing them with the financial stability in their future life, in case they are not competent enough to sustain themselves.