

Triple Talaq and its Current Status in India: A Critical Analysis

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-:ABSTRACT:-

Woman is the historically oppressed section of the society. Indifferent from the culture, society, or time, women are denied their basic right. They are considered to be the weaker sex and thus are denied any indulgence in social, political and economic spheres. No society or culture as a whole is able to do justice with the women. The Islamic society is considered to be the one where women are provided with very less rights and liberties. Whether it may be hijab, burkah, issues with respect to adoption or practices like triple talaq, majority of Muslim women are always denied the freedom.

Triple Talaq was an issue which was witnessing very heated debates in the recent times all across the country. It was considered as a setback to the gender equality and women empowerment. The Supreme Court of India in Shah Bano Begum's case delivered a landmark judgment providing Muslim women a right to claim maintenance as prescribed under section 125 of Cr.P.C., but the same was overturned by the Muslim Women (Protection of Rights on Divorce) Act, 1986.

This paper aims at discussing about the various aspects related to triple talaq, its history, its standing in Quran, international perspectives and the issue in India. It also discusses about the Supreme Court's judgment in ShayaraBano case and The Muslim Women (Protection on Rights of Marriage) Act, 2019. The paper will discuss at length the issues pertaining to the Act and its criticism

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Status of Muslim Women in India: An Introduction:-

Women across every culture, religion and society was subjected to oppression and they were treated as second class citizens all across the world. They have been made to suffer socially, politically, economically, emotionally, physically and sexually through all the ages. The reason that women in the society is not allowed to work, it never allowed them to be independent. This made them financially dependent on their male family members and thereby losing the hold on the family and the decision making. In spite of various protective measures provided by the constitution, women in India have not been emancipated from the age-old tradition and customs and therefore they are unable to play any significant role in overall development.²

The Muslims in the country belong to one of the most economically backward section in the society, they as a community lack education, financial opportunities and an equality of status in the society. Their rights are not very well recognised as a whole other the constitutional safeguards provided to them for being a minority.³

The status of Muslim women being in a vulnerable section belonging to the minority

makes the position worse. Here they are daily facing the hardships which a woman in the country faces coupled with the hardships superimposed of being from the minority section of the society.⁴ It is getting more and more difficult for them to set out a framework combining the religious predicaments with the development and progress of the legal system in the country. Therefore, their role as a contributor in the national development is negligible.⁵

But the current stance taken by the Muslim women and various other non-governmental organisations in India are serving as a potential catalyst for development of the society at large. Their emancipation may be a crucial step in the development of community. Their present status by and large reflects the dominance of traditional attitude. An improvement in their present-day status will not only contribute in the progress and modernization of the community but also the development and modernization of entire nation.⁶

The present details of the development or talk of Indian women ignores Muslim women and considers their status a product

²Sushila Aggarwal, 'Status of Women', Jaipur, Printwell Publishers, 1988, p. IX.

³Ansari I.A, "Muslim Educational Backwardness: New Educational Policy and Programme", The Muslim Situation in India, New Delhi: Sterling Publishers, (1988).

⁴Hameeda Naeem, "The Problem of Muslim Women in India Special Focus on Kashmiri Women" in Women and Gender Justice (ed) by Asghar Ali Engineer, New Delhi, Kalpaz Publishers, (2005) p. 345.

⁵I. Ahmed, "The Problem of Muslim Educational Backwardness in Contemporary India: An Inferential Analysis", Occasional paper (1980).

⁶Sushila Jain, "The Process of Modernization in India and the Status of Muslim Women" in Status of Women (ed) Sushila Aggarwal, (1988) p. 78.

of personal law and assumes a sameness in the status and form of oppression, cross community, first the problem of omission with some important exception & most studies take notice of Muslim women.⁷

The minority location does qualitatively transform women's experience and perception in a very distinct way and change in their status and role is central to understanding the development of the community.⁸

The Issues Related to Triple Talaq:-

Islam is one of the oldest religions that acknowledge the rights of women, the Holy Quran grants the women right in their ancestral property. The concept of '*mehr*' which is the opposite of what the concept of dowry, clearly state that women in Islam is not considered as a burden or liability which is the case in the Hindu tradition.

The Holy Quran has been misinterpreted in such a manner that today Islam appears to be a religion that is considered to be the one that violates the rights of women to the greatest extent. It features practises like polygamy, triple talaq, '*halala*', etc. which are considered to be primarily to be something that violate the rights of women.

As per Islam the institution of marriage known as '*Nikaah*' is a contractual agreement called the '*Nikahnama*' in which the wife choose to live with the husband on the consideration of a '*mehr*' which qualifies to any amount of money, gift, object or just few verses of the Holy Quran. In Islam, different kind of marriages are available depending on the choices of the parties, for example, '*Nikaah-e-Mut'ah*' which is a sort of temporary marriage and '*Nikah-e-Misyari*' which allows the polygamy and lays down the duties and obligations of the contracting parties.⁹

Women as per the '*shariyat*' and the Quran don't have the right to walk out of the wedlock or seek for divorce, though a Muslim women can seek the court's interference in order to get a divorce under the secular laws in India. Otherwise, only the husband is entitled to divorce his wife as per '*shariyat*'. The divorce can be claimed by expressly stating the words through different mediums.

The issue of triple talaq or '*talaq-e-mughallaza*' has seen a severe debate across the nation in the recent time. It can be inferred as an irrevocable divorce under which a divorce can be done by way of stating '*talaq, talaq, talaq*' thrice also known as '*talaq-e-biddat*'.¹⁰

⁷Zoya Hasan and Ritu Menon, '*In a Minority*', London, Oxford University press, (2005), p. 3.

⁸AndraBeitelle, "*The Position of Women in Indian Society*" in Indian Women (ed) Devki Jain, New Delhi, Publication Division Ministry of Information Broadcasting Government of India,(1975) p. 63.

⁹Tahir Mahmood, '*The Muslim law of India*', (1980) Central Law Agency Allahabad, p.115.

¹⁰Aqil Ahmed, '*Mohammedan Law*', (2013) Central Law Agency Allahabad, p.175.

Now as per Islam, this can be said through any medium so with the advancement, this was being done on call, text messages, whatsapp, or any other medium, thus a husband can divorce the wife without being face to face with her.

Though, the supports who weren't willing to let the government take any action in this regard stated that instant triple talaq is prohibited in Islam and it is considered a sin. Whereas, the other side representing the Muslim women who were victim of this inhumane practise advocated that this is just a way to establish patriarchy in the society to violate the rights of women. This was considered as violation of the right of Muslim women to live a life with dignity as they can be deserted by their husband at any time without any reason or justification.

The women divorced was only entitled to seek maintenance for three months i.e., the period of '*iddat*' and after which the Wakf Board takes care of the women apparently. They are not entitled to seek maintenance from their husband under section 125 of Cr.P.C. Though in a landmark the Supreme Court upheld the right of the Muslim woman to claim maintenance from her husband as per the Cr.P.C. as it is a secular law and everyone is entitled for the rights granted in it.¹¹ But later on the government nullified the Supreme Court's judgment by bringing The Muslim Women (Protection of Rights on Divorce) Act, 1986 and reinstated the

earlier position. Thus, as per the law, the women will seek maintenance only for the three months immediately following the divorce.

Supreme Court's Judgment in ShayaraBano's Case:-

The Supreme Court in the landmark judgment of *ShayaraBano v. Union of India*¹² declared triple talaq as unconstitutional and arbitrary with a majority of 3:2. The Supreme Court for deciding this case setup a multifaith constitutional bench comprising of all the five judges belonging to different religions. It even directed the government to come up with a law that prevents the misuse of triple talaq and preventing the rights of Muslim women.

The bench in the said case pronounced three different opinion which in term held the practise as arbitrary and unconstitutional. The court framed three important issues namely Is Talaq-e-biddat Islamic in nature? Secondly, whether the Muslim Personal Law (Shariat) Act, 1937 confers statutory status to the subjects regulated by it or is it still covered under "Personal Law" which is not "law" under Article 13 of the Constitution as per previous the Supreme Court judgments? And lastly, is the triple talaq protected by Article 25 of the Constitution?

For the first issue, Kurian J's judgment places an overwhelming reliance on the

¹¹ *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*, 1985 SCR (3) 844.

¹² Writ Petition (C) No. 118 of 2016.

petitioner's argument in concluding that Triple Talaq is unislamic. It is very interesting to note because it does not dwell upon the constitutionality of the Triple Talaq, but rather focuses only upon whether it is a part of Islam or not.

Here, the *Shamim Ara's* judgment¹³ was heavily relied as per which every Talaq must be reasonable and be preceded by attempts at reconciliation. The phrase "attempt at reconciliation" need not necessarily mean that the attempt has to be between the two pronouncements of Talaq, it can also be before pronouncement of Talaq for the first time. Moreover, if one is to read the Quranic texts into the judgment, it is the caprice of the husband which is condemned by prophet, whereas, what the present judgment enforces is following of a compulsory iddat period by the parties before effectuating the divorce. Thus, this was declared to be unislamic.

For the second issue, Nariman J. focused on arbitrariness of law and not gender equality under Art. 15, as a basis for declaring Triple Talaq to be unconstitutional, he tactfully swings the discussion away from the concern that Talaq, as an instrument, is available only for males and not for females and steers clear from the difficulty of also questioning the other two forms of Talaq.

The last issue of considering the question of whether a constitutional protection under article 25 is provided to triple talaq, the

essentiality test was being used, where it was deliberated upon that is triple talaq an essential part of the religion or not. If the essentiality test as per Nariman J. is to be followed, we find no difficulty in declaring Triple Talaq to be outside the ambit of Article 25. However, following the test laid down by CJI Khehar, we come to question whether Triple Talaq is regarded as an essential part by the Islamic community or not. This question can be answered in the negative, since Islam consists of many communities, a lot of which do not follow Triple Talaq as a practice.

Thus, the Supreme Court here after examining every possible aspect related to it very tactfully declared the practise of triple talaq as unislamic, arbitrary and unconstitutional.

The Muslim Women (Protection of Rights on Marriage) Act, 2019:-

The Muslim Women (Protection of Rights on Marriage) Act, 2019 was the law made by the parliament on the directions of the Supreme Court to enforce its judgment. The bill gave rise to huge controversies and therefore, was only passed by the Lok Sabha and then referred to the standing committee. The bill was passed later by both houses and was published in the official gazette after the Presidential assent.¹⁴

It can be seen evidently that this legislation was result of haste. Though, the purpose

¹³ Appeal (Crl.) 465 of 1996.

¹⁴ The Muslim Women (Protection of Rights on Marriage) Act, 2019 No. 20 of 2019

which it is intended to be serve is noble and genuine but the way it was drafted left many questions unanswered. The government in the name of women empowerment reflected that woman are very weak and are solely dependent on men. In this it was being reflected that divorce means the end of the world for the divorcee and they cannot lead a good and dignified life after being divorced. The argument appears to be highly orthodox and continues with the legacy of women oppression across the country.

The Supreme Court has declared triple talaq unconstitutional but it has nowhere in the judgment made that it has to be made a criminal offence whereas in the case of the tabled bill it is mentioned that if a husband resort to triple talaq he can be jailed for three years.

The government through this bill is not clear on making triple talaq as a guilty intention offence or a strict liability offence. What if there is no intention of the husband to divorce the wife, but he merely utters the word talaq thrice, can he be prosecuted in this case.

Secondly, as per the criminal jurisprudence, the onus of proof is on the petitioner and the respondent is to be presumed innocent until proven otherwise. Similarly, in this case, the burden of proof falls on the wife to show that the husband has said triple talaq to her. Now, it is important to note that, in the case when the husband pronounce triple talaq orally with no one else present, how will the

wife proof that the husband has resorted to triple talaq and vice versa.

Nextly, the bill provides that the husband will be liable to pay maintenance to wife. It must be seen as to how the husband will be able to pay maintenance when he is in jail. And since triple talaq is unconstitutional, what will be the marital status of the couple after the husband pronounces triple talaq. If one presumes that the three pronouncements will have no consequences, then it ought not to affect the wife nor the society at large harming no state interest.

The parliament in the current case should have left the issue as it is because as per article 141 of the constitution, the judgment of the Supreme Court is a law in itself. There appeared no need for a law as the pronouncements no longer dissolves any marriage. Also, the imprisonment for three years seemed arbitrary as the same is the punishment for rioting with deadly weapons under section 148 of Indian Penal Code and there can be technically no penal punishment for a husband divorcing his wife as by and large matters pertaining to family law are civil matters.

Therefore, since this matter was not only religious, but also concerns the institution of family, it was not right for the government to interfere and make it a penal provision, the government would spoil the whole institution as there will be no love or affection left after the husband is imprisoned, thus at the maximum it should have been made a civil contempt of the

Supreme Court rather than being a penal provision.

Laslty, many legislations made for the protection of a particular section of the society from the other is misused, this legislation will open another door for the blatant misuse and extortion from the husband. Therefore, before bringing a law in such an issue, it was important that the government should have taken into consideration all the aspects related to it, otherwise, it was better not to have any such law.

Concluding Remarks:-

The situation of women in the country is very pathetic and it gets worst when the women belong to the minority community. Minority is having a conflicting situation as per the constitution of India. Whereas, it is the responsibility of the state to allow the minority to profess their religion to carry forward with their own customs and practise the constitutional safeguard which is provided to the minority restricting the state to interfere in their religious beliefs and traditions. The constitution also obligates the government to ensure equality and a right to life with peace and dignity to every citizen.

Today even studies point out, that majority i.e. 69.75 percent Muslim women do not want to educate their daughters beyond the primary level of education. Further many middle-class women who have requisite qualifications are not allowed to seek employment because 'community

respectability' is likely to get smeared. This has resulted in general backwardness of Muslims and particularly Muslim women in India.¹⁵

The Muslim community and its women withdraw into the safety of familiar orthodoxies, reluctant to participate in the project of modernity which threatens to blur community boundaries. It was said that for a large number of Muslim women in India today the only safe place, both in term of physical protection and in term of protection of identity, is unfortunately within the boundaries of home and community.¹⁶

Though, by way of declaring the practise of triple talaq as unconstitutional the Supreme Court has taken a great step forward for the social empowerment and security of Muslim women in the country. The judgment has again started a debate on the issue of a Uniform Civil Code for the nation.

The issue of uniform civil code has existed from the time when the constituent assembly of India was framing the constitution for the nation. It happens to be very controversial issue which broke after the imposition of Hindu Code Bill by the then Prime Minister of India, Jawahar Lal Nehru. It saw severe conflict of opinion between Dr. Rajendra

¹⁵Asghar Ali Engineer, 2005, Islam Women and Gender Justice, New Delhi, Kalpaz Publishers. P. 348

¹⁶Social, Economic and Educational Status of the Muslim Community of India; A Report, November, 2006, New Delhi, Prime Ministers High Level Committee Cabinet Secretariat, Government of India, P. 13

Prasad, Pt. Jawahar Lal Nehru and Dr.Bhim Rao Ambedkar. It is considered to be a threat to the diversity of India. Though, the supporters for the uniform civil code state that it brings a uniformity in the nation thus, protecting the rights of many.

The judgment had a very important reflection in the society. Today we see the sections of Muslim women coming up and claiming their rights against practises like that of '*halala*' where a female divorcee marrying someone else, consummating the marriage and then getting a divorce in order to make it allowable to remarry her previous husband.