A QUEST FOR 'SUBSTANTIVE EQUALITY': A NARRATIVE BEYOND *SHAYARA BANO* JUDGMENT

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Abstract

The concept of equality includes formal equality *i.e.*, 'equality before the law' and substantial equality *i.e.*, 'equality in law.' Initially, the feminist movement had insisted on formal equality but found it insufficient for the complete realization of equality and gender justice and moved beyond 'equality before law' to achieve material equality in the family and social structure. Substantive equality includes equal opportunity through special treatment, but still discrimination in the name of religion and culture prevails. CEDAW provides a framework to guide the State parties to incorporate substantive equality. The *triple talaq* judgment re-ignites the debate on the reformation of Muslim personal law. The present paper discusses the main themes namely the women's right to equality, the feminist approach to gender justice and international human rights law in the light of *triple talaq* judgment and the analysis of Muslim Women Protection of Rights on Marriage Act, 2019 to identify the judicial and legislative attitude towards the incorporation of substantive equality for Muslim women.

Keywords*: Equality- formal and substantive, feminist movement, gender justice, discrimination*.

I. Introduction

II. Part 1 - Basic Themes

III. Part 2 - Veiling gender justice: Missing debate on woman rights and equality

IV. Conclusion

I. Introduction

THE PRINCIPLES of justice, equality, human dignity, love and compassion have been the essence of every religion and Islam is not an exception. Discussion about Muslim personal law and rights of Muslim women has indeed gained momentum nowadays. There are arguments that triple *talaq*, polygamy *etc.*, are tools used for the subjugation of women. The debate on the reformation of

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Muslim personal laws generally revolves around the outer sphere of religion, interpretation of Quran or uniform civil code [1] and it is futile without addressing the core issues of gender justice and equality. This paper deals with the conceptual aspects of equality and gender justice perspectives concerning the ongoing debates on Muslim women's rights and reform of Muslim personal law specifically triple *talaq* judgment and the Act promulgated.[2] Along with that, an attempt to highlight the main theme of women's right to equality with special reference to CEDAW[3] and International Human Rights Laws[4] to identify the integration of substantive equality with gender justice is also done.

The contents of the paper are broadly divided into two parts. Part one introduces the basic theme of equality and feminist jurisprudence whereas part two appraises the triple *talaq* judgment and the Muslim Women (Protection of Rights on Marriage) Act, 2019 on the ground of basic theme. In part one, the paper offer brief overview of two aspects of equality- formal and substantive. Focus is given on the aspect that while formal equality addresses the discrimination, substantive equality encourages the state to initiate actions for better impact of legal rules. The feminist perspective of gender justice is outlined as its objective is 'gender justice through equality' which was the reason behind feminist movement, endorsing substantive equality more than formal equality as the latter was found insufficient to address difference. It is relevant because the evolution of equality models and feminist jurisprudence has influenced the deconstruction of international human right laws as well as national laws, hence its inclusion in the paper .

In part II, the judicial attitude in recent *triple talaq* judgment[5], as well as the Act,[6] is examined in the context of basic themes described in part one. For a better understanding, a brief overview of Islamic law in its historical context in India, different forms of dissolution of marriage and variations occurred by the passage of time are given. The focus is whether the judgment[7] on triple *talaq* has considered the basic tenets of women's rights or has preferred the debate of religion,

[1] *Hereinafter* referred to as 'UCC'.
[2] The Muslim Women (Protection of Rights on Marriage) Act, 2019.
[3] *Supra* note 1.
[4] *Hereinafter* referred to as 'IHRL'.
[5] *Supra* note 2.
[6] *Supra* note 4.
[7] *Supra* note 2.

culture and tradition over it. The paper analyses whether the Act incorporates any provisions for substantive equality like special treatment or specific mechanisms to examine the impact or outcome of this Act or to empower the victims of this inhuman practice. It is noted with agony that even after India had ratified CEDAW in 1992, we couldn't still accelerate the notions of substantive equality in its true sense. Still there is a vacuum that can be filled and fertilised by an extensive concept of equality and gender justice, policy measures, law reform, better implementation *etc*., It is concluded that emphasis should be given to the women-centered-approach while deciding on women's rights because integrating such approaches in the deconstruction of laws and rules will help women in better realisation of gender justice and other human rights.

II. Part 1 - Basic Themes

A. Concept of equality - Introspection

The idea of equality is the most defining area, not only in modern political thought but also in legal jurisprudence because the idea of 'Equality' remains the uncontested element of justice. The classical and medieval thinkers were of view that inequality is likely and unavoidable, but modern thinkers strike at the root of this view assuming all individuals to be equal. There is difference between the idea of equality, uniformity and sameness; however, these terms are used interchangeably. Initially the term 'equal' is used to refer the things of same physical appearance. If absolute equality among people in all things is impossible, then questions arise like equality of what, whose, how and when. It can be, 'what we want to achieve, what our goal is, when we want to make people equal; whether we want to compare two persons biologically, physically or distribution of resources.'[8] This simple question of what we want to compare when we make judgments of equality and inequality engrosses conceptual and practical problems.[9] Equality is not opposed to human diversity and the goal is not to make everyone alike. The goal is to discover the legal, political and social settings, where people have an equally valuable and satisfying life.[10] So, equality is not about uniformity but leveling the conditions of social subsistence which are vital to

[8] Iris Marion Young, "Equality of Whom? Social Groups and Judgments of Injustice" 9 *JPP* 1 (2001).
[9] *Ibid.*
[10] Andrew Heywood, *Political theory An Introduction,* 271 (Palgrave Macmillan, London, 4th edn., 2015).

human good.[11]There is a theoretical association between the concept of equality-inequality and discrimination because analysis of one involves the consideration of the other.[12]As there are various ways of comparison between two persons so are the various forms of equality like moral, political, legal, social, racial equality *etc.* The two main significant forms of equality are- Formal equality and Substantive equality also termed as material equality. Substantial equality originate from formal equality though sometimes it seems contradictory to it and refers as right to unequal. Formal equality is the classical idea of equality which is also called as foundational equality.

Aristotle dealt with the legal thought on equality and said "the just is the lawful and the equal, and the unjust is the unlawful and the unequal."[13] He interpreted equality by treating the likes alike, suggesting that all human beings are equal by virtue of being human. Same idea was also coined by the natural rights theory, the American Declaration of Independence and the French Declaration of Rights of Man and of Citizen by declaring that 'all men are created equal.'[14] The formal equality requires that 'all same must be treated same'. Human beings are alike because they all are humans; they are born equal and endowed with the same natural rights. The basic idea of formal equality is that all human beings possess equal rights by virtue of their common humanity; thus must be treated equally.[15]

The most prominent expression of formal equality is the legal equality. Equality before law *i.e.* law should 'treat' all persons equally as individual without considering their backdrop- social, political, economics, education, caste, gender, race, color, *etc.* Legal equality is supported by all irrespective of their political ideology- conservatives to socialists. The dominant test is a similar situated test - 'those who are similarly situated be treated similarly.'[16] This 'equal treatment' provides that the person, class of persons not situated similarly with others because of historic or systemic discrimination, are not able to treat equally.[17] 'Equality before law' is about the nature of

[11] *Ibid.* Author also warns that equality may remain a political slogan unless we specify equality of what, when, how, where and why?
[12] E.W. Vierdag, *The Concept of Discrimination in International Law,*7 (Martinus Nijhoff, Hague, Netherlands, 1973).
[13] Otto A. Bird, *The idea of justice,* 133 (Fedrick A. Praeger, New York, 1st edn., 1968).
[14] *Supra* note 12 at 270.
[15] *Ibid.*
[16] Ratna Kapur, "Un-Veiling Equality: Discipling the 'Other' Woman" in Anver M Menon, Mark S Ellis *et. al.* (eds.), *Islamic law and International Human Rights Law Searching for Common Ground,* 267 (Oxford University Press, Oxford, 1stedn. 2012).
[17] *Ibid.*

treatment, not about the result of that treatment. However formal equality also has a limitation as it is unable to provide real equality but only provides relative equality. It only recognizes the inequality and set up differential treatment. Formal equality prohibits only discrimination on certain grounds but it not addressing the disadvantage suffered by a particular person or class.

Gender equality also involves formal equality in the form of legal equality. The struggle for equal rights is the base of the feminist movement while holding the equal right of vote, education, in law and politics. Nevertheless, women have achieved the formal equality through struggle but still in some societies inequalities persist. The contemporary feminists (third wave of feminist) stirred beyond equal rights and hold a view that formal equality is insufficient. No doubt that formal equality provides that men and women are equal and there should not be any discrimination based on sex; but it ignores inequality in family structure, concept of patriarchy and position of women in the private sphere. Therefore it becomes necessary to discuss the other significant form of equality, 'substantial equality.

B. Substantive equality- A necessity

The origin of substantive equality is traced from formal equality and at times both become contradictory to each other.[18] Substantive equality is not about the 'equal treatment' of law or treating the likes alike but the 'result of the treatment' or real impact of the law.[19] The key goal of substantive equality is the exclusion of material inequality. Substantive equality is not concerned with the sameness or the difference rather it considers the inequality suffered by the disadvantaged group or class based on social, economic, educational backdrop.[20] It points at the eradication of individual, institutional and systemic discrimination.[21] According to Ratna Kapur the essential quest of substantive equality is "whether the rule or practice in question contributes to the subordination of the disadvantaged group and whether their treatment in law contributes to their historic, systemic disadvantage."[22]

[18] *Supra* note 12 at 271.
[19] *Supra* note 18 at 268.
[20] Parmanand Singh "Equal Opportunity and Compensatory Discrimination- Constitutional Policy and Judicial Control" 18 *Journal of Indian Law Institute* 300 (1976).
[21] Katherene Lahey, "Feminist Theories of (In)Equality" in S Martin and K Mahoney (eds.), *Equality and Judicial Neutrality* 70-71(Carswell, Toronto, 1987).
[22] *Supra* note 18 at 268-269.

There are two aspects of substantive equality- equality of opportunity and equality of outcome. The idea of equality of opportunity was found in the writings of Plato who suggested that social position should be based on individual capacity and all should be provided an equal opportunity to recognize their abilities. Equality of opportunity is focused on initial conditions with the starting point of life.[23] It entails equal opportunity to realize one's unequal potential.[24] Equality of opportunity simply removes the obstacles that stand in the way of personal development by introducing special treatment or measures to prevent the discrimination faced by disadvantaged group or class, which is described as preferential treatment or reverse discrimination.[25] The early form of this equality was found in the affirmative action policy on race issue in America to compensate the disadvantaged persons for past discriminations.[26]However it was argued that State intervention in social and personal life would threaten individual liberty and essentially violates the idea of equal rights.[27] Although, equality of opportunity is an important step towards social and economic equality it cannot control the outcome or impact of preferential treatment.

Equality of outcome is the most radical form of substantive equality. It shifted focus to the results *i.e.,* outcomes should be equalized. However, at times it is not clear whether the term 'outcome' is indicating towards resources, welfare or satisfying the demands of an individual, as equality of outcome is associated with material equality.[28] It is the idea of a higher level of social equality which is regarded as important for social accord and stability. With regards to gender equality, itis argued that male standard of sameness as values, attributes, internal treats and qualities (generally by nature and nurture having aggressive behavior, competition and greed) used in determining the equality, failed to consider the women's sufferings and thus continued the disadvantage and social discrimination faced by the women.[29] The creation of laws and legal concept are gender biased, based on the men's perspective and patriarchy. According to Savitri Goonesekere "this even

[23] *Supra* note 12 at 272.
[24] *Id.,* at 273.
[25] Savitri W. E. Goonesekere, "The Concept of Substantive Equality and Gender Justice in South Asia", *available at:* www.unwomensouthasia.org/assets/The-Concept-of-Substantive-Equality-and-Gender-Justice-in-South-Asia (last visited on May 8, 2021).
[26] *Supra* note 12 at 274.
[27] *Ibid.*
[28] *Supra* note 12 at 275.
[29] *Supra* note 27 at 13.

challenges the substantive equality that made the men the reference point for women's equality."[30] Jean Paul Satre also share a similar view that "men think themselves superior to the women, but they mingle that with the notion of equality between men and women. It's very odd." [31] This highlights basic biological and social differences based on individual's values leading to social conditioning resulting into various feminist approaches to equality. The concept of Substantive equality focused on the result of treatment, tackled the actuality of context and eliminates discrimination, and determines equality for women. The reality of disadvantage and context, taking outcome and impact into consideration is required to decide whether there is discrimination or not. The emphasis is not only on equal treatment but also on removing discrimination and analysing the outcome of such treatment. The impact of laws, policies and judgments must be appraised from this viewpoint.[32]

C. Gender justice - Embedded or Enjoyed (A Feminist Perspective)

The above discussed outline of equality becomes complicated about women and gender justice as it implies different proportions and theories of feminism. The term feminism is of recent origin but feminist views can be traced back in different cultures and civilizations. The19th century feminism developed as a result of the women's movement and focused on right to vote and right to education.[33] The traditional feminist movement has demanded equality with men. Thus, the movement of feminism was considered as a movement for achieving sexual equality or it was political equality. Feminists highlighted a political relationship between sexes, the supremacy of men and the subjugation of women in most of societies.[34] Still, feminism carried contrasting approaches of equality inside it.

The first wave of feminism was characterized by the demand that women should enjoy the same legal and political rights as men. It ended with the achievement of female suffrage because it was believed that if women could vote, then all other forms of discrimination would disappear. First wave was based on liberal ideology feminism demanding equal rights as men had. Second wave

[30] *Ibid.*
[31] As quoted by Catherine A. Mackinnon, *Feminism Unmodified Discourses on Life and Law* 20 (Harvard University Press, Cambridge, 1987).
[32] *Supra* note 27 at 13.
[33] Andrew Heywood, *Political Ideologies: An Introduction*227 (Palgrave Macmillan, London, 5th edn., 2014).
[34] *Ibid.*

feminism recognized that the achievement of equal legal rights had not solved the question of gender equality. The goal was not merely political emancipation but women's liberation, which can be realized by revolutionary process of social change; equal rights may be meaningless unless women enjoy social equality. Thereafter, radical feminism, the most distinctive feature of second wave moved beyond the equal rights and regarded the gender differences in society as important. It was argued that women's position was determined by social factors and not by natural factors; and hence developed a multifarious evaluation of 'Patriarchy'.

The central feature of feminism is the belief that sexual oppression is the deep-seated feature of society and other forms of inequality are secondary.[35] It is concerned about equality in family and personal life. No doubt women go out to work and enjoy more liberty than before but still issues like not getting equal wages, household work not considered as work of others, not posted on higher posts and moreover less control over their body., still exists. This highlights the impact of patriarchy as a tool of women's subjugation therefore until and unless patriarchy is not abolished, feminists will not able to achieve their goal.[36] The third wave of feminism which started in the twenty-first century allowed the voices of not only women, but more specifically that of poor women, women of color and highlights a particular and complex range of gender, racial and economic disadvantages. [37] While, liberal feminists examined patriarchy as unequal social participation of women *i.e*. underrepresentation of the women in public life, socialist feminists emphasized on the 'economic' aspects of patriarchy and radical feminists emphasized upon patriarchy as an institutionalized form of power.

Conservatives stood against saying that gender divisions in society are natural.[38] Men and women fulfill their roles as designed by the nature. Feminist confronted with the idea of 'biology destiny' by drawing a distinction between sex and gender. Sex differences are biological one and they have no social, political or economic significance. Gender differences are social structure and outcome of culture, which implies that women's role in private sphere is expected effect of their biological difference. Women and men should not be judged by their sex, but as individuals. The goal of

[35] *Id.* at 242.
[36] *Id.* at 247.
[37] *Supra* note 12 at 264.
[38] *Supra* note 36 at 233.

feminism is to genderless personhood. The question of gender and inequality is the question of difference and sameness.[39] There are two main approaches to understand the question of gender and inequality[40]- the sameness approach and difference approach.

Sameness approach is: '*be the same as men'*[41] and allotted same standard to both men and women and upholds that both men and women are equal before law. It has based on gender neutrality principle- according to which gender difference is irrelevant. It rules out any analysis of the impact of gender-neutral legislation and strike down provisions that discriminates between men and women.[42] Difference approach is: '*be different from men'*[43] and the core idea is that sex is a differentiation or division. This recognition of difference refers to special benefit or protection rule[44] because women are dissimilar to men. Legislation that treats women differently can be sustained as women need to be safeguarded. Thus dominance is created and justified. There are criticisms about both because the man standard has become the criteria of both approaches. In the sameness approach, women are compared with men and under difference approach women are measured according to men standards.

The concept of substantive equality has added a third approach of gender difference and that is corrective treatment, whereby the women are considered as a historically deprived group. Gender difference necessitates recognition as well as a corrective treatment. Thus any legislation treat women differently and designed to improve the position of women can be justified. These approaches are helpful whenever the judiciary or legislation consider the women rights to understand the grass root problem and views of women from women perspective. These approaches provide great help in decision-making process and reformation of laws, hence it is elaborated before the analysis of the judgment and Act under discussion herein.

D. International human right laws

[39] Catherine A. Mackinnon, *Feminism Unmodified Discourses on Life and Law* 32 (Harvard University Press, Cambridge, 1987).
[40] *Id.* at 33.
[41] *Ibid.*
[42] *Supra* note 18 at 270.
[43] *Supra* note 44 at 33.
[44] *Ibid.*

Concept of equality provides a distinctive challenge not only to domestic laws but also to international human rights laws in the area of gender equality. Feminists have raised this issue at international level and announced that formal equality failed to address the discrimination and inequality towards women. Situation becomes more complex with regards to discrimination and equal rights when equality suffers severe damage in disguise of religious personal laws as happened in the case of Muslim women through triple *talaq*, *halala*, and unequal property rights. To protect the human rights of the individual and to provide an atmosphere in which rights can be enjoyed are the main goal of International Human Right Laws (IIHRL). The main focus here is how the United Nation charter and treaties (UDHR, ICCPR, ICESCR, especially CEDAW) addressed women's right, inclusion of substantive equality and gender justice. The preamble of the charter of United Nations (hereinafter referred to as the UN) affirmed the commitment to uphold the human right of all persons and equality between men and women as a fundamental human right.[45] It also articulates the purpose of UN to approve and encourage respect for human rights and freedom for all without distinction as to sex.[46] It reiterates respect and observance of human rights for all without any discrimination on the ground of sex.[47]

This universal principle of equality has been further elaborated by the Universal Declaration of Human Rights (hereinafter referred to as the UDHR).[48] These principles provide a general declaration of equality. Article 7 of UDHR[49] provides the common declaration of equality before law, which are generally provided by domestic laws in almost countries. Article 16(1)[50] provides that both men and women have equal rights of marriage as well as dissolution of marriage. General principles of equality in UDHR were transferred to International Covenant to Civil and Political Rights (hereinafter referred to as the ICCPR) and International Covenant to Economic, Social and Cultural Right (hereinafter referred to as the ICESCR). All IHRL's declares the equality between men and women and urges equal human rights for women- social, political and economic.

[45] Preamble of Charter of United Nations, *available at*: https://www.un.org/en/charter-united-nations (last visited on May 21, 2021).
[46] The Charter of United Nations, 1945, art. 1 (3).
[47] The Charter of United Nations, 1945, art. 55(c).
[48] The Universal Declaration of Human Rights, 1948, art.1 and 2.
[49] *Ibid.*
[50] *Ibid.*

For the first time, Convention on Elimination of All Forms of Discrimination against Women (hereinafter referred to as the CEDAW),which is also called the Magna Carta of women's right, in 1979 articulates not only Substantive equality in the form of affirmative action but also structural aspect of equality of outcome. It has enlarged the scope of women's human right and formally acknowledges the effect of culture and tradition as a limitation on the enjoyment of human rights by women. It lays down the framework that incorporates the machinery of measurement of impact of any rule, practice and law; therefore provide the radical aspect of substantive equality. The convention focuses on discrimination against women, stressing that women have suffered and persist to experience various form of discrimination because they are women. The definition of discrimination even includes unintended discrimination.

Articles 2 and 16 are the core provisions of the convention. CEDAW imposed an obligation on states to redress the causes of inequality by taking special effective measures not only in public sphere but also in private spheres. Article 2 of the CEDAW[51] has recommended the states parties to frame and impose policy of eliminating all forms of discrimination against for practical realisation of equality to condemn discrimination against women in all its forms, by all appropriate means and without delay. It recommends the state parties to adopt appropriate measures, sanctions for prohibition of discrimination against women, not only against any person but also against any organization or enterprise. It further acclaims to abolish any existing law, rule, custom or practice which discriminates against women. General Recommendation No. 28[52] on article 2 provides the main object of convention and expands the scope of substantive equality by achieving the equality of result. Through article 5(a)[53], stress has laid down on state parties to take positive action to modify the social and cultural pattern of conduct of men and women which are based on gender inequality. Article 16[54] compelled the state parties to eliminate discrimination in all matters of marriage and family relation. General recommendation No. 29[55] redresses one of the important aspect of life of married women, the economic impact of separation or dissolution of marriage on

[51] The Convention on the Elimination of all Forms of Discrimination against Women, 1979, art. 2.
[52] General Recommendation on the core obligation of State parties under article 2 of the CEDAW, *available at:* https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx (last visited on June 17, 2021).
[53] The Convention on the Elimination of all Forms of Discrimination against Women, 1979, art. 5(a).
[54] The Convention on the Elimination of all Forms of Discrimination against Women, 1979, art. 16.
[55] General Recommendation on article 16 of the CEDAW (Economic consequence of marriage, family relations and their dissolution), *available at:* https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx (last visited on June 17, 2021).

women. Generally the women of both developed and developing countries experience inferior economic condition.[56]

This general recommendation provides direction for state parties in achieving *de-jure* as well as *de-facto* equality under which economic benefits of relationship and result of dissolution of marriage are borne by both men and women equally. It also laid down the mechanism for evaluating the implementation of this economic equality in family. A women centered approach has been reinforced by the CEDAW for gender equality. It acknowledges the gender difference and disadvantage suffered by women while being women. Hence in brief the convention imposes an obligation on State parties[57]- to assure that there is no direct or indirect discrimination against women in their laws and by public authorities, the judiciary, organization, enterprises or by private individuals, to extend the *de facto* position of women through efficient strategies and programs and to address the existing gender relations and gender-based stereotypes, not through individual act but also in law and legal, social structures and institutions.

India as a state party has ratified CEDAW in 1993 and declares that it shall abide by the convention specifically article 5(a) and 16 but with its policy of *non-interference in the personal affairs* of any community without its initiative and consent.[58] This declaration shows the attitude of the authorities and in essence contradicts the main objectives of the convention. It says that in principle we are abide by the principles of CEDAW but in practical, by the colonial-minded policy of non-interference in the personal affairs of the community.

III. Part 2 - Veiling gender justice: Missing debate on woman rights and equality

A. Historical context

The hot debate over the subject of Muslim law reform is in the air already. After 33 years of the controversial *Shah Bano* case[59] now, Indian legal scenario is again a point of contention about

[56] Facts and Figures: Economic Empowerment, *available at*: https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures#note (last visited on June 17, 2021).
[57] *Supra* note 57.
[58] "State parties' ratification and reservations", *available at:* https://www.treaties.org/cedaw (last visited on May 30, 2020).
[59] *Mohd. Ahmad Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556.

Muslim law reformation. In this context, a brief historical background of evolution of Islamic law and position of Muslim women in India is given herein.

'Islamic law' is an English expression for *Sharia* and *fiqh,* whereas both these expressions are not the same. *Sharia* is based on divine origin of laws while *fiqh* refers to human deduction of rules and doctrines from *Sharia.*[60] Muslim jurist were divided in their opinion and their interpretation of Quran and *Sunna* led to different schools (*madhhabs*).[61] In India Islam was probably brought in by Muslim traders through sea route to south India;[62] later on by the Arab conquerors through land route who were the followers of *Hanafi* school of *Sunni* sect. Later, Islamic law as administered by British Empire was called *Anglo-Muhammadan* law, squeezing the application of Islamic law and it was a mixture of both. They gradually delimited Islamic customs and traditions by introducing codification.[63] The fact that the English judges decided it through their own understanding and with the help of *moulvies* further diluted Islamic law; though the policy of non-interference was followed in personal matters and customs.[64]

After independence drastic reforms were introduced in personal matters of Hindus, but non-interference policy with respect to Muslim personal law was maintained. In 1984, the debate of reformation and Muslim women's rights was initiated because of the Supreme Court judgment in *Mohd. Ahmad Khan* v. *Shah Bano*[65]. *Shah Bano*, a Muslim woman, brought a petition for maintenance under section 125 Cr.P.C.[66] The husband dissolved the marriage by uttering triple *talaq* and paid customary maintenance for *iddat* period and amount of dower (*mehr*). He sought the court to dismiss the petition as she had received maintenance under the Muslim personal law applicable to them. The five-judge bench of Supreme Court held that she was entitled to

[60] Muhammad Khalid Masud, "Clearing Ground: Commentary to Sharia and the Modern State" in Anver M. Menon, Mark S. Ellis, *et. al.,* (eds.), *Islamic law and International Human Rights Law Searching for Common Ground*, 106 (Oxford University Press, Oxford, 1st edn. 2012).
[61] Rudolph Peters and Peri Bearman, "Introduction: The Nature of the Sharia" in Rudolph Peters and Peri Bearman (eds.), *Ashgate Research Companion to Islamic Law* 2 (Ashgate, 1st edn, 2014).
[62] David Pearl and Werner Menski, *Muslim Family Law* 30 (Sweet & Maxwell, South Asia Edition, London, 3rd edn. 1998, reprint 2015).
[63] The Kazis Act, 1880 (Act 12 of 1880), Mussalman Wakf Validating Act, 1913 (Act 6 of 1913), Muslim Personal Law (*Shariat*) Application Act, 1937 (Act 26 of 1937), Dissolution of Muslim Marriages Act, 1939 (Act 8 of 1939).
[64] Abdul Hussain, *Muslim Law As Administered in British India' Tagore Law Lectures 1936* 2 (Abinas Press, Calcutta, 1936).
[65] *Supra* note 64.
[66] The Code of Criminal Procedure, 1973 (Act 2 of 1974).

maintenance under section 125 Cr.P.C[67] as Criminal Procedure Code is secular Act applicable to all irrespective of religion and suggested the legislature to consider the Uniform Civil Code. Due to the outrage against the judgment by a section of the Muslim community, the government enacted the Muslim women's (protection of rights on Divorce) Act, 1986 to dilute the decision of the court. Progressive women and non-government organizations raised voice against the Act[68] on the ground that it violated equality in general and gender equality specifically. But the issues of equality were diluted by the debates on secularism, UCC and freedom of religion. It also witnessed that the concept of equality was deployed for attacking the Muslim community not that they had sympathy for Muslim women but the sake of demonization of Muslims.[69] Therefore the real issue of gender justice and equality was lost in the above debate.

Recent judgment[70] on triple *talaq* re-ignites the debate of equality and gender justice. The disagreement is between those who see Islamic law opposing the idea of equality in the Constitution and those who argue that triple *talaq* is not Islamic and not as rightful by Quranic verses.[71] Before going to the details of judgment, a short outline of various modes of dissolution of marriage in Islamic law in India is done here.

B. Dissolution of marriage in Islam

There are different forms of dissolution of marriage, some developed in formative period, others in classical period. *Talaq-al-Sunnat* introduced in formative period refers to *talaq* in accordance with *sunnat* (action of Prophet Muhammad termed as tradition).[72] According to this form a man pronounce *talaq* to his wife during *tuhr* (purity period), then refrains intercourse until three menstruation period called *iddat* period. Before *iddat* period lapses the husband may resume the marriage, but only twice. If the husband divorce wife for third time, the divorce becomes final.[73] *Tamlik* also originated in formative period, whereby husband renounces the option of *talaq* in favor

[67] *Ibid.*
[68] Muslim women's (protection of rights on Divorce) Act, 1986 (Act 25 of 1986).
[69] *Supra* note 18 at 284.
[70] *Supra* note 2.
[71] Seema Chishti, "Why the triple talaq case before Supreme Court is different from Shah Bano's in 1986" *The Indian Express*, *available at:* http://indianexpress.com/article/explained/triple-talaq-case-islam-shayara-bano-triple-talaq-case-supreme-court (last visited on November 8, 2020).
[72] Susan A. Spectorsky, *Women in Classical Islamic Law* 106 (Brill, Leiden, Boston, 2010).
[73] *Id.* at 105.

of the wife for a temporary period. Therefore choice is given to wife, but only the husband can give this authority. Another mode of divorce, *Khula* divorce commences by the wife, but in reality husband divorce his wife for the cost or payment she gives.[74] In *Lian,* husband denies paternity of child; thus accuses wife for adultery and can institute *lian* procedure against wife.[75] If he does not follow the procedure he remains married.[76] If he confesses that he lied, he is punished but marriage dissolves.[77]

Many changes occurred during the transformation from formative to classical period. A new form of *talaq-al-sunna* developed, whereby husband utter *talaq* once in a period of *tuhr* and then twice in other two *tuhrs,* refrain intercourse during the *iddat* period; as soon as *iddat* period lapse divorce become irrevocable. This type of *talaq* is termed as *talaq-al-Hasan*. Also, a triple pronouncement of *talaq* in one statement in *tuhr* period came into existence termed as *talaq-al-bidat*. It will become effective from the moment of pronouncement of *talaq.* If it is in written form, it will be concluded along with the execution.[78] *Hanafi* branch of *Sunni* school which is the major school in India has accepted talaq-*al-bidat* as a valid form of *talaq*. According to Asghar Ali Engineer triple *talaq* amounts to the quickest and simplest way of divorce, becoming effective immediately and severing the marriage irrevocably hence has become popular and has displaced all other divorce methods.[79] Recently it was declared unconstitutional by Apex Court.[80]

C. *Shayara Bano* Judgment v. Quest of 'Substantive Equality'

In the Shayara Bano case[81], when the petitioner knocked at the door of the Supreme Court to demand justice, it has been decided that triple *talaq* is invalid. But judgment leaves many matters of discussion unanswered. Time has come to say a big 'no' to this practice forever, but not to end

[74] *Id.* at 126.
[75] *Id.* at 128.
[76] *Id.* at 129.
[77] *Ibid.*
[78] A.A.A. Fyzee, *Outlines of Muhammadan Law* 155 (Oxford University Press, Oxford, 9th edn., 2005).
[79] Asghar Ali Engineer, *Rights of Women in Islam* 150 (New Dawn Press, Elgin, 3rdedn., 2004).
[80] *Supra* note 2. There are cases which was decided on same lines. For eg., *Rahmatullah* v. *State of UP,* 1999 (12) Lucknow Civil decision at 463 quoted in Aqil Ahmad, Mohammedan Law 178 (24th edn. 2011*)* wherein court observed that *Talaq-ul-Biddat* giving an irrevocable divorce at once without allowing the period of waiting runs counter to the mandate of Holy *Quran* and is sinful.
[81] *Supra* note 76 at 14.

up with 'no', instead, what to do next to ensure that the impacts of this 'no' is worked out to bring about the 'substantive equality into the dark sides of Muslim women's lives.

The judgment starts with the synopsis of the sub-topics discussed by the Supreme Court. An analysis of sub-topics discussed shows that no consideration is given to the concept of equality and women's rights rather whole judgment is revolved around Muslim personal law and its reformation. It was submitted in Supreme Court that '*talaq-e biddat'* is neither recognized by the Qurannor by *hadith;* although the Supreme Court has gone into the examination of the verses of Quran concerning *talaq*. The Apex Court concluded through the perusal of the verses of the Quran that divorce for the reason of mutual incompatibility is allowed.[82] After the second utterance of *talaq*, the parties must make up their mind, either to dissolve their ties permanently, or to live together honorably, in mutual love and forbearance – to hold together on equitable terms.[83] It is also mentioned that where the freedom of the wife suffers due to the husband's refusal to dissolve the marriage or treat her with cruelty; it is permissible for the wife, in such a situation, to extend some material consideration to the husband; termed as *khula.*[84]

The Supreme Court gives an overview of reformation of the Islamic law of *talaq* through legislation by Islamic and non-Islamic countries such as Arab countries, Southeast Asian countries and Sub-Continent countries. Thereafter, the Court further examines the various judicial pronouncements on *talaq-e-biddat* right from Privy Council judgments and includes a wide discussion about article 14 of the Constitution of India. It agrees that article 14 is the founding faith of the constitution and pillar of the democratic republic and emphasizes that equality is a dynamic concept that strikes at the root of the arbitrariness to ensure fairness.

The court by applying the test of manifest arbitrariness to the case at hand, held that triple *talaq* is a form of *talaq* which is innovative, irregular or heretical form of *talaq*. The Court quotes the opinion of Fyzee that though it is recognized it is sinful in that it incurs the wrath of God. The court reiterates its view in *Shamim Ara* v. *State of U.P*[85] that "the correct law of talaq as ordained by the Holy Quran is that *talaq* must be for a reasonable cause and be preceded by attempts at

[82] *Id.,* at 19.
[83] *Id.,* at 20.
[84] *Ibid.*
[85] (2002) 7 SCC 518.

reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, *talaq* may be effected."

The Court concluded that considering the fact that the triple *talaq* is instant and irrevocable, it is obvious that any attempt of reconciliation between the husband and wife by two arbiters from their families which is essential to save the marital tie, cannot ever take place. 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 of reconciliation so as to save it. This form of *talaq*, therefore contravenes the fundamental right under article 14 of the Constitution of India. It is to be noted that the then Chief Justice of India, J.S. Khehar. J. employed the Supreme Court's rare and extraordinary jurisdiction under article 142.[86] Thus, the result was that it set aside the triple *talaq* and invoked article 142 for putting an injunction on husbands from divorcing their wives for the next six months and sought for a legislation to end this evil. This led to the drafting of the Muslim Women (Protection of Rights on Marriage) Bill, 2018[87] for enacting a legislation, failing which resulted in the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019.[88]

Though the judgment speaks about the unconstitutionality of triple *talaq*, it is silent about substantive equality, gender justice and various approaches of feminism. It could have used this opportunity to interpret *talaq* on equal terms by considering the above-given concepts. Without ensuring the substantive equality, the space for Muslim women in this area is unjustly distributed. The notion of substantive equality necessitates that women should be experiencing this equal placement. It cannot be achieved by merely declaring that triple *talaq* is void, rather women's right shall be placed at par with men as both are human beings. It means, the Court could have initiated a distribution of equal degree of powers in divorce and the unjust use of unilateral *talaq* could have been minimized. Some affirmative action to cope the disadvantage suffered by the victims of this practice could have been recommended for the full realization of their basic human rights.

[86] The Constitution of India, art .142.
[87] The Muslim Women (Protection of Rights on Marriage) Bill, 2018, *available at*: *http*://www.prsindia.org/billtrack/muslim-women-protection-rights-marriage-bill (Last visited on May 10, 2020).
[88] *Ibid.*

The Apex court has dealt with the International conventions also in the judgment and considered them of utmost importance. But it is unfortunate to say that the Court handled the issue more of as that of arbitrariness. Despite many arguments raising triple *talaq* being antithetical to article 15 and the provisions of CEDAW wherein our nation is a signatory, the Court sidelined the vital side of sex discrimination. Useful provisions of CEDAW and its General Recommendation, specifically no. 29[89] (regarding economic consequences of the dissolution of marriage) could have been considered. It further requires the State parties to establish a mechanism for evaluating the implementation of economic equality in the family.[90] Moreover, General Recommendation No.28 in 2010 (obligation of State to protect the rights of women and to develop and improve their position and implement their right of de jure and de facto or substantive equality)[91] requires that there shall not be direct or indirect discrimination against women should have been relied on. [92]

The narrower ground of arbitrariness limited the scope of examining the grounds of discrimination. Thus a very apt opportunity to expose, debate and settle a progressive sex discrimination jurisprudence is missing in the judgment and it is to be viewed as stumbling block. It was a golden chance to recommend the Parliament to consider the international human rights law specifically CEDAW to eliminate all kind of discrimination. Using CEDAW, the Bible of the substantive rights of women; Court could have analyzed feminist jurisprudence, instead it adopted the same pattern of debate of arbitrariness mentioned above.

D. The Muslim Women (Protection of Rights on Marriage) Act, 2019 v. Substantive Equality

The Act provides that declarations of *talaq* resulting in immediate and final dissolution of marriage are void and illegal.[93] It also has a provision to make instant *talaq,* proclaimed verbally, through writing or electronic form, illegal and void. The provision seems to be protective to Muslim Women and shows that since women are inferior, should be benefited and protected. This refers to the patriarchy structure and not any signs of equality are shown expressly or impliedly. Other forms of *talaq* are still valid, which again put the husband superior and dominant because no such

[89] General Recommendation No. 29, 2010, *available at:* https://www.un.org/womenwatch/daw/cedaw/states (last visited on May 11, 2021).
[90] *Supra* note 60.
[91] *Supra* note 57.
[92] *Ibid.*
[93] The Muslim Women (Protection of Rights on Marriage) Act, 2019 (Act 20 of 2019), s.3.

equal rights are given to Muslim women to dissolve the marriage. Under the Dissolution of Muslim Marriage Act, 1939 Muslim women can apply for divorce on specified grounds in Court of law, which cannot be termed as equal to husbands' right to pronounce *talaq* (which are still valid except triple one). Nevertheless, it is argued by Muslim jurist that Muslim women have given equal right by way of *khula* and *tamlik* form of dissolution of marriage. It is not correct because in both, it depends on the volition of the husband. In *tamlik*, actual choice is given to husband to transfer his right to his wife; only then wife has option. In *khula*, wife buys her freedom from husband by giving compensation. If husband do not want to sell her freedom she cannot buy her freedom. Where is the 'Equality' here, even 'formal' one?

The penalising provision section 4,[94] which provides that any Muslim husband who pronounces *talaq* shall be punished with three years of imprisonment and fine is again meaningless in the perspective of substantive equality because by putting the man behind prison is no way providing substantive equality or any other benefits or economic protection to her. This punitive section is only deterrent, for the protection of women because they are weak. It is not infusing substantive equality notion to the legal structure. It nowhere provides formal equality as well as equality of opportunity to Muslim women. Actually it upholds inequality.

Section 7 of the Ordinance is retained in the Act and provides that instant *talaq* a cognizable, compoundable and bailable offence.[95] Section 2 (b)[96] provides that jurisdiction related to any information related to triple *talaq* can be entertained by the magistrate in the area where the married Muslim woman resides. This of course is a women-friendly approach where jurisdictional aspect is defined by limiting it to the place where she resides. Section 6 which provides for the custodial right of children to women in the event of pronouncement of *talaq* is again questionable because if the *talaq* itself is void, she is still having the right to the matrimonial home and the marriage is still valid and how can the separate custody can be claimed while nothing has been displaced from her as the pronouncement is void.

[94] *Id*., s.4.
[95] *Id.,* s.7.
[96] *Id.,* s.2 (b).

It is to be noted that neither the Ordinance nor the Act has not laid down any mechanism to check or measure the impact of such a law on Muslim Women. It has not laid down any positive action or reverse discrimination in favor of Muslim women. Formal equality is attained when law treats all equal, whereas substantive equality requisites impact of those laws and practices to improve the condition of disadvantaged group.[97] Some special actions are required to bring them at the same level. Different treatment on the basis of sex amounts to direct discrimination. When a practice, law or policy does not appear to be discriminatory on its face, but is discriminatory in its effect, it amounts to indirect discrimination. In that sense, this Act has resulted in indirect discrimination upon Muslim women.

The plight of the woman will not change unless the effective mechanism for 'equality in law' is ensured by the legislature and criminalization itself cannot serve this objective. Securing gender justice by simply putting the husband behind the bar is not useful as it doesn't provide an alternative to save her economic rights in his absence. What can be done is to codify Muslim law in tune with Constitutional principles and true Quranic spirit incorporating substantive equality and feministic notions. The humanistic element is actually eclipsed by the patriarchal forces by mixing law with unhealthy cultural elements. It is to be regained by taking reformative steps as suggested in CEDAW discussed above, instilling substantive equality in to law and judgments.

IV. Conclusion

Formal equality refers to 'equality before law' and substantive equality means 'equality in law'. Feminist approach demands not only the equality before law but broader equality in substance, which concentrates on the actuality of disadvantage and focuses on equality of outcome and result. Substantive equality transfers the focus of achieving the formal equality through deconstruction of law and policies to eliminate direct as well as indirect discrimination promoting adoption of rational and gender receptive policies. It can be used innovatively in judicial exposition and policy actions to resolve the conflicting rights even related to custom and religion. This being the possibility, a mere protectionist approach towards women, without providing effective mechanism

[97] Alice Edwards, *Violence against Women under International Human Rights Law*158 (Cambridge university press, Cambridge, 2011).

of special treatment and its impact on the women, is not sufficient for the full realization of human rights.

The general approach of the judgment as well as that of Ordinance/Act is problematic on three points: firstly, the approach continues to advance a male standard and have effect of demoting inferior position to women. Neither a women-centered approach, nor an attempt to analyze feminist jurisprudence was undertaken. We will suggest a four-dimensional framework of aims and objectives as suggested by Sandra Fredman.[98] It can be discussed under four points. First of all, it must have an aim for redressing disadvantage. Next, it should counter stigma, stereotyping, violence *etc*., Thirdly, we should have steps for securing participation and raising a voice to fight political and social exclusion. The provisions to accommodate difference and achieve structural change must be included as the fourth and final step. This four-dimensional approach is useful as an analytical framework to modify policies and practices in our voyage towards substantive equality.

Secondly, they disregard the gender applicability criteria and thought that arbitrariness, reasonableness *etc*. are gender neutral terms. It did not consider why there is difference between Muslim men and women with regards to dissolution of marriage, whether these differences have any rational reason or just a social, cultural and patriarchy criterion. Thirdly, they incarcerate the idea of equality to distinction and difference rather than idea of liberation of women from patriarchy, derogatory customs and practices; so that they can enjoy all human rights with dignity. For example, CEDAW had incorporated provision and mechanism to achieve substantial equality for women, but the declaration of non-interference[99] made government practice silence and suffered with internal contradiction- on one hand to be abiding by the provisions of CEDAW, on other hand stuck with non- interference policy. This could have been easily solved through this case and the non-interference policy could have been revoked.

[98] Sandra Fredman, Substantive equality revisited, 14 (3) *International Journal of Constitutional Law* 712–738, July 2016, *available a*t: https://academic.oup.com/icon/article/14/3/712/2404476 (last visited on June16, 2021).
[99] CEDAW: State parties, *available at:* https://www.un.org/womenwatch/daw/cedaw/states (last visited on May 11, 2020).

The Judiciary, Legislature and Executive need to make their contribution to transform the basic framework in CEDAW or the Constitution for achieving substantial gender equality to a reality. While delivering the judgments, the Court should consider feminist jurisprudence and it should reflect progressive but substantive claims. Thus, in the light of the above analysis the concept of substantive equality is not yet answered or achieved by the judgment or Act after it, rather it just invalidates a discriminatory practice without speaking about further steps to empower the victims. Efforts to achieve substantive equality necessitates acknowledging and addressing of the differences between women and men, and the variations in their actual circumstances. The various barriers that women face particularly in political, economic and social life due to their gender must be focused and so mere equal treatment of women and men will not be sufficient to address inequality. Therefore States have to implement laws and policies emphasizing substantive equality, allowing preferential treatment for women in education, employment, political participation, economic life and other areas, though it may appear to discriminate against men. In the context of Triple *Talaq* Act, it can be ensuring the safety and living of victims or even a temporary special measure or programs for their skill enhancements for jobs. The Act could have been drafted to consolidate the whole law of *talaq,* and its procedure. The Act is extolled as a major reformation, it's not so as the term reform implies some progress or improvement. Nothing new is evolved except 'turning the clock back' and reclaiming the past by just undoing the innovation of triple *talaq*. It is the duty of lawmakers to infuse ideas of human rights and gender justice into the law, making its themes contemporary relevant and beautiful with realisation of substantive equality.