TRIPLE TALAQ- COUNTER PERSPECTIVE WITH SPECIFIC REFERANCE TO SHAYARA BANO

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Abstract

Generally human rights are equated with more freedom and progress. However it becomes pertinent to note that conferring rights do not always result in emancipation. The major reason behind this exclusionary nature of human rights is the universal assumption on which it is based. The darker side of human rights most apparently manifests itself in case of women as they are caught at the intersection of community identity and the narrative of modernity. One such universalistic subject is the image of a thoroughly victimised Muslim women who is in need of protection through the liberal rights discourse. The current debate around triple *talaq*, centred on the Sharaya Bano and several batches of petitions as well as Supreme courts own *suo moto* PIL considers certain aspects of Islamic personal laws which amount to gender discrimination and hence violates the constitution misses the point of intersectionality. As per the liberal understanding of rights for empowerment of women we need to subordinate the category of religion and culture. However constitutional rights would remain a dead letter if we do not understand the manner in which identity politics unfolds especially in case of women. The whole triple *talaq* issue has become a battleground for the culture versus mordernity debate. It is important to realize that womenôs experiences cannot be understood in these reductive binaries as ñsheò is produced from the very power relations which subordinate them. In this paper the author deals with the question of triple *talaq* in the light of the recent petition filed in the Supreme Court for declaring such *talaq* invalid. The author argues that there is an already existing legal precedent established by the apex court with respect to triple *talaq* which should be followed instead of resorting to a confrontational approach which may become hegemonic to Muslim women themselves. The author shall advocate that taking cue from third wave feminism, the identity of Muslim women must be understood at the intersection of gender and religion.

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I Introduction

THERE IS a proliferation of media images of a *burqa* clad thoroughly victimised Muslim women who is in need of protection through the liberal rights discourse. Such representation of a universally victimised subject creates knowledge of the ótherô as oppressive and consequently an opposite self image of humane.Religious fundamentalism is often presented as a characteristic or feature of ótherô countries, `otherô worlds, and most frequently of course, the Islamic world and the Muslim community.[1]This practice is reminiscent of the imperialist project of civilizing the ñotherò where imperialism was justified on the pretext of ñwhite manôs burdenò where the knowledge production from the west created certain understanding about the culture of the non-west. Such discourse about the non-west was constructed through textual interpretation and education.

Such construction of the Muslim ótherô also shapes the Hindu identity. It is important to note that personal laws have become the pivotal in structuring the identity of both the Hindu and the Muslim community. The Hindu codification of personal law became the face of modernity of the community.Although it becomes pertinent to acknowledge that the codification did not empower Hindu women. These laws offer women limited rights to divorce, and includes the óright to conjugal rightsô.[2]In the following two decades, there were several cases where husbands approached courts to stop their wives taking up gainful employment in a place of their choice by filing petitions for restitution of conjugal rights.[3]

Further as far as polygamy is concerned with only the Brahmanical idea of marriage being codified where *saptpadi* was a sine qua non to marriage, several customary conceptions were done away with, giving the Hindu man an opportunity to solemnise marriage with impunity. However such codification was absurd as Hinduism was defined in the widest terms to include castes, sects and religions that did not follow Brahminical rituals, and further, among many communities, the ceremonies prescribed for a second marriage differed vastly from those followed for the first marriage of a virgin bride.[4]

Further though the section 13 of the Hindu Marriage Act, 1955 provides for the modes of divorce, section 29 (2) validates customary divorce. Hence, despite the law being codified, a

[1]Ratna kapur, ñThe Fundamentalist Face of Secularism and Its Impact on Women 's Rights in Indiaò 333 *Cleveland State Law Review* 47 (1999).
[2]Geetangali Gangoli, *Indian Feminisms: Law, Patriarchies and Violence in India*(Routledge, 2016)
[3]Flavia agnes, ñLiberating Hindu Womenò 15 *EPW* 10(2015).
[4]*Ibid.*

Hindu need not approach any state authority either for solemnising the marriage or for dissolving it, and can conveniently live outside the pale of official law.[5]

In 2005 the Supreme Court in *Rameshchandra Daga* v.*Rameshwari Daga*[6] while dealing with the problem with maintenance of Hindu women brought to forth the development in Muslim law which ameliorated the position of women. However such developments have been ignored in the recent debates around triple *talaq*creating an imagery of a victimized Muslim subject who is need of protectionist reforms. The problems which are common between the women of both the communities have been ignored.It seems as though domestic violence and desertion are unique problems faced by Muslim women.The violence Muslim women endured itself is not important; it is her Muslim-ness and the projection that she is the victim of archaic and oppressive personal laws which alone can give her that special status and set her apart from all other victims of domestic violence.[7]

In this paper the author shall deal with the question of triple *talaq* in the light of the recent petition filed in the Supreme Court for declaring such *talaq* invalid. The author shall argue that there is an already existing legal precedent established by the apex court with respect to triple *talaq* which should be followed instead of resorting to a confrontational approach which may become hegemonic to the Muslim women herself. The author shall advocate that taking cue from third wave feminism the identity of Muslim women must be understood at the intersection of gender and religion. The first part of the paper shall analyse the *Shayara Bano*v. *Union of India*[8]petition and the argument put forward by the same. The second part of the paper shall deal with the alternative legal remedies available to the Muslim women in the current legal set-up. The third part of the paper shall deal with a case study of *Mohd. Ahmad Khan* v.*Shah Bano Begum*[9]whereby the court pitched women rights against the Muslim identity which proved to be detrimental to the victimized women as inter-sectionality was not taken seriously.

II The case of *Shayara Bano*

The current debate around triple talaq is centred on the Sharaya Bano and several batches of petitions as well as Supreme courts own *suo moto* PIL to consider whether certain aspects of

[5]*Ibid.*
[6](2005)2SCC33.
[7]Flavia agnes, ñMuslim Womenôs Rights and Media Coverageò 15 *EPW* 22 (2016).
[8]WRIT PETITION (CIVIL) of 2016.
[9]AIR 1985 SC 945.

Islamic personal laws amount to gender discrimination and hence violates the constitution. The petition hence challenges the validity of triple *talaq* on the touchstone of article 14, article 15, article 21 and article 25.

It states: [10]

> It is submitted that religious officers and priests like imams, maulvis , etc. who propagate, support and authorise practices like talaq-e-bidat, nikah halala, and polygamy are grossly misusing their position, influence and power to subject Muslim women to such gross practices which treats them as chattel, thereby violating their fundamental rights enshrined in Articles 14, 15, 21 and 25 of the Constitution.

Then the petition goes on to explain the plight of the Muslim women who is suffering due to the abhorrent practice of triple *talaq*. Further it avers that:[11]

> The Muslim personal laws of India permit the practice of *talaq-e-bidat* or *talaq-i-badai*, which includes a Muslim man divorcing his wife by pronouncing more than one *talaq* in a single *tuhr* (the period between two menstruations), or in a *tuhr* after coitus, or pronouncing an irrevocable instantaneous divorce at one go. This practice of *talaq-e-bidat* (unilateral triple-*talaq*) which practically treats women like chattel is neither harmonious with the modern principles of human rights and gender equality, nor an integral part of Islamic faith, according to various noted scholars.The practice also wreaks havoc to the lives of many divorced women and their children, especially those belonging to the weaker economic sections of the society.

It is important to note that though the petition mentions several judgments which have dealt with the triple *talaq* conundrum; it does not rely on the ratio of any of the judgements but rather challenges the constitutional validity of the triple *talaq*. Further the petition discussed that as triple *talaq* is not an essential tenet of the religious belief of the Muslims it is not saved by article 25 of the Constitution of India. However the petition nowhere questions the inherent discretion given to the Muslim husband to pronounce *talaq* to the wife, rather it only

[10] *Supra* note 8.
[11] *Ibid.*

challenges the practice of triple *talaq*. Hence the Shayara Bano petition does not bring out the ills of triple *talaq*as it stands today.

Further in the public interest litigation here is no mention of Protection of Women from Domestic Violence Act, 2005 when it was clear that the woman had been subjected to worst kind of cruelty ranging from dowry demands to abandonment. There are several stipulations in the said act which provide for easier dispensation of justice especially considering the facts and circumstances of this case.

The above resulted in a predictable reaction from the Muslim Personal Board which saw this move as a question on their Muslim identity. The counter-affidavit by the All India Muslim Personal Law Board (AIMPLB) to plead that the Supreme Court has no jurisdiction to adjudicate over Muslim Personal Law since it is inextricably interwoven with the religion of Islam, which is based on Quaranic injunctions and is not a law enacted by Parliament, only serves to render the proceedings contentious and add to the controversy.[12]However such an argument does not hold good as the Supreme Court has in innumerable cases intervened in personal laws. Be it either *Shamim Ara* v. *State of U.P*[13]or *Mohd. Ahmad Khan* v.*Shah Bano Begum*[14]or *Danial Latifi* v. *Union of India*[15] the Supreme Court has been instrumental in reforming the personal legal position.

From the above it is clear that the petition has created a discourse whereby rights of the Muslim women can be only guaranteed by confrontation with the Muslim identity. It is important to note that both the ignorance of the legal development in the Muslim personal laws by the lawyers as well as the illogical intervention by the Muslim Personal Law Board has gone on to construct this divide of ‘us’ versus ‘them’. Such a divide has always proved to be detrimental to women as somewhere in this meta-truth of good and evil, oppressive and civilized the experiential realities of women are obliterated. It is important to understand that the Muslim women subject is formed from the very community which allegedly subjugates her. It is important for the courts to understand that constitutional rights would remain a dead letter if we do not understand the manner in which identity politics unfolds especially in case of women. The whole triple *talaq* issue has become a battleground for the culture v. modernity debate. It is important to realize that women’s experiences cannot be understood

[12]*Supra* note 7.
[13]2002 (7) SCC 518.
[14]*Supra* note 9.
[15](2001) 7 SCC 740.

in these reductive binaries as ñsheò is produced from the very power relations which subordinate them

IIILegal alternatives

There has been plethora of cases both in the Supreme Court and several high courts declaring instantaneous triple *talaq* to be invalid. The apex court in *Shamim Ara* v. *State of U.P*[16] has already invalidated instantaneous triple *talaq*. While quoting *Rukia Khatun* v. *Abdul Khalique Laskar*[17] the court observed:[18]

> the correct law of *talaq*, as ordained by Holy Quran, is: (i) that *'talaq*' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, '*talaq*' may be affected.

The court further added that the ñtalaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate.ò

The court further added:[19]

> None of the ancient holy books or scriptures mentions such form of divorce. No such text has been brought to our notice which provides that a recital in any document, incorporating a statement by the husband that he has divorced his wife could be an effective divorce on the date on which the wife learns of such a statement contained in an affidavit or pleading served on her.

Therefore from the above judgment it is clear that a plain affidavit or *talaqnama* without any efforts of reconciliation cannot effectuate a *talaq*.

Further in the *Dagdu Pathan* v. *Rahimbi Pathan*[20]the full bench of the High Court of Bombay held that a Muslim husband cannot repudiate the marriage at will. The court added thatñto divorce the wife without reason, only to harm her or to avenge her for resisting the

[16]*Supra* note 13.
[17](1981) 1 GLR 375.
[18]*Supra* note 13.
[19]*Ibid.*
[20]II (2002), DMC 315 Bom FB.

husbandôs unlawful demands and to divorce her in violation of the procedure prescribed by the Shariat is haramò.[21]

In *Mansroor Ahmed* v. *State (NCT of Delhi)*[22]the High Court of Delhi while interpreting the *Shamim Ara*[23] judgment held that:[24]

> A revocable talaq, the dissolution of marriage does not take place at the time of pronouncement but is automatically deferred till the end of the iddat period. This duration is specifically provided so that the man may review his decision and reconciliation can be attempted. A hasan talaq is revocable. So also are the first two talaq pronouncements in the case ccof ahsan talaq. Now, talaq-e-bidaat has also been held by me to be operative as a single revocable talaq.

In the recent ruling of*Shakil Ahmad Shaikh* v. *Vahida Shakil Shaikh*the High Court of Bombay reaffirmed that the plea taken by the husband that he had given talaq to his wife at an earlier date does not amount to the dissolution of marriage, unless the talaq is duly proved and it is further proved that it was given by following the conditions precedent, namely, arbitration/reconciliation and valid reasons.[25]

Hence from the above discussion it is clear that in order to pronounce effective talaq reconciliation is a *sine qua non*. Therefore it is safe to conclude that the abovementioned cases obliterate the distinction between *talaq-e-biddat* and *talaq-e-sunnat*. It is important to note that in the Shayara Bano petition there is no challenge with respect to talaq-e-sunnat therefore the decision of the cases shall not serve as a legal precedent. In fact the petition nowhere discusses the issues that plague the whole discretion debate.

Further it is also a settled law that the deserted wife is entitled to maintenance and such right holds good even if the husband has pronounced *talaq* or sent the *talaqnama*. In *Daniel Latifi case*[26]the court had held that the wifeôs right to maintenance is not extinguished after the *iddat* period but continues for her entire life.

Therefore there were a lot of available legal recourses which could have been resorted to by the petitioner rather than pleading for such controversial which has already been invalidated

[21]*Ibid.*
[22]2008 (103) DRJ 137 (Del).
[23]*Supra* note 13.
[24]*Supra* note 22.
[25]*Supra* note 7.
[26]*Ibid.*

by the Supreme Court back in 2002 had is being followed by all the high courts. However such negation of these alternate remedies creates an image of a thoroughly victimized Muslim woman who has been oppressed by the archaic personal law and can be only rescued by the Supreme Court. Such an all encompassing narrative completely invisiblises the long drawn feminist struggle which has successfully subverted the patriarchal practice prevalent in the community by approaching and negotiating with the same courts but without invoking the communal fervour.It is further important to note that such invocation would not change the lived experience of the Muslim women rather it places her at the crossroad as her oppression cannot be attributed to anyone source due to the interlocking between her Muslim identity and gender subjugation.

IV Not another Shah Bano

The best example of confrontational politics leading to actual victimization of the woman in question was the *Shah Bano* case.[27]The case pertained to maintenance to the Muslim wife after *talaq* had been pronounced. The court while upholding the abovementioned right under section125 of the CrPC observed that:[28]

> It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A commonCivil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.

The plea to invoke UCC and the adverse comments made by the court against the Prophet and Islam resulted in to a backlash from the Muslim community. It was seen by them as an attack on their cultural believes and faith and was perceived as a means to impose the

[27]*Supra* note 9.
[28]*Ibid.*

hegemonic idea of uniformity and universality on them. Therefore a statute based on Islamic jurisprudence was demanded. During this period the Muslim woman was situated within these sharply drawn binaries and was called upon to choose between her religious beliefs and community affiliations at one end and her gender claims at the other, which was indeed a difficult choice her.[29]

Such discourses led to Shah Bano renounce the maintenance given to her by the court under section 125. Ironically, the fury which was whipped up seemed to be divorced from the core component of the controversy, a paltry sum of Rs.179.20 per month, far too inadequate to save the middle-aged, middle class, ex-wife of a Kanpur-based lawyer, from vagrancy and destitution.[30] However Shah Bano declared that she would instead be a devout Muslim rather than claim maintenance.

Such a statement warrants introspection from both the side of the controversy. The woman who was presented as the face of oppression of the Muslim community declined the relief given to her. It is important to appreciate her subject position of not just being a woman but a Muslim woman. Heridentity was multifaceted and she wanted to achieve empowerment within the boundaries of her faith. Such an example brings us back to the question put forward by Gayatri Spivak that ñcan subaltern speak?ò

V Conclusion

The question remains that whether declaring the practice of triple *talaq* unconstitutional would ameliorate the condition of Muslim women more than the invalidation has done. Further such a move would pit the rights of a Muslim woman against her social and cultural believes.

It is important to understand that identity subversion is a very complex phenomenon. The problem with identity politics is that it does not transcendent difference but is rather shaped by the very difference. Drawing upon the post-modern scholarship the subjectivity of the Muslim women has to be understood to be constructed within the same socio-cultural context. For example, pious Islamic women may contest patriarchal regimes of Quaranic

[29] *Supra* note 7.
[30] Flavia Agnes, ñShahbano to Kausar bano: Contextualizing the "Muslim woman" within a communalized polityò in A. Loomba and R. A. Lukose (eds.) *South Asian Feminisms* 33-53 (Duke University Press,2012).

interpretation home, while at the same time articulating a sort of global solidarity.[31] It has to be understood that the identity of a Muslim woman is intrinsically linked to her Muslim-ness and cannot be divested from it. Therefore the law reforms cannot take into account the linear narrative of victimisation through the patriarchal Muslim community but rather also has to provide space for assertion of multilayered identities like these.

Here we stand confronted by some of the most intractable problems of the conflict of rights where self--chosen sedimentation of identity within a religious tradition is at odds with forms of universalistic modes of de-traditionalisation of the politics of difference demanding gender equality and justice.[32] Here comes to the recue the conceptualization of inter-sectionality were we can better acknowledge and ground the difference among us and negotiate the means by which these differences will find expression in constructing group politics.[33] So basically in case of Muslim women article 14, 15 or 21 cannot be seen to give a universal definition of equality or life applicable to all women. The conception of equality must also be informed by the difference in experiences of the women. It has to be understood that neither human rights are universal nor apolitical infact they can sometime, though unconsciously, become the political tool of oppression. Therefore the idea of equality which pitches the two identities which she is made from, against each other can never be a feminist achievement. It is a big success for feminist politics that now even the Muslim community is recognizing the *Shamim Ara* judgment and hence the whole community is acknowledging the invalidation of arbitrary talaq.

However even when gender concerns of the marginalised women hit the headlines, they do so primarily to strengthen the prevailing stereotypical biases against the community at large.[34]Hence ówomen rightsô is a multifaceted issue which is embedded in broader political processes and consequently requires a complex response. Such response has to engender in a communally vitiated environment to actually have an impact on the lives of Muslim women.In the current scenario when the case is put before the court and if it hears it even after the Muslim Personal Law Board recognising the *Shamim Ara*[35]decision then the court shall again pitch the ógender versus communityô debate thereby creating another Shah Bano.

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[31]Upendra Baxi, *Future of human rights*(Oxford University Press, NewDelhi, 2008).
[32]*Ibid.*
[33]Kimberley Crenshaw ñMapping the Margins: Intersectionality, Identity politics and violence against women of colourò 43*Stanford Law Review* 1299 (1991).
[34]*Supra* note 31.
[35]*Supra* note 13.