TRIPLE TALAQ DECISION : FINALLY, SOME JUSTICE FOR MUSLIM WOMEN

By
–K. RAMAKANTH REDDY,
Advocate, High Court at Hyderabad

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

First time on April 18, 1966 in Maharashtra to protect the right of Muslim women the social justice movement against triple talaq started. During the Rajiv Gandhi Government in 1986 Parliament enacted Muslim Women (Protection of Rights under Divorce) Act to overturn and subvert an earlier Supreme Court ruling in *Mohd. Ahmed Khan v. Shah Bano Begum and others*, 1985 (3) SCR 844; to grant maintenance to *Shah Bano*, a 62-Year old Muslim mother of five who had been divorced by her husband. Though, Parliament after this ruling limited divorced Muslim women to maintenance only for the iddat period (roughly three months) after which they would have to depend on the charity of relatives or Waqf Boards. For last 33 years till this August, 2017 however Hon'ble Supreme Court has constantly protected the Muslim Women Rights as when approached, the Supreme Court has ruled that the Muslim Women Act should be read with the constitutional guarantees provided to safeguard dignity and equality of women. Still, in the *Shah Bano* case, the Court merely urged the Government to frame the Uniform Civil Code. Also, in *Daniel Latifi and another v. Union of India*, (2001) 7 SCC 740, Supreme Court has also only upheld the right of Muslim women to maintenance till remarriage.

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

After proper examination on validity of this form of practice, this recent historical judgment of Constitutional Bench has declared the practice of unilateral divorce unconstitutional, it is now has become a settled principle that the Triple Talaq is not a fundamental part of Islam Religion as it runs in contrary to the principles of gender jurisprudence, equality, international human rights as well as Quran itself.

So, what is truly historical about this decision ?

In 22 countries including Pakistan and Bangladesh, Triple Talaq has been banned but in our country, when confronted by the religious men like All Indian Muslim Personal Law Board (AIMPLB), a non-Governmental organisation "defends" the application of Muslim Personal Law, and putforth the argument that the Triple Talaq is an integral part of Islam and the Courts should be

altogether excluded in interfering with the personal laws of the Muslim community. During the arguments in the present case, appearing on behalf of AIMPLB, former Law Minister, *Kapil Sibal* had argued that it is the Muslim Community which will initiate the change themselves by enacting the laws and not by intervention of Supreme Court. On the other hand, lawyers, human rights activists and members of civil society who oppose triple talaq had argued that Muslim Personal Laws should not be immune to change and that the practice of instant divorce is unconstitutional because it violates the fundamental rights of Muslim women. Though the Muslim religious leaders advocates that Quran by its various stipulations ensure that Triple Talaq if fair for both of the spouses but in reality if we see it only gives husband an enquivocal right to demand divorce from their wives. Even in the age of information technology, we have witnessed the misuse by horrific instances of Muslim men divorcing their wives via text and over messaging platforms like Skype and Whatsapp.

All these issues and disparity has led the Supreme Court to question its constitutional validity under the purview of particularly Articles 14 (equality before law), 15 (protection against discrimination) and 21 (protection of life and personal liberty) and started the hearing with the question being raised "Does the Constitution stop where family laws begins?"

To answer this question, the Supreme Court first examined whether this Triple Talaq practice is codified or a statutory law under the Muslim Personal Law (Shariat) Application Act, 1937) or merely an uncodified religious practice or 'personal law'. This aspect is important as the present existing position in this matter in 1951 has been laid down by Bombay High Court in *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 84. In that case, the Court held that family and personal laws is out of the jurisdiction of Courts for examination of any violation of fundamental rights and no judicial scrutiny can be done of the personal laws. So, the issue before the Supreme Court was that if this practice sanctioned the Shariat Act of 1937, it could be examined for violation of fundamental rights. On the other hand, if it found that triple talaq was a part of uncodified 'personal law', it would have to revisit the decision in *Narasu* and answer a second question as to whether uncodified personal law could be subject to judicial scrutiny for violating fundamental rights and whether the practice of triple talaq did in fact violate any fundamental right.

The majority outcome

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

Justice *Rohinton Nariman* with Justice *U.U. Lalit* held that the practice of triple talaq derives its statutory validity from the Act of 1937, and therefore is subject to a challenge for violating fundamental rights. Both of the Judges examined the freedom of conscience and free profession, practice and propagation of religion protected under Article 25 and held that instantaneous triple talaq is not essential to the practice of Islam and does not therefore benefit from the constitutional protection granted by Article 25.

They further examined whether triple talaq is inconsistent with any of the fundamental rights. While doing this the Judges followed the doctrine of manifest arbitrariness as a valid touchstone for examining the constitutionality of a practice, overruling a series of decisions that held the contrary view. The doctrine of manifest arbitrariness as per *E.P. Royappa v. State of Tamil Nadu and another*, 1974 AIR 555; strikes down any law under Article 14 by being capricious, irrational, disproportionate or excessive. The Judges went on to hold that

the practice of triple talaq violates Article 14 of the Constitution for being manifestly arbitrary. Specifically, Justice *Nariman* held :

> "..This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India…."

In a separate observation by Justice *Kurian* held that "triple talaq is bad in theology and therefore bad in law" and lacks legal sanctity. Justice *Joseph* differed from Justices *Nariman* and *Lalit*, and held that this talaq practice fall in the personal law and not regulated by the Shariat Act, 1937. He, however, relied on the earlier Supreme Court decision in *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518 and concluded that triple talaq was not integral to Islam, was against the tenets of the Quran and Shariat, and therefore constitutionally void.

The dissenting opinion

The dissenting opinion was delivered by Chief Justice *J.S. Khehar* with Justice *Abdul Nazeer* observing that Triple Talaq is an integral part of the Muslim Personal Law and it is not regulated by the Shariat Act, 1937. They also held that this practice doesn't violate any fundamental right of Articles 14, 15 and 21 and enjoys protection under fundamental right to freedom of Article 25 as triple talaq regulates the conduct of private parties and no constitutional remedy can be provided where there is no involvement of State actions. Thus, this minority opinion held that this practice is not in derogation to the constitutional values and fundamental rights, and directed the Government to consider legislating on the issue.

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

However, the prevailing decision by the majority Judges has stood on the correct stand of the customs and practices of Sunni Muslims while striking down the age old practice of instant divorce called triple talaq. This verdict is not against any judgment any institution, organisation or against Islam region. On the other hand, this decision has reinforced the true meaning and spirit of Quran. It has also traced the rule of law and human rights enunciated in our Constitution. It is a verdict which has done justice in favour of the Muslim women recognizing their human rights which has been denied even though Quran by its provisions provides equality of spouses in marriage and beyond.

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

We can say the August 22, 2017 will always be considered as a monumental moment in judicial history of India which overturned the status of gender equality for Muslim women. With the help of our

esteemed Judges of Hon'ble Supreme Court, India's Muslim women have achieved equality which was sought as unattainable since India's independence. This decision has established a sound relationship between Constitutional guarantees given to all irrespective of gender and religious structures of Islam.

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

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

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RIGHT TO PRIVACY: INDIAN PERSPECTIVE ON ITS RELEVANCE TO HUMAN RIGHTS

By

—**N. SRIDEVI**, M.Com., L.L.M.

"The right to privacy is protected as an intrinsic part of the right of life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part-III of the Constitution"[1].

Introduction:

Privacy is a qualified fundamental human right that is essential for the protection of human dignity which is the basic foundation upon which many other human rights are built. The right to privacy protects one from unwarranted interference and against arbitrary and unjustified use of power. Every individual has a right to privacy as part of his or her overall right to live with dignity without being interfered by any exercise of any fundamental freedom. Any unjustifiable interference with his right to privacy has to necessarily lead to legal consequences, if not there will be no meaning for individual rights at all. According to Black's law dictionary, privacy is referred as "right to be left alone", the right of a person to be free from unwarranted publicity and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned." This right is incident to person and not to property.

Privacy is generally a claim about the individual's right to restrict the availability of information about himself or herself. The justification for such restriction is typically couched in terms of a natural need for personal space, or control over the presentation of one's identity or self to the outside world.

1. *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 2017 SCC Online 996.