

From Shah Bano to Shayara Bano: Developing the Rights of Muslim Women

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Abstract

The present paper highlights the development and changes that have happened in the rights of the women belonging to the Muslim religion. The concern of the paper is the rights of Muslim women in terms of marriage and divorce primarily. We have attempted to trace the historical developments by focusing on the Quranic aspects of the same, and then the decision rendered by various courts along with the legislations have been examined. The reformatory nature of The Holy Quran and the logic behind the principle enshrined therein has been consistently highlighted throughout the paper. Excerpts and relevant discussions from the Constitutional Assembly debates have been considered in order to penetrate the fundamentals of the Constitution with respect to family law. The constitutional perspective of the Muslim personal law, consisting of rules relating to women along with the various criticisms faced by the same, has been addressed. The paper focuses on the era between the two historic judgments rendered by the Honorable Supreme Court of India in the cases of Mohd Ahmad Khan vs Shah Bano Begum and Shayara Bano vs Union of India. Various decisions on the subject were rendered by various subordinate courts during that crucial period. The paper first mentions the historical background to the rights and then begins to analyze the decision and its aftermath in a chronological order.

Keywords: *The Holy Quran, Personal law, Rights of women, Muslim law, Constitutional Assembly debates, The Constitution of India, Code of Criminal Procedure, 1973, Shariat Act, Iddat period, Muslim Women (Protection of Rights on Divorce) Act, 1986, Fundamental rights, Divorce, Marriage, Maintenance, Triple talaq, Talaq-e-biddat, Shah Bano, Shayara Bano, Islamic law, Uniform Civil Code*

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INTRODUCTION

It would be wrong to say that any system of rules either in the primitive era or in the modern civilized age is free of lacunas. In this paper ahead, we will focus on the rights of the Muslim women, about which many debates have happened throughout the nation. Our country is a mix of various flavors, the Muslim system being one of the most controversial yet attractive to the tongue. A lot has been said on the subject, a lot of advantages have been taken of the prevailing gaps in the system and communication but before making a comment, it is essential to understand the history of developments particularly focusing on the decisions of several courts as well as the relevant verses of the Holy Quran. The Holy Quran itself reflects its reformatory nature. This paper would continue to analyze the

transition that has happened in the rights of the women belonging to the Muslim community beginning from the historic judgment of the Shah Bano case [1] and ending with the recent major reform brought by the Hon'ble Supreme Court of India in the judgment rendered by the five-judge bench in the Shayara Bano case [2].

“Of all systems of the law”, observed Syed Ameer Ali, “the Islamic system furnishes, from a historical point of view, the most interesting phenomenon of growth. The small beginnings from which it grew up, and the comparatively short space of time within which it attained its wonderful development, marks its position as one of the most important juridical systems in the civilized world” [3]. It is indeed true that the introduction of Islam brought important reforms. Regarding the

position of women, Islam provided an efficient legal framework for the protection of her dignity and safeguards against her exploitation [4].

The first Prime Minister of independent India, Shri Jawaharlal Nehru, once said that “You can tell the condition of a nation by looking at the status of its women” [5]. It is pertinent to mention here that the Islamic law, amongst other progressive principles, enshrines the principle of free marital choice for both sexes, breakdown theory of divorce, divorce by mutual consent, and the retention of an independent personality and freedom of action by the woman after her marriage. Unfortunately, the Legislature failed to carve out progressive legislations relating to the Muslim Personal law with the demand of time. In a democracy like ours, the Legislature consists of elected representatives who must legislate and work for the welfare of the state, and the state includes women undoubtedly. It would not be correct to say that no developments have been made by the legislature in the field of Muslim women’s rights; the changes were brought and were implemented as well but the whole process was extremely slow and hence was often neglected. The reasons for this kind of laid back and rigid attitude of the legislators of the country forms the basis of the dark, evil and corrupt side of the democracy where it is often very easily forgotten that this form of government was essentially for the benefit of the people.

In this paper, the constitutional perspective of the Muslim personal law consisting of rules relating to women would be discussed along with the various criticisms faced by the Muslim law. At the time of the drafting of the Constitution of India, the members of the Constituent assembly participated in heated debates over the concept of the personal law; this paper will also discuss some of those views as they have left a huge impact on the law that exists today.

In the present paper, we have highlighted primarily the plight of the Muslim married women. Marriage, as an institution, is encouraged by Islam because family life not only ensures survival of humans but also

guarantees social stability and a dignified existence for both woman and man [6]. According to the Holy Quran, “They (wives) are your garments (O’ men) and you are their garments” [7]. Thus, in Islam, men and women are given an equal position in marriage; it is not merely a union but that of mutual love and respect. The concern of today is that the true meaning of the term “marriage” in Islam must not lose its sanctity. The Prophet has said “there is no celibacy in Islam. Marriage is a religious duty and is consequently a moral safeguard as well as social necessity” [8]. Prophet Mohammad placed woman on a footing of almost perfect equality with men in the exercise of all legal powers and functions [9,10].

The word Islam means ‘peace and submission.’ In its religious connotation, it is understood as ‘submission to the will of God.’ Muslim Law is admitted being based upon a well-reasoned system of jurisprudence providing many rational and revolutionary concepts, which could not be conceived by the other systems of law in force at the time of its inception [11]. The only fear that haunts the minds of the well-wishers of the state and its people is the lack of reason in the socio legal order of the society today. In the name of religion or due to any other possible reason, one must not forget that our forefathers have left a Constitution to be guarded by us against all the forces. No force shall ever be able to convince or compel us to deceit our constitutional values.

THE DISPUTE LEADING TO SHAH BANO: HISTORICAL BACKGROUND

Before continuing with the history behind the conflict, one must know that who is a Muslim because here we will be dealing with the rights of Muslim women only. According to Shariat, a child born of parents, either of whom is or both of whom are Muslim, is presumed to be a Muslim. For one to be a Muslim it is not necessary that he should be an orthodox believer in that religion; it is enough if he professes Islam in the sense that he accepts unity of God and the prophetic character of Muhammad [12].

Serious debates on the issue of personal laws being ultra vires the draft Constitution were going on at the time of drafting of the Indian Constitution. Article 35 of the draft constitution provided that “The State shall endeavor to secure for citizens a uniform civil code throughout the territory of India” (now Article 44 of the Constitution of India). The arguments to this Article were in the sense that the personal laws should be kept out of its purview. Mohammad Ismail stresses in his speech that the right of every community to follow its personal law is a part of fundamental right to religious freedom [13]. KM Munshi contested this argument by saying that [14]:

- (a) Even in the absence of Article 35 it would be lawful for Parliament to enact a Uniform Civil Code, since the articles guaranteeing religious freedom gave to the State power to regulate secular activities associated with religion;
- (b) In some Muslim countries, e.g., Turkey and Egypt, personal laws of religious minorities were not protected;
- (c) Certain communities among Muslims, e.g., Khojas and Memons did not want to follow the Shariat; but they were made to do so under the Shariat Act, 1937.
- (d) European countries had uniform laws applied even to minorities;
- (e) Religion should be divorced from personal law; the Hindu Code Bill did not conform in its provisions to the precepts of Manu and Yajnavalkya;
- (f) Personal law discriminated between person and person based on sex, which was not permitted by the Constitution; and
- (g) People should outgrow the notion given by the British that personal law was part of religion [15].

Dr. Ambedkar, however, rejected the arguments against the draft Article 35 and instead concluded that “the freedom which India had achieved required reform of the social system and, therefore, personal laws could not be excluded from the jurisdiction of the state.” He pointed out that the State was only claiming the “power to legislate” and not an “obligation” to do away with the personal laws [16].

It is true that we had our Constitution when

Shah Bano’s tragedy was discovered but still there was no proper legislation in this respect to prevent the discrimination of women based on sex which was clearly prohibited by the Constitution. Personal law was inconsistent with the mandate of the supreme law of the land yet the guards of orthodox practices and customs intervened time and again to prevent any attempt at achieving the uniformity of laws. Here we would like to quote the words of Asaf AA Fyzee, “The separation of civil law from the moral or religious law can no longer be delayed in Islam”. He further says that “The first task is to separate logically the dogmas and doctrines of religion from the principle and rules of law. The essential faith of man is something different from the outward observance of rules...ethical norms are subjective, legal rules are objective” [17]. In his article titled *Womanhood in Islam*, Dr. Tahir Mahmood stated the “The tragedy of the modern age is that while the non-Muslims have either awfully distorted or gravely misunderstood Islam’s stand on women, the Muslims, in general, are themselves either wholly ignorant of their true laws in this regard or have unconsciously allowed these laws to be eclipsed by some un-Islamic practices which they have imbibed from others” [18]. There is no doubt that attempts at this kind of separation might seem unreligious to some, but one must not forget that even a resource as precious, valuable and pious as water starts stinking when kept still over a period. Change is a universal rule, the only constant custom, according to us.

The conflict in the Constituent Assembly debates could be felt even today; all the opinions were heard but even then a progressive modern approach was adopted by the makers of our Constitution. It is very sad to realize that there still exist some who either lack the courage to break the shackles of self-acclaimed religious duties or have dived so deep into the habits of dominance and dangerous oppressiveness that they have forgotten the real message of the Prophet. The Constitution comes to the rescue of those who are being discriminated against in any way. Part III of The Constitution of India guarantees such freedoms and provides that any law inconsistent with these precious freedoms to

be void to the extent of the inconsistency. Today, we believe that the law must be kept distinct from religion, we affirm the view of the great Islamic scholar Asaf A.A. Fyzee saying that “I believe in truth, beauty and goodness as applied to life. I believe in the virtue of brotherliness, manliness, fidelity, generosity and humility. I believe in Islamic form of prayer, but not in prescribing and enforcing a soulless ritual which has no meaning left in modern life” [19].

Article 13 of the Constitution of India [20] clearly declares that “All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.” According to sub-article (3) of Article 13, “law” includes even any custom or usage having in the territory of India the force of law. Muslim law was applied by the Privy Council in many cases that came before it, it was considered as the law relating to the Muslims and thus it is our humble belief that it comes under the purview of “laws in force”. Hence the Muslim personal law, in so far as it discriminates based on sex between men and women or takes away any of the fundamental rights must be declared void to the extent of the inconsistency. In the case of *Krishna Singh v. Mathura Ahir* [21], it was observed by the Supreme Court that “Part III of the Constitution does not touch upon the personal laws.” This ruling was in consonance with the observation made by MC Chagla and PB Gajendragadkar in *Narasu Appa’s case* [22]. Our views stand in contradistinction to these two decisions and hence we strongly feel that all personal laws are hit by Article 13(1). Mohammad Ghose also argues in the same sense that “it is difficult to see why a personal law should be ‘supra fundamental rights’ while even constitutional law is not so” [23].

In addition to this, the Constitution itself, in Entry 5 of List III of the Schedule 7, provides that the Union as well as the State has the power to regulate “...all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law” [24]. The State, within the Constitutional

limits, is duty bound to act in matters which involve the conflicts relating to personal laws. The State must protect those who are being discriminated against the spirit of the Constitution and when such responsibility has been endowed upon the State, we see no reason why the personal laws must be kept out of the purview of the Constitution.

The Quran provides for the maintenance of divorced women in the following words: “For the divorced women let there be a provision in the kindness; this is an obligation for those who are mindful of the God” [25]. When a marriage under the Muslim personal law is dissolved by divorce, the wife is entitled to maintenance during the period of iddat [26]. The period of ‘Iddat’ upon divorce is three menstrual courses or three lunar months. If the wife is pregnant, the period of iddat would be up to the time of delivery of the child or the usual three months, whichever is longer. However, a fair and reasonable interpretation of the above-mentioned verse would mean that the divorcing husband should make a reasonable provision for the subsistence of his divorced wife without any period of limitation, which means for life or till she remarries.

It is important to mention here the beauty of Chapter IX of the Code of Criminal Procedure where a wife is entitled to maintenance from her husband when she is unable to maintain herself and the husband, having enough means, neglects or refuses to maintain her [27]. A wife here includes a divorced wife also [28]. There are no barriers of religion; the section is a secular one and hence applicable to Muslim women as well. Therefore, the question of a wife being irrevocably divorced by her husband under the Muslim personal law is irrelevant for the applicability of the said section. This was already concluded by the Hon’ble Supreme Court of India in the earlier two decisions in the case of *Bai Tahira v. Ali Hussain* [29] and in *Fazlunbi v. K. Khader Vali* [30]. In *Shah Bano*, the matter was referred to a larger bench because a Bench consisting of learned judges, Murtaza Fazal Ali and A Varadarajan, JJ. were of the view that those cases were not correctly decided. The apex court has also propounded that “Section 125 was enacted in order to provide a

quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of enough means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion” [31]. Shah Bano Begum was one of such unfortunate wives who had to fight for getting this explicit right belonging to her. The matter was crystal clear. Muslim wives were being discriminated against other women of the nation just because and based on their religion. A Muslim husband enjoyed the authority of irrevocably pronouncing divorce on his wife and could even refrain from giving her maintenance beyond the period of iddat whereas for women professing any other religion than Muslim, a proper procedure of divorce was there in accordance with the law. This was against the spirit of Article 15(1) of the Constitution [32]. But unnamed fear stopped the authorities from declaring so.

At this juncture, it is relevant to further highlight how the prevailing Muslim personal law was unjust to their women. Here we are not pondering upon the question as to whether the Quranic principles were being followed in their true sense because the interpretations done and the Shariat was far from the law so declared by the Prophet. It is some celebrated scholars and people of great knowledge who have misguided the law for centuries. What the Muslims of this country have been practicing is indeed an adulterated Shariah, which surely does not reflect the true teachings of Islam [33]. Even the Holy Quran says that: “And women shall have rights; equitably similar to the rights against them” [34].

In his famous “last sermon” delivered at Mecca, he appended a warning in these words: “Fear God in the matter of women. Verily women have rights against you, as you have rights against them” [35].

The human rights of women are non-negotiable, be the person Hindu or Muslim or

Parsi or Christian. Article 14 of the Constitution, which rejects discrimination based on sex and religion, mandates a uniform code for women’s rights [36]. The learned Chief Justice (as he was then) in the Narasu Appa’s [37] case said that “It must not be forgotten that in a democracy the Legislature is constituted by chosen representatives of the people. They are responsible for the welfare of the State and it is for them to lay down the policy that the State must pursue.” If the Parliament does not do it, the Court may be bound to declare it. Indeed, apart from Article 44, there is the fiat of Article 14 to treat both genders with equal justice. And Article 14 is non-amendable and immediately binding. Its egalitarian potential when tested in court, will force changes in all personal laws [38]. Those who take the defense of the protection given to religion and its practices under Articles 25 and 26 of the Constitution must not forget that the right is not absolute and is subjected to public order, health, and morality and to other provisions of Part III of the Constitution. Thus, the prevailing Muslim law in respect of the rights of women relating to divorce and maintenance was not only contrary to the constitutional values and the Fundamental Rights but was also a result of the wrong interpretation of the holy texts of Islam.

Shah Bano’s story began when her advocate husband drove her out of her matrimonial home in the year 1975 and aspired to hide in the veil of personal law for not giving maintenance to his wife. In April 1978, the respondent filed a petition against the appellant under section 125 of the Code of Criminal Procedure asking for maintenance at the rate of Rs. 500 per month. After a few months, on November 6, 1978 the appellant divorced the respondent by an irrevocable talaq. The talaq was pronounced again to escape his responsibility of providing maintenance and thus he was able to confidently submit before the court that now because Shah Bano ceased to be his wife, there was no obligation on him to pay further maintenance to her. He further added that he had already paid her maintenance for two years and had also deposited the amount of dower during the period of iddat. In August 1979, the learned Magistrate directed her

husband to pay a sum of Rs. 25 per month to the respondent wife Shah Bano by way of maintenance. On revision, the sum was enhanced to Rs. 179.20 per month. Thereafter her husband approached the Supreme Court of India by special leave.

The Decision in Shah Bano

After years of confusion regarding the right of maintenance of Muslim women, a five-judge bench of the Honorable Supreme Court dealt with the issue and decided the issue but only partially, according to us. The question was whether a Muslim divorced wife is entitled to maintenance under Section 125 of the Code of Criminal Procedure, 1973.

The true position today is that if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself [39]. In this historic judgment, the Court endorsed the view that Section 125 of Code of Criminal Procedure is purely of a secular character. It was highlighted that the liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion. Moreover, it was highlighted that if there was a conflict between the Muslim personal law and the provisions of the CrPC, the latter would prevail.

The honorable Supreme Court further analyzed the concept and meaning of the term 'Mehr'. It concluded that it must not be understood as an amount payable by the husband to the wife at the time of divorce, rather it is an amount payable to the wife in consideration of marriage. The Court observed that "Some confusion is caused by the fact that, under the Muslim Personal Law, the amount of Mehr is usually split into two parts,

one of which is called "prompt", which is payable on demand, and the other is called "deferred", which is payable on the dissolution of the marriage by death or by divorce. But, the fact that deferred Mehr is payable at the time of the dissolution of marriage, cannot justify the conclusion that it is payable 'on divorce'...Divorce may be a convenient or identifiable point of time at which the deferred amount must be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is meant by the expression 'on divorce', which occurs in section 127(3)(b) of the Code."

A larger bench of the Supreme Court in this case [40] not only directed for payment of maintenance to a divorced Muslim wife in accordance with the Code of Criminal Procedure but also found the same to be in conformity with the principles enshrined in the Holy Quran. Thus, the appeal was dismissed, and the judgment of the High Court was confirmed.

AFTERMATH OF THE SAGA

The decision in Shah Bano received widespread anger of the so-called protectors of Muslim law, not even mindful of the rights of the divorced Muslim women. The beneficiary was a Muslim person only. The protests and counter protests over the Shah Bano judgment persisted. Initially, the Rajiv Gandhi-led Congress party which had won the parliamentary elections of 1984 by a sweeping majority, favored the judgment [41]. However, after suffering losses in state elections in some Muslim-dominated regions, the government changed its approach. It succumbed to vote-bank politics. Extraordinary pressure was brought on the government to change the effect of the decision by the agency of legislation. As a result, the Muslim Women (Protection of Rights on Divorce) Act was passed in 1986 [42]. According to the MWA, Mehr and maintenance were to be paid to a divorced Muslim woman only during the three-month iddat. It effectively deprived Muslim women of the right to file a maintenance petition under Section 125 of the CrPC [43]. The issue was not yet settled. It received several criticisms. The Act, instead of doing any good, further mitigated the scope of

enlargement of the maintenance rights of Muslim women.

In *Maharshi Avadhesh v. Union of India* [44], the Act was challenged constitutionally but the attempt remained unsuccessful. The constitutional validity of this new legislation was thereafter again challenged by way of a writ petition [45] as Section 3(1)(a) of the Act [46] mentioned that a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. It was highlighted that the former husband is not absolved from his statutory liability from making with the provision for his divorced wife...even after the iddat period [47]. Before this challenge made to the constitutionality of the Act, there were two views prevalent among the various High Courts. One side conformed to the view of the High Court of Andhra Pradesh taken in the case of *Usman Khan v. Fatimunnisa* [48], saying that the liability of the Muslim husband to pay reasonable and fair maintenance is confined only during the period of iddat. A similar view was adopted by the High Court of Madras and other High Courts as well [49]. Another view pertained to the minority opinion delivered by Bhaskar, J., who made it clear that the Legislature intended payment of maintenance only for the iddat period and not beyond that, but the liability of making 'reasonable and fair provision' has not been confined to the period of iddat [50].

The Act was intended to see that divorced woman does not become a destitute or thrown out on the street after divorce without any means to sustain herself [51], but instead the provision for maintenance was being given a contradictory meaning at sometimes. Therefore, in *Danial Latifi*, it was contented that the Act was un-Islamic, unconstitutional and it has the potential of undermining the secular character of the Constitution. It was further contented that the Act was violative of the Right to Equality because it takes away the benefit of Section 125 of the Code of Criminal Procedure from the Muslim women and discriminates them as a result without any reasonable basis. The learned Solicitor General appeared for the Union of India and

vehemently opposed the challenge and contended that "Personal law is a legitimate basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution" [52]. Shri Y.H. Muchhala, the learned Senior Advocate appearing for the All India Muslim Personal Law Board, clearly stated that the main object of the Act was to undo the Shah Bano case [53]. Thus, it was a clear fight between the two organs of the State. The Court came to the conclusion that the Act actually and in reality, codifies what was stated in Shah Bano case. The High Court decisions which were contrary to this view of the Hon'ble Apex Court stood overruled by this decision. Thus, once again the fundamental rights of a vulnerable class of society were protected by an active judicial system by declaring, in *Danial Latifi & Anr vs Union of India* [54], that:

1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives was unable to pay maintenance, the magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

3) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

This landmark ruling has been followed by the other Courts of the country at many times [55]. In the year 2003, the Supreme Court observed, in the case of [56] that even when the wife was pregnant at the time of marriage and the

husband had full awareness of this fact but later divorced his wife, the wife was entitled to get maintenance from her husband. The fair provision for maintenance even includes normal educational expenses when the wife is a student and wants to pursue her studies [57]. It was again held in the year 2010 that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the CrPC after the expiry of period of iddat also, as long as she does not remarry [58]. Thus, the rights of Muslim women now are at par with the rights of the other women of the nation, so far as the concept of post-divorce maintenance is concerned.

THE CONTROVERSY IN SHAYARA BANO

Talaq literally means untying a knot, being released from a covenant. It is a derivative of *itlaq*, which means sending away or untying the knot of marriage. The latter is the technical meaning [59]. There are many modes of divorce recognized under the Muslim law but in this research, we will keep ourselves restricted to the concept of ‘talaq-e-biddat’ as the plight of Shayara Bano revolved around this irrevocable form of divorce only. As the name signifies, talaq-e-biddat is a form of talaq based on innovation, introduced during the second century of the Mohammedan era. When a husband pronounces talaq three times during one single tuhr either in one sentence, ‘I divorce you thrice’, or in separate sentences, ‘I divorce you, I divorce you, I divorce you’, or, a single pronouncement made during a tuhr clearly indicating an intention to irrevocably dissolve the marriage, ‘I divorce you irrevocably’, it constitutes talaq-ul-biddat [60]. Thus, this is a form of divorce where there is no scope for arbitration or stepping back, there is no cooling period, what happens is an instant irrevocable talaq. Even amongst Muslims ‘talaq-e-biddat’, is considered irregular [61]. The petitioner, in Shayara Bano [62], was divorced irrevocably by her husband by the pronouncement of triple talaq due to which she approached the Hon’ble Supreme Court with a prayer to declare ‘talaq-e-biddat’ unconstitutional. Back in the year 1994, in the case of *Rahmat Ullah v. State of Uttar Pradesh* [63], the Allahabad High Court

observed that an irrevocable talaq (talaq-e-biddat) is unlawful because this kind of talaq is against the dictates of the Holy Quran and is also against the provisions of the Constitution of India. The Courts have declared so time and again but this time the issue was before a bench of five learned judges of the Apex Court of this democratic nation to be settled for all and with a hope to put an end to this derogatory practice to women. It is pertinent to mention here the Verse 4:35 of the Holy Quran as it shows the basis and the true procedure of talaq:

“If ye fear a breach Between them twain appoint two arbiters one from his family, And the other from hers. If they seek to set things right, Allah will cause Their reconciliation. For Allah hath full knowledge; And is acquainted with all things.”

The Prophet had also declared *talaq* to be “the most detestable to God of all the permitted things.” As pointed out by Ameer Ali:

He restrained the power of divorce possessed by the husbands...and towards the end of his life he went so far as practically to forbid its exercise by the men without the intervention of arbiters or a judge [64].

Thus, even the Quran points to the appointing of two arbiters to achieve a reconciliation or to set things right between the couple. At this juncture, it must be clear that the concept of instant, unreasonable, and irrevocable talaq have no place in the holy Quran. Talaq is generally not encouraged in Islam unless a reasonable cause exists, and the correct procedure is followed. This was also highlighted by Justice Bahrul Islam, then of the Guwahati High Court [65]. He held that the correct law on the point is:

- (1) That talaq must be for a reasonable cause; and
- (2) That it must be preceded by an attempt for 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 Supreme Court of India has referred to these observations made by Justice Bahrul Islam in the case of *Shamim Ara v State of UP*

[66] in the year 2002 and has expressed agreement with these. The decision of the Apex Court was reiterated and affirmed by the Supreme Court in the year 2007 [67] and has also been followed by several High Courts [68] of the country.

In the case of *A. Yousuf v. Sowramma* [69], Justice Krishna Iyer has observed that “The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce.” In the later year 1979, Justice Baharul Islam’s judgments in two Assam cases of 1978-79 also decided that a talaq not following a proper Quranic procedure would be legally invalid [70]. A year before the decision came in the Triple Talaq case [71], in December 2016, the High Court of Kerala stated that, “It is to be noted that Qur’an nowhere approves triple talaq in one utterance and on the other hand promotes conciliation as best method to resolve the marital discord. The method and procedure of divorce as above has been referred to by all leading Islamic scholars. They have also frowned upon triple talaq in single utterance to effect divorce saying that it revolts against Allah’s law. One of the eminent scholars Sheikh Yusuf al Qaradawi in his book, “The Lawful and the Prohibited in Islam” refers to method of divorce and holds that triple talaq in single utterance is against God’s law” [72].

THE CHANGE: SHAYARA BANO JUDGMENT

Diverse Views and Contradictory Contentions

The contentions raised by the petitioner’s learned counsel, Senior Advocate Mr. Amit Singh Chadha were accepted by the Court to the extent that there is no mention of ‘talaq-e-biddat’ in the Quran and that ‘talaq-e-biddat’ is recognized only by a few Sunni schools, prominently by the Hanafi sect of Sunni Muslims. The petitioners also contended inter alia, that ‘talaq-e-biddat’, is not in conformity with the unambiguous edicts of the Quran, and

therefore, cannot be considered as valid constituents of Muslim ‘personal law’. It was submitted, that no court should find any difficulty, in declaring a custom or usage, which is sinful, as unacceptable in law.

Mr. Anand Grover, Senior Advocate, made a frontal attack to the ‘hadiths’ relied upon by the AIMPLB as being recorded later in point of time, and hence being less credible and authentic, as with the passage of time, distortions were likely to set in. Ms. Indira Jaising, Senior Advocate, contented that triple talaq is violative of the right to equality of Muslim women guaranteed under Articles 14 and 15 of the Constitution to the extent that a Muslim man exercised power to declare unilateral divorce, but the Muslim woman has no control over such unilateral, arbitrary, extra-judicial divorce and her marital status. It was thought of being against the dignity of Muslim women.

Senior counsel Kapil Sibal was of the view that court should not interfere in the practice of triple talaq as it is a matter of faith. He had also said that as Muslims had been practicing triple talaq for at least 1400 years, it cannot be termed un-Islamic. Senior advocate Raju Ramachandran, Counsel for Jamat-ulema-i Hind, contented that when a person agrees to get married under his/her personal law, he or she is also making a conscious waiver of the right to be governed by the “secular non-religious” law or by a purely civil law.

The Court was assisted by Senior Advocate Salman Khurshid who played the role of amicus curiae in the matter endorsing the view that instant triple talaq “cannot be justified or given legal validity”. He argued that the practice “was sinful but legal”.

The Decision: Majority Opinion

The majority opinion in the case was delivered by Kurian Joseph, J., R.F. Nariman, J., U.U. Lalit, J. (as they were then). The honorable Court observed that “What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well”. The court disagreed with the statement that triple talaq is an integral part of the religious practice. It was also clearly

observed and laid down that the whole purpose of the 1937 Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2, which include talaq. The 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression “laws in force” in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Thus, it was concluded that the practice of pronouncing this kind of divorce is violative of Articles 14, 15 and 21 of the Constitution of India.

The Dissenting Opinion

The minority opinion was rendered by Hon’ble Chief Justice Jagdish Singh Khehar and Hon’ble Justice Abdul Nazeer. The opinion endorsed the view that, “Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion”. The judges arrived at the conclusion, that ‘talaq-e-biddat’, is a matter of ‘personal law’ of Sunni Muslims, belonging to the Hanafi school; it constitutes a matter of their faith, it has been practiced by them, for at least 1400 years. Thus, the judges declared that it has the protection of Article 25 of the Constitution and they cannot nullify and declare as unacceptable in law, what the Constitution decrees them, not only to protect, but also enforce.

CONCLUSION

It is the junk of long history that we have to clear up, this rust of misuse and misconduct that we have to remove in order to discover the true Islamic law on women. An unbiased eye ready to see the reality, an open mind free from preconceived notions and prejudices and a searching heart capable of distinguishing between the true principles and their corrupt practice, can easily unveil Islam’s unadulterated teachings on the socio-legal status and rights of women. Let us try [73].

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that “The State shall endeavor 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 common Civil 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 [74]. In the aftermath of the historic Shayara Bano decision [75], a step was taken by the Government of India by introducing The Muslim Women (Protection of rights on marriage) Bill, 2017. The Bill was aimed at curbing the practice of talaq-e- biddat and criminalizing. The same was passed in December 2017 in the Lower House of the Parliament. In September 2018, The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was promulgated by the President of India while the 2017 Bill was pending in the Council of States. The said Ordinance was promulgated by virtue of clause (1) of Article 123 of the Constitution of India [76] as the President was satisfied that it was necessary for him to take immediate action in the circumstances. Successive petition was filed in the Supreme Court by the Samastha Kerala Jamiathul Ulema challenging the validity of the said Ordinance on the ground that there was no such urgency to justify its promulgation. Senior Advocate Raju Ramachandran even went to the extent of calling it “a fraud on the Constitution” [77]. A bench of Chief Justice Ranjan Gogoi, Justice K.M. Joseph and Justice Hemant Gupta declined to go into the merits of the Ordinance. Every Ordinance is to be laid before both Houses of the Parliament and shall cease to operate at the expiration of six weeks from the reassemble of the Parliament or if resolutions disapproving the Ordinance are passed by both the Houses before the expiration of the said period [78]. To meet this situation, a new Bill was introduced by the Government and on 27 December 2018, The Muslim Women (Protection of Rights on Marriage) Bill, 2018 was passed by the House

of People with 245 votes in favor of the Bill and 11 against with 0 abstentions. The said Bill is currently pending in the Upper House of the Parliament.

In the golden words of Dr. Ambedkar, the father of our Constitution, "...I personally do not understand why religion should be given this vast, expansive jurisdiction to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system which is so full of iniquities, so full in inequalities, discriminations and other things, which conflict with our fundamental rights, it is, therefore, quite impossible for anybody to conceive that personal law shall be excluded from the jurisdiction of the State [79].

Coming one final time to the concept of Muslim marriage, we would like to produce, the words of Justice Badar Durrez Ahmad of the Delhi High Court in the case of Masroor Ahmad [80], where he observed that, "Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to divorced women and even men who are left with no choice to undo the wrong or any scope to bring about a reconciliation. It is an innovation which may have served a purpose at a particular time in history...I hold that a triple talaq be regarded as one revocable talaq." Thus, the time has come to understand the inspiring words of Justice V.R. Krishna Iyer that, "Cultural autonomy is not hostile to national unity...No human sacrifice, woman torture, religious storage of bombs, starvation of children as a penance or running a Devadasi system can be suffered in our Constitutional order. Counterculture cannot claim immunity on the alibi of religious freedom" [81].

Presently, petitions regarding the sinful practices of polygamy, Nikah Halala, and female genital mutilation prevalent in the Dawoodi Bohra community, are pending in the Hon'ble Supreme Court of India. In the recent judgments [82] rendered by the Supreme Court of India, the Court has delved extensively about Fundamental Rights and freedoms by upholding the constitutional

guarantee. The court has emphatically approached the concept of constitutional morality where the individual liberty should be protected and must be recognized in accordance with the procedure established by law. The basic cardinal value of our constitution is equality and human dignity. We have a strong hope imbibed in our hearts that the constitutional morality will once again be preserved by this Court which is the guarder of the Fundamental Rights of the citizens. Justice V.R. Krishna Iyer has rightly said in his book that, "Once we accept the fundamental that even the Koran is dynamic, not dated, and tunes itself to changing times and national compulsions, the issue is simple. Don't condemn luminous Islamic law as deadened and inalterable as the laws of the Medes and the Persians but use the dynamics to reform to make the system radiant enough to contribute many new values to the common civil code now in embryo" [83]. The statement reflects a solution and is worth pondering upon.

The preface of Dr Tahir Mahmood's book *Religion Law & Society* contained the words of Dr. Sir Mohammad Iqbal:

"Kahta hoon wahi baat samajhta hoon jisey haq
Naey ablah-e-masjid hoon na tahzib ka farzand"
(I say only what I consider to be the truth
Neither a mosque fool I am nor a modernist).

With these words, we would like to highlight our firm belief that extremism results in negation of logic, wisdom and righteousness. Thus, the attitude of reform and development must be adapted for once and for all, at least by the institutions of this country.

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Cite this Article

Isha Kapoor, Jai Saini, From Shah Bano to Shayara Bano: Developing the Rights of Muslim Women. *Journal of Family & Adoption Law*. 2018; 1(1): 18–30p.