

From Shah Bano to Shayara Bano : A Long Journey By Muslim Women

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‘Talaq’ is the Arabic word for the phrase ‘I divorce you’. Under Muslim personal law, a Muslim husband may repudiate his marriage by pronouncing ‘Talaq’ three times, continuously, in the presence of two other witnesses. Though this form of divorcing one’s wife, also known as Talaq-ul-Biddat, is the least preferred method of divorce among Muslims, it is a valid and rampantly used one. But just like the ongoing debate about the Muslim personal law’s concept of having four wives, the constitutional validity of Triple Talaq has also been challenged on many an occasion.

The Quran, the holy book of Muslims, does not recognize Talaq-ul-Biddat and considers it to be a spiritual offence. It directs that both parties in a marriage must make all attempts at reconciliation before declaring a divorce as irrevocable. Thus, legalizing the practice of triple talaq only surmounts to an impediment in the right of a Muslim woman to practice and profess her religion, by unleashing a spiritual offence upon her and violating Article 25 of the Constitution.

Another pre-requisite to any divorce is that it must not be whimsical and must be preceded by several attempts to reconcile. It must be the last resort in a failing marital relationship, which Talaq-ul-Biddat does not allow. Also, it can only be used by the husband and the wife has no say in the process. This makes this practice a gross atrocity towards Muslim women and their fundamental rights.

It is undeniable that in this scenario, a Muslim woman is helpless against the decades of unfair practices. Not only can the wife be divorced by her husband for any reason, upon his whims and fancies, but she is also denied Mehr (a form of compensation provided by the husband to a divorced woman to aid her independence after marriage). It, thus, falls upon the courts to act as torchbearers of justice and curb this unjust practice at the earliest.

From Shahbano to Shayara Bano, it has been a long journey. But has anything changed for the Muslim woman, rendered homeless by husbands with ‘talaq, talaq, talaq’ muttered at one sitting that renders her destitute in one stroke?

In the Shabano case 1984 the issue was of the right to maintenance of the divorced Muslim woman that the courts allowed, and the legislature denied. In Shayara Bano's case 2016, the very right to pronounce triple talaq is being challenged.

Shahbano was a destitute woman, divorced by her husband, who took the case to the courts and after a long while reached the Supreme Court for justice. All that she was asking was for the Rs 500 allowance under the Criminal Procedure Code made available by the law of the land for destitute women of all religions, and finally the apex court granted her the maintenance in what was a landmark ruling of the 1980's. Just as the ageing Shahbano was digesting the import of a ruling that would alleviate some of her misery, she became the centre of a political storm with then Prime Minister Rajiv Gandhi succumbing to the pressure of Muslim fundamentalists and negating the judgement with a new law Muslim Women (Protection of Rights on Divorce) Act 1985. That there was little to protect the Muslim woman was evident from the law that denied maintenance rights for divorced women of the community, and effectively removed Muslim women from the purview of the Criminal Procedure Code with even the paltry Rs 500 being seen as too much by the conservative men who had united in and outside Parliament to oppose the verdict.

Today Shayara Bano from Uttarakhand has approached the Supreme Court against the regressive triple talaq, polygamy and the demeaning practice of halala where the divorced woman can only get married to the husband in case they have a change of mind, by consummating her marriage with another man. In all three cases, the woman is treated as an object without individual rights or dignity. Shayara Bano is a simple woman who was divorced, after a history of marital abuse, through a telegram that the local maulvi told her was valid. She has not seen her children now for over a year, and has been denied all rights including visiting rights. She underwent countless abortions---"I do not even remember how many"---by the husband who made her take contraceptives, and made ceaseless demands on her and her family for more dowry. The local clerics insisted her husband was within the law, and Shayara who is also not very clear why she is suddenly in the spotlights, but she is hopeful that a favourable ruling will help her and women like her.

There are, no doubt, striking resemblances between the Shah Bano case of 1985 and Shayara Bano case of 2016 as regards the plights of the victims. But the social outcome of the Shayara Bano case this year could be strikingly different from that of the Shah Bano case three decades ago when the high expectation of the reformation of the Muslim Personal Law had come to a naught. Both the cases

pertained to Muslim women. Both the Muslim women had moved the court to seek gender justice. In both the cases, these women were asking for the court's intervention against certain provisions of Muslim Personal Law that discriminated against women.

Shayara Bano was subjected to the same misery of instantaneous divorce based on triple talaq by her husband in October last year after 15 years of marriage. In her case, adequate maintenance was not the issue; she went on to challenge the very provision of instantaneous triple talaq (talaq-e-bidat) and two other evils associated with it – polygamy and *nikah halala* (a debased practice that forces divorced women willing to go back to their husbands to consummate a second marriage before returning to the original fold). Her petition wants the Supreme Court to declare all three discriminatory practices as illegal and unconstitutional as they violate the rights guaranteed by the Constitution under Article 14, 15, 21 and 25.

Shayara Bano's husband has opposed her plea on the same ground that Shah Bano's husband had done – being Muslims, they were governed by the Muslim Personal Law and triple talaq, polygamy and *nikah halala* are sanctified provisions under Muslim Personal Law.

In both the cases, the All India Muslim Personal Law Board (AIMPLB) has taken the patriarchal view and justified that 'no maintenance to a divorced wife' and 'triple talaq as a mode to divorce wife' were integral norms of the Muslim Personal Law. It made the preposterous contention that if the provision of triple talaq was banned, the Muslim husbands would be forced to kill or burn their wives! (Do such men deserve to live in a civilised community?) In any case, the AIMPLB insisted that it was beyond the purview of the court to adjudicate on the personal and family matters of Muslims.

In the Shah Bano case, all the three courts – the lower court, the high court and the supreme court – adjudicated that Section 125 of the CrPC did not make any exception for the Muslim community and therefore, it would override the provisions of the Muslim Personal Law.

In the Shayara Bano case, as the Supreme Court is hearing the matter, no decision has been taken yet. No decision is likely to be taken soon unless the Supreme Court constitutes a Constitution bench and holds its hearing on a priority basis. Given the Supreme Court's predilections and earlier judgments in similar cases, the judicial outcome of the Shayara Bano case is most likely to go the Shah Bano way.

The societal outcome is, however, likely to be different in both the cases on several counts: in last three decades, the number of Muslim women who want Muslim Personal Law to be reformed has increased

manifold. In 1985, when Shah Bano case became a major bone of contention between the Muslim clerics and the judiciary, the All India Muslim Personal Law Board (AIMPLB) was able to mobilise hundreds of thousands of Muslims on the streets who defended the obscurantist provisions of the law. But supporters of Shah Bano within the Muslim community who hit the streets were just a few hundreds.

That is why Rajiv Gandhi, the then prime minister, who had initially supported the Supreme Court judgement and had fielded Arif Mohammad Khan, a progressive Muslim MP, to defend the decision on the floor of Parliament, later changed his stance when he came to realise that his party would lose the major chunk of the Muslim vote bank. He pushed through a new law in Parliament to override the outcome of the Supreme Court judgment in the Shah Bano case. Ironically, the Act was named Muslim Women (Protection of Rights in Divorce) Act, 1986 where as it actually undermined the very rights the Muslim women had been granted by the Supreme Court in its Shah Bano judgement the previous year.

Like in 1985\86, AIMPLB still retains a large base among the orthodox Muslims who refuse to get out of the antiquated tradition (they are impervious to the fact that many Muslim-majority countries including Pakistan have reformed the Muslim Personal Law and have banned triple talaq and have provided for maintenance for the divorced Muslim women).

But, at the same time, the number of Muslim women and men supporting Shayara Bano today is many times larger compared to the corresponding figure during the Shah Bano case. The Bharatiya Muslim Mahila Andolan (BMMA), which has impleaded itself in the case in the Supreme Court in support of Shayara Bano, has more than one lakh registered members.

The Muslim clerics must know that the time has come for them to realise that they are not the sole spokesmen of the Muslim community. They succeeded in pressurising Shah Bano to disown the Supreme Court verdict and give up on maintenance in 1986, but they cannot repeat the feat in 2016. One-lakh strong Muslim women have come out in the open to challenge their authority. They have the support of the silent millions of oppressed Muslim women.

So the system of triple talaq, ultimately, puts unfair power in the hands of Muslim men. When a man is allowed to marry and divorce as many women as he wishes (and can even be married to four women at any point of time), with no authority having the right to question him about his actions, women tend to become an expendable commodity for him. And in this day and age, when every social and political forum is striving to achieve gender equality, it leaves the Muslim women unarmed and vulnerable.

Conclusion

Shayara Bano case is most likely to be the catalyst to reform the Muslim Personal Law in India. That would be a blow for gender equity and justice. That would be a just victory for the underprivileged Muslim women over the patriarchal orthodoxy of the Muslim clerics.

However in Dec 2016, The Allahabad High Court had observed in a case that triple talaq was “cruel” and judicial conscience was disturbed. The centre has also asked the Supreme Court to determine certain questions like,

1. Whether triple talaq and polygamy are protected under the fundamental right to religion guaranteed under Article 25 of the Constitution?
2. Whether right to religion is subject to important fundamental rights like right to equality (Article 14) and right to life (Article 21)?
3. Whether personal law can be termed as a law under Article 13 of the Constitution?
4. Whether triple talaq and polygamy are compatible with India 's obligations under international treaties and covenants to which it is a signatory?

So inspite of guarantee of the Constitution, Muslim Women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during the commencing of the first marriage, resulting in denial of dignity and security to her. At times when talaq over text, emails and phones are becoming common, a declaration from the apex court is sought, saying that sec2 of the Muslim Personal Law (Shariat) Application Act, 1937 which permits Triple talaq and practice of talaq halala is unconstitutional as it violates fundamental rights guaranteed under Article 14, Art 15 and Art 25 Of the Constitution.

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