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Triple-Talaq: Muslim Women's Rights and Media Coverage

Flavia Agnes

Abstract: Despite the large number of positive court judgements in favour of Muslim women in India, the media prefers to endorse the view that once the husband pronounces talaq, the wife is stripped of all her rights. Similarly, articles by experts, while focusing on the need to declare instantaneous triple talaq invalid, pay little attention to the rights laboriously secured from the trial courts, the high courts and even the Supreme Court by many Muslim women.

Shayara Bano faced severe domestic violence for nearly 15 years (she is 35 years old) that apart from physical assaults included demands for dowry, prevention from meeting her family, and forced multiple abortions leading to health problems and depression. After she was sent back to her parents' home by her husband, he sent her a talaqnama by post.

Why did Shayara Bano accept this torture for 15 years? Why did she not secure her rights while she was living in her husband's home or soon thereafter, by approaching a trial court in her vicinity and availing of the remedies which are open to her under a secular statute, the Protection of Women from Domestic Violence Act, 2005 whereby she could obtain reliefs such as maintenance, child custody / access and protection from future violence?

Two choices were open to her even after she received the talaqnama. She could approach the court and plead that the arbitrary triple talaq was invalid by relying upon the landmark ruling,

Shamim Ara v State of UP[i] and claim the reliefs she would be entitled to, as a wife. Alternatively, if she wished to accept the talaqnama and bring to an end the oppressive marriage, she could file under the Muslim Women (Protection of Rights upon Divorce) Act, 1986 (Muslim Women's Act) accept the divorce and claim a lump sum settlement. This is an option available to Muslim women who, unlike women from other communities, would not need to go through a laborious, time consuming and expensive court process to secure a judicial divorce.

This is what thousands of Muslim women routinely do – file proceedings in magistrates' courts for enforcement of their rights under various legal provisionslike the Domestic Violence Act, 2005, the Muslim Women (Protection of Rights upon Divorce) Act, 1986 or maintenance under Section 125, CrPC(Criminal Procedure Code).

But for Shayara Bano, this was not to be, as the legal strategy crafted by her lawyer, whom she had approached to transfer a case filed by her husband, Rizwan Ahmed in the Allahabad Family Court to her home town was a high profile but cumbersome one. It is a public interest litigation (PIL) in the Supreme Court challenging triple talaq on the ground that it violates the fundamental rights of a Muslim woman guaranteed under the Constitution.

Contextualising the PIL

It is interesting to examine the context under which a little known lawyer practicing in the Supreme Court, Balaji Srinivasan, who has no claims to be an expert on Muslim family law struck upon this strategy.

In October, 2015, while examining the provisions of the Hindu Succession Act, Justices Anil R Dave and Adarsh K Goel of the Supreme Court gave a renewed call for enacting a uniform civil code (UCC) in the context of discriminatory Muslim personal laws, on the ground that they violate the fundamental rights of Muslim women by permitting triple talaq and polygamy and sought responses from the Attorney General and the National Legal Services Authority of India on whether "gender discrimination" suffered by Muslim women should be considered a violation of fundamental rights.

When the lawyer realised that Shayara Bano's husband had sent her a talaqnama, it dawned on him that he would receive instant fame and make history, if he used her case for filing a PIL taking recourse to the very same formulation that the Supreme Court had used during the earlier case - triple talaq, a violation of fundamental rights of Muslim women. The astute lawyer sought only a limited remedy of abolishing "instantaneous triple talaq" and not triple talaq itself, which is permitted by the Quran if the three utterances are spread over 90 days. According to him the PILs filed by non-governmental organisations (NGOs) in the past were dismissed as they were not filed by an affected party and because they pleaded for the enactment of a UCC. The case filed by him would be tagged on to the earlier reference to the Chief Justice to constitute a special bench to examine the core issue of framing a UCC.

Legal Precedents

Anyone familiar with the developments within the Muslim Personal Law would know about the plethora of case law piled up over a decade and a half, declaring instant triple talaq invalid. Hence the verdict in this case would not be a legal precedent.

In 2002, in a landmark ruling in Shamim Ara v State of UP[ii] the Supreme Court invalidated arbitrary triple talaq and held that a mere plea of talaq in reply to the proceedings filed by the wife for maintenance cannot be treated as a pronouncement of talaq and the liability of the husband to pay maintenance to his wife does not come to an end through such communication. In order to be valid, talaq has to be pronounced as per the Quaranic injunction. The term "pronounce" was explained as "to proclaim, to utter formally, to declare, to articulate". While setting aside the judgements of the two lower courts, the family court and the Allahabad High Court, the Supreme Court commented,

None of the ancient holy books or scriptures mention 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. Unfortunately, this landmark ruling did not receive wide media attention and was not discussed in public forums. However, it became the basis for several later rulings by various high courts which have held that in order to be valid, talaq has to meet the quaranic injunctions.

In 2002, in Dagdu Pathan v Rahimbi Pathan[iii], the full bench of the Bombay High Court held that a Muslim husband cannot repudiate the marriage at will. The court relied upon the following words of the Quran, "To divorce the wife without reason, only to harm her or to avenge her for resisting the husband's unlawful demands and to divorce her in violation of the procedure prescribed by the Shariat is haram." The court ruled that all the stages like conveying the reasons for divorce, appointment of arbitrators, conciliation proceedings between the parties are required to be proved when the wife disputes the fact of talaq before a competent court. A mere statement in writing or oral disposition before the court regarding talaq in the past is not sufficient to prove the fact of divorce.

In 2004, in Najmunbee v Sk Sikander Sk Rehman[iv], the Bombay High Court reiterated this position and held that a Muslim husband cannot repudiate his marriage at will. He has to prove supporting reasons for his decision and it cannot be based on a mere whim. Muslim law mandates pre-divorce reconciliation between parties through the intervention of arbitrators.

In Dilshad Begaum Ahmadkhan Pathan v Ahmadkhan Hanifkhan Pathan[v], the Sessions judge had accepted the contention of the husband that he had pronounced talaq in the presence of witnesses in a masjid. Hence, the order of maintenance of Rs 400 awarded to the wife by the trial court was quashed. But on appeal, the Bombay High Court held that though the husband had proven that he had pronounced talaq it was not valid and legal as the additional requirements had not been proved like the reasons for divorce, the appointment of arbitrators and conciliation proceedings to bring about reconciliation. The failure of such proceedings or situation where it was impossible for the marriage to continue had not been proved. A compromise was arrived at which recorded in a document that the husband had agreed to transfer one third of his land to his wife if he failed to cohabit with her or pay maintenance to her. The court held that this document was not acted upon by the husband and he did not fulfill the additional requirements. Hence the talaq pronounced by the husband was held to be invalid.

In 2007, in Riaz Fatima v Mohd Sharif[vi], the husband had pleaded that since he had divorced his wife she was not entitled to maintenance. He produced the photocopy of a fatwa obtained by him regarding the validity of the talaq. He also disputed the paternity of their minor child. Rejecting the husband's contention, the magistrate's court had awarded maintenance to the wife and child. But the Sessions court overruled this decision and set aside the order of maintenance.

In appeal the Delhi High Court laid down clear guideless regarding the process of proving talaq:

Divorce must be for a reasonable cause that is mandatory of the Holy Quran. Therefore, when a dispute arises, the husband has to give evidence showing the cause which has compelled him to divorce his wife.
He has to prove that there was proclamation of talaq thrice in the presence of witnesses or in a letter. Till then the talaq is not valid.
The husband would also have to prove that an attempt had been made for settlement/conciliation prior to the divorce.
There has to be proof of payment of meher (dowry) amount and observance of iddat (the period of waiting by a woman after divorce or the spouse's death before she can marry again).
The court held that in the present case there was insufficient evidence to prove that the husband had pronounced talaq on his wife. A mere statement before the court by the husband, stating that he divorced his wife on a particular day, would not suffice. All the pre-requisites have to be fulfilled before a Muslim husband can divorce his wife.

In a recent ruling, the Bombay High Court in the Shakil Ahmad Shaikh v Vahida Shakil Shaikh[vii] 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 viz arbitration / reconciliation and valid reasons. The mere existence of a document like a talaqnama is by no means sufficient to render a talaq valid. It is not sufficient that the prescribed expression has been pronounced thrice, the stages it is preceded by are required to be pleaded and proved before the court.

In these cases, the wife had approached a civil court for maintenance and the husband had pleaded that since he had divorced his wife, he was not liable to maintain her. This is due to a misconception which prevails even among legal scholars and Muslim women's groups that a Muslim husband is not liable to pay maintenance to his deserted wife, if the husband pleads that he has pronounced talaq or has sent her a talaqnama.

The authoritative Constitution Bench ruling in the Daniel Latifi case[viii], while upholding the constitutional validity of the Muslim Women's Act enacted after the controversial Shahbano

ruling[ix] has clearly stipulated that a Muslim woman's right to post divorce maintenance is not extinguished after the iddat period and the provision for maintenance must be made for her entire life. Even this ruling has not been widely publicised.

Hence the view that a plea of divorce made in a written statement or a talaqnama sent by post will deprive a Muslim woman of her right to post divorce maintenance is erroneous but continues to be adopted by ill-informed lawyers. Hence even after the receipt of the talaqnama Shayara Bano could have initiated proceedings to enforce her rights under the Muslim Women's Act or under the Domestic Violence Act in a local magistrate's court.

Instant Media Hype

Rather unfortunately, despite the plethora of judgements cited here, instead of highlighting the positive judgements in favour of Muslim women the media has preferred to endorse the view that once the husband pronounces talaq, the wife is stripped of all her rights. Due to this misconception, Shayara Bano received wide media publicity as the first Muslim woman to challenge the Constitutional validity of instantaneous triple talaq and it has been projected that finally Muslim women will get some respite from their oppressive personal laws. Overnight Shayara Bano was transformed into a star, as the news of the PIL spread like wild fire, just as Shahbano who fought for her right of maintenance under the provisions of Section 125 of the CrPC was rendered a household name three decades ago. Parallels are drawn between these two women whose struggles are projected as iconic because the media has taken a fancy to these cases and has projected them as heroic struggles.

It is wrongly projected that Muslim women in India are devoid of rights and the only recourse open to them is to challenge their personal laws in the Supreme Court. It seems as though domestic violence and desertion are unique problems faced by Muslim women, a misfortune that has befallen upon them by an archaic and oppressive legal regime which needs to be reformed through the intervention of the apex court in a top down manner, in order to secure for them the dignity enshrined in the Constitution. It seems that by declaring instantaneous triple talaq invalid, the violence suffered by Shayara Bano over the last 15 years will be vindicated and justice will be meted to her and all other women who are similarly situated.

In the prevailing media frenzy there is no space to raise simple questions about the options available to her under other the various common statutes such as the Domestic Violence Act for, after all, she is a Muslim woman and the domestic violence she suffered cannot be placed under a general category. It must be given a special Islamic hue for the violence to be taken seriously by the media. The violence she 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. Without such framing, the violence she suffered would command no special status, and may easily be dismissed as the "routine" violence suffered by women in India.

Islamic Scholars and Legal Developments

Several articles written by experts, while focusing on the need to declare instantaneous triple talaq invalid, have paid scant attention to the volume of case law on this issue and the achievements of scores of Muslim women for well over a decade and laboriously secured their rights from the trial courts, the high courts and even the Supreme Court.

Islamic Scholars like Zeenat Shoukat Ali, have referred to the pristine Islamic law to hold that the practice of arbitrary instantaneous triple talaq is not known to Muslim law and a declaration by the Supreme Court to outlaw this practice is long overdue. However these scholars do not make any reference to court rulings which have upheld the rights of Muslim women over several decades and have declared such practice un-Islamic.

Islamic scholar and a former member of the Planning Commission Syeda S Hameed who enjoys the unique reputation of presiding as a qazin over a Muslim marriage which according to her is a paradigm shift unheard of in India within the Islamic cultural traditions, in a recent article ("This Reform must begin within" The Hindu, 27 April, 2016) has expressed her concern that the proceedings in the Supreme Court may only serve to polarise public opinion. It will pit Muslim clerics against secular groups pressing for state intervention and "provide the masala to the electronic and social media." Stereotypical images of Muslim women and Muslim men will be flashed as the backdrop to sharply divided panels who will engage in mutual acrimony. Whichever side "wins", the impact of internal democratisation and reform on Muslim women who seek to negotiate their rights within the faith would receive a setback. It will also provide a

boost to the anti-Muslim propaganda of the Rashtriya Swyamsevak Sangh (RSS) and other Hindu right wing outfits and may even fuel communal violence in the country which in her opinion, is best avoided as it may result in loss of innocent lives of people at the margins from both communities.

On the other hand, the intervention 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 Quranic injunctions and is not a law enacted by Parliament, only serves to render the proceedings contentious and add to the controversy. Their claim is pure illogic since the Board had intervened in many important rulings such as the Shahbano and Daniel Latifi (cited above) ones. It was also instrumental in pressuring the government to enact the Muslim Women's Act in 1986 and the Dissolution of Muslim Marriages Act, during the pre-independence period.

Instead of opposing the authority of the Supreme Court it would be more prudent for the Board to assure the Supreme Court that the internal processes of declaring arbitrary talaq invalid are in progress and proceedings in the Supreme Court may hinder the process of democratisation, not as a strategy to stall the proceedings, but with the genuine concern for the welfare of the community.

Conclusions

If the Supreme Court declares "instantaneous triple talaq" invalid and lays down guidelines for the three utterances to be spread over 90 days, while Shayara Bano's name will be etched in gold in the annals of Muslim personal law reform, in practical terms, what would its impact be upon her personal life? The litigation is bound to isolate her family that belongs to a conservative social mileu while the legal case will be referred to the trial court to determine her claims through another round of litigation!

In a recent interview to the media, Shayara Bano, is reported to have replied to the question – is there more communal intolerance today than before? thus "No, I don't think the situation is like that. There is no communal intolerance between Hindus and Muslims." To another question, about the "Bharat Mata ki jai" slogan controversy her response was, "I feel all Muslims should

say ‘Bharat Maa ki jai’there is nothing wrong with us raising this slogan”. While Shayara, a victim of domestic violence, cannot be criticised for her answers, the questions reflect the insidiousness of the media and are an indicator of how she may be manipulated with the motive of pitting her against her community within a politically volatile situation. As the case drags on in court, such comments will serve to alienate her from her community within the now familiar formulation “gender versus community” and may eventually lead to her retracting her claim just the way Shahbano was compelled to do three decades ago.

Notes

[i]2002 (7) SCC 518
[ii] Cited above
[iii] II (2002) DMC 315 Bom FB
[iv] I (2004) DMC 211 Bom
[v] II (2007) DMC 738 Bom
[vi] I (2007) DMC 26 Del
[vii] MANU/MH/0501/2016) Bombay High Court dated 20-01-2016

[viii]Danial Latifi v. Union of India, (2001) 7 SCC 740
[ix]Mohd. Ahmad Khan v. Shahbano Begum, AIR 1985 SC 945