

**MUSLIM WOMEN STUDIES**

# Judicial Interventions of Muslim Women Rights: A Study from Shah Bano to Shayara Bano Case and its aftermath

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## Abstract

The post colonial politics of Muslim personal law, women right and minority right in India has intensified since the Shaha Bano case 1985. The case of Shaha Bano the court deal the question was whether the right provided by the section 125of the Crpc prevails over the parties law in case where disagreement arise, the court stated that a Muslim women is entitled to maintenance under this clause and that would apply to her even if it conflict with Muslim personal law however back in 1986 the prevailing political atmosphere government passed the [Muslim protection on divorce Act] 1986. This made the husband bound by Law to maintenance to divorced wife only for the period of Iddath.

Year after in 2001 the constitutional validity of the above act was challenged in Danial Lathifi and Anr vs. Union of India. Later in 2017, in Shayara Bano vs Union of India Supreme Court constitution Bench ruled that the practice of instant triple Talaq is unconstitutional. This Article analyses and compared the two-land mark judgment related to Muslim women Right and to what extent judiciary can intervene in the personal law of the citizen.

**Key Words:** Minority right, Muslim personal law, legal pluralism, two land mark supreme court verdict



## INTRODUCTION

Outward manifestations of prejudice and border discriminatory practices, based on the misrepresentation that Muslim women are differentiated across Gender, Class and community and observe a verity customs and traditions like other Indian women, they are subject to the interface between gender citizenship and community within the Indian social political and economic context, and to pressures and constraints of group identity for political purposes. More over that, Rather than a single Law, Muslim women are depend on the different interpretation of the Sharia.

For Indian Muslim women, this means being subject to a combination of principles varying from the very traditional and patriarchal to a relatively modern egalitarian social role. Unless India's constitutional Ideals of religious non-discrimination, equality before law and the equality of all Indian citizens are upheld the confidence of Indian Muslim women and the wider community to bring about the much needed reform in personal law, which are contented with international human rights standers and based on the ethical principles of Islam. Furthermore, there is a need to remove social prejudice against women and to design and implement policies to ensure the participation of Indian women-including Muslim women in politics and economic development of the country<sup>1</sup>. Today Muslims at twelve percent of the population are India's largest minority. Islam came to Indian subcontinent at different period of time and was absorbed in verity of ways. Yet Muslim rule lasted for almost eight centuries, leaving an indelible impression on the history, culture, politics and administration of India.

Therefore, Muslim are not a single homogenous community in India, over 350 regional or ethno-linguistic Muslim group exist in India. Cultural diversity among Muslims including attitudes, habits, language and tradition and a non uniform diffusion of Islam over the century had resulted in a variety of Muslim law and customary practices within Muslim community in India<sup>2</sup>. There is a general notion that the Muslim family is influenced by Muslim law or Sharia. This implies that Muslim family and communities are in some way, uniquely different from non Muslims. The wide verity of customary practice indicate that Muslim community have either discarded strict adherence to the Sharia and the Muslim community or the status of Muslim women is defined solely by Islam<sup>3</sup>. Islam is therefore in practice is rich and diverse and more electric than its orthodox theological dimension.

Personal Law [law covering family relations, marriage, divorce, inheritance, custody right etc] is a contested arena for the women movement. Personal laws are



governed by the respective religious law. Accordingly Muslim women were under the purview of Muslim personal law. The Muslim personal law [Sharia] was passed in 1937, with the aim of formulate an Islamic law code for Indian Muslim. British who were at this point in time governing India were trying to ensure that Indians were rule according to their own cultural norms. When it came to distinguishing between law made for the Hindus and those for the Muslims, they laid out the statement that ‘clear proof of the usage will outweigh the written text of law’ in the case of Hindus and Muslim on the other hand, the writing in the Quran would be of foremost importance. Since 1937 there for the Sharia application Act mandates aspect of Muslim social life. The act lay out that in matter of personal dispute the sate hall not interfere. The primary source of the Muslim personal law was Quran. This was supplemented by Ijma-[consensus] the argument of Muslim scholar on point of Islamic law, Qiyas-an analyzing made arising the available sources when the existing law mare not applicable to a particular case. Due to British period, in the initial year they had maintained a policy of non interference with religious practice in India. But in later years would prove to be a potent weapon to de-stabilize India<sup>4</sup>. Initially through the charter of 1753, the British gave both Hindus and Muslim freedom to practice their personal law. In 1772, the Governor General of India, Warren Hastings had laid down that the laws of Quran will be applied to Muslim

In 1834, the first law commission was appointed with Lord Macaulay as its chairman. The commission prepared a draft penal code and submitted it to the government of India on 14 October 1837. This again left the personal law untouched and they continued to be governed by religious tenants. Mean while in the 1927, November the British government appointed the Simon Commission to review the working of the government of India act 1919 and propose constitutional reforms for India. As a result, leaders of the nationalist movement responded to the challenges by drafting the Nehru Report 1928. The main recommendation of Nehru Report was that India should be given Dominion Status with the Parliamentary form of Government with Bicameral legislature; there should be Federal form of Government in India with Residuary power to be vested in centre<sup>5</sup>. And it recommended Nineteen Fundamental Right including equal rights for Women, right to form union and universal adult suffrage.

Thus in the 1930’s Muslim league took up the case of codifying the Sharia as part of the law of British India. It sought to end the confusion in court over which law would apply to Indian Muslims. So they started codifying Muslim law and the Sharia Act was passed that even now form the bases of Muslim personal law in the



country<sup>6</sup>. While there were many compromise made in the passing of the Sharia Act like excluding Agricultural land from it purview to ensure that Muslim in Punjab are not given inheritance rights, there were also occasion when the Muslim personal law was way ahead of the Hindu customary law. Even it did not give equal justice to women in case of Talaq- e- biddath, Nikah halala, and Muslim husband permitted to have polygamy. After Independence Indian judiciary pronounced number of land mark judicial verdict related to Muslim personal law, especially Shah Bano case in 1985, and Shayra Bano case on 2017. This Article discusses the Triple Talaq and its journey through land mark judicial pronouncement. And tried to compare the different response to the two land mark judgment related to Triple Talaq in the last three decades.

India suffers from a type of communalism developed by British imperialist to undercut the nationalist movement. British used religious identity as a tool of political mobilization and despite the effort of the leaders of the independent movement, the consequent political spirit between Hindu and Muslim increased over time<sup>7</sup>. Their dedication to the idea of tolerance, equality since India independence became incompatible with Shah Bano.

Mohd Ahmad Khan vs. Shaha Bano Brgum and ors [1985] popularly known as the Shaha Bano case, is regarded one of the turning point in the struggle for equality of Muslim women in India and it is an important part of Indian polity. In this case Shaha Bano went to the court and requested maintenance for herself and her five children under section 125 of the 1973 of the CRPC.

The Supreme court clearly said that Triple Talaq cannot deprived a divorced Muslim woman of here right to maintenance if she is unable to support herself or her children after her husband has divorced her, prima facie, this practice violates Article 14 [equality before law] Article 15 [Freedom to propagate any religion] and Article 21 [protection of life and personal liberty] Article 25 [which provides freedom of conscience and free profession, practice and propagation of religion.

The contradiction caused by the constitutional guarantee of equality and non discrimination of women and the continued applicability of personal law were brought to light in the Shaha Bano case. This law suit was a turning point in the legal system because this ruling has highlighted the significance of providing maintenance to divorced Muslim women who are unable to work and support themselves<sup>15</sup>. But in the contrary however in 1986, the prevailing political atmosphere the government enacted the Muslim women [protection on right on divorce] Act 1986, which made



the husband bound by law to pay maintenance to a divorced wife only for the period of iddath<sup>12</sup>.

Year after that in 2001, the constitutional validity of the Muslim women [protection on divorce Act] 1986 was challenged in *Danial Latifi and Anr vs Union of India*, where the supreme court stated that the husband responsibility to pay maintenance under the act extended beyond the period of iddath. Iddath is the waiting period a lady follow before getting married to another guy after her husband passed away or gets divorced. The length of the iddath term is contingent [often 3 months].

Later in the year 2017 land mark judgment came which upholstered the draconian practice. That is the *Shayara Bano vs Union of India*, better known as triple talaq case gave India a historical judgment that declared the practice of triple Talaq to be unconstitutional<sup>10</sup>. This case led to the ban of the Muslim practice of triple talaq. It is a process of divorce under the Muslim Sharia law, where a Muslim can instantly divorce his wife by pronouncing the word Talaq, three times without any state intervention. The means of communication might be in any form i.e., written, oral or may be in electronic. In *Shayra Bano* supreme court constitutional bench ruled that the practice of triple Talaq is unconstitutional and violate Article 14,15, and article 21and 25 of the constitution<sup>11</sup> while justice Kurien Joseph, Rohinton Nariman and U. U Lalith were more assertive in state that, Triple Talaq practice was retrograde and thus violating the right to equality under Article14, and other two judges namely justice Kedar and Abdul Naseer agreed that the practice was sinful. The majority concluded that the 1937 Act is a pre constitutional legislative measure that fall under article 13[1] of the constitution. So the question therefore, became as to what constitutes an essentially religious activity. The majority adjudged the practice to be a breach of a basic right under Article 14 [right to equality], Article 25 of the constitution says that if it is an religious practices you cannot strike it out, but if not and it is found arbitrary under Article 25[1]. As per majority decision, it was not a thing which is protected under Article 25 because although is followed by one school called Hanifin, still it is considered as a sinful mater according to the religion of Islam. More over that according to pre constitutional law, if anything infringes fundamental right, then that should be declared as void according to their in consistency level by using the 'doctrine of eclipse and severability.'

It was supported and criticized by many organizations. After that instantaneous Triple talaq went without legal validity and was held unconstitutional. This was already illegal because since the 1980's a number of judgments in High court held



that, for thalaq to be legally valid, it must hold the following principles. Firstly it should pronounce for reasonable cause. Secondly must become last by as many attempts for reconciliation held by facilitators representing both parties. These principles are not followed in most cases so it is already illegal.

In Shayara Bano case she gets married with Rizwan Ahamad for 15 years. She was divorced by him through instantaneous triple talaq in 2016. She then filed a writ petition on SC, on the ground that because they are violating Article 14, 15, 21, 25 of the constitution, and she argued that following practices are held to be unconstitutional Talaq-e-biddat, Polygamy [multiple wives] Nikah-halal.

The case is disposed of accordingly by a 3:2 majorities. The constitutional bench of apex court held that Triple talaq is an unconstitutional practice on 22nd August 2017. Parliament was directed by the court to bring legislative measures against the practice of triple talaq. As result Muslim women [protection of Right on marriage] Bill 2017, was introduced as a result, which got the president assent on 31st July 2019 and became retrospectively effect from 19th september 2018. It is worth noting that the Muslim women [protection of Right on marriage] Act of 2019, make triple talaq a cognizable and non cognizable offence, with a maximum punishment of 3 years in prison for a Muslim spouse who does so.

The major critics of such Act are that the divorce is a civil matter and making Triple talaq is a criminal offence is disproportionate to criminal jurisprudence. The Supreme Court declared the triple talaq as invalid and did not ask the government to make it a penal offence. However, by criminalizing triple Talaq the law presumes marriage has ended and for that man shall be punished. Further if the Husband is imprisoned, how he can pay maintenance allowance to wives and children. There by criminalizing the triple Talaq goes against the spirit of the Supreme Court judgment. But it is a fact that the triple talaq was held to be violative of Article 14, which is held by the supreme court from Shah Bano Case 1986 to Shayra Bano case in 2017, Triple Talaq has led to the subjugation of Muslim women even after 72 years of Independence but its solution must come through coexistence rather than coercion.

## Conclusion

Presently the law of the land is clear and triple talaq was abolished by the constitution of India and also to curb the menace the legislation was enacted by the government of India. This Article discusses the Triple Talaq and its journey through land mark judicial pronouncement. And tried to compare the different response to the two land mark judgment related to Triple Talaq in the last three decades. In



a secular democracy like India, if a community does not give equal right to all members of that group, the state must interfere. It is a fact that, Triple talaq has led to the subjugation of Muslim women even after 72 years of independence. But its solution must come through coexistence rather than coercion. Even though legislation is in place concerning triple talaq, the evil still prevails in society and it will not go without a tough fight.

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