Study Guide

Lok Sabha

BITSMUN 2019

Letter from the Executive Board

Greetings Parliamentarians!

It gives us immense pleasure to welcome you to the simulation of Lok Sabha at BITS Model United Nations'19, we look forward to an enriching and rewarding experience.

This study guide is by no means the end of research, we would very much appreciate if the delegates are able to find new realms in the agenda and bring it forth in the committee. Such research combined with good argumentation and a solid representation of facts is what makes an excellent performance. In the session, the executive board will encourage you to speak as much as possible, as fluency, diction or oratory skills have very little importance as opposed to the content you deliver. So just research and speak and you are bound to make a lot of sense. We are certain that we will be learning from you immensely and we also hope that you all will have an equally enriching experience. In case of any queries feel free to contact us. We will try our best to answer the questions to the best of our abilities. I want to thank Mr. Sai Krishna Kumar for his inputs in preparing the Study Guide.

We look forward to an exciting and interesting committee, which should certainly be helped by the all-pervasive nature of the issue. Hopefully we, as members of the Executive Board, do also have a chance to gain from being a part of this committee. Please do not hesitate to contact us regarding any doubts that you may have.

All the Best!

Vijay Tyagi
Speaker
vijaytyagi31@gmail.com

Marriage: Nikah

The current laws that determine Muslim marriages and divorces in India are the Sharia Act, 1937, which declares that the personal affairs of Muslims will be governed by the Sharia, the Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986. Increasingly middle and upper-class couples register their Nikah under the Special Marriage Act in order to access travel documents or bank accounts. Marriages registered under the Act, even if they are carried out subsequent to a Nikah, have to be formally dissolved in a court of law.

A Nikah is conceptually a contract (Aqd-e-Nikah) and the wedding is a contract-signing ceremony between two parties. Like any other contract, the nikahnama can be modified or added to at the time of the marriage. Lawyers can be brought in to draft it. It may perhaps be better understood if I say it's a pre-nuptial agreement sanctioned by religion. The Aqd-e-Nikah not only registers the mehr to be paid to the bride but can also contain rights and the logistics if the couple were to divorce.

Islamic law also lays down certain safeguards for women. One of the safeguards comes in form of the mehr, which is a pre-negotiated amount that a bride is entitled to and it is recorded in the nikahnama. Mehr is in the form of money or property meant for the exclusive use of the woman. It should ideally be paid on the night of the marriage. The wife can allow her husband to breakup the payments of the stipulated mehr by accepting a substantial part of it on the day of marriage and allowing the husband to pay the rest at a later date. Without payment of the mehr, the Nikah is not considered valid.

Nikah Halala

A Law that Demands a Woman to Sleep With Stranger To Remarry her Divorced Husband Women seeking farce marriages or 'halala services' face the risks of being sexually exploited, blackmailed or financially exploited. The practice known as Nikah halala, accepted by a small minority of Muslims who subscribe to the concept of triple talaq, involves the woman marrying someone else, consummating the marriage and then getting a divorce - after which she is able to remarry her first husband.

According to the Qur'an (2:229, 2:230):

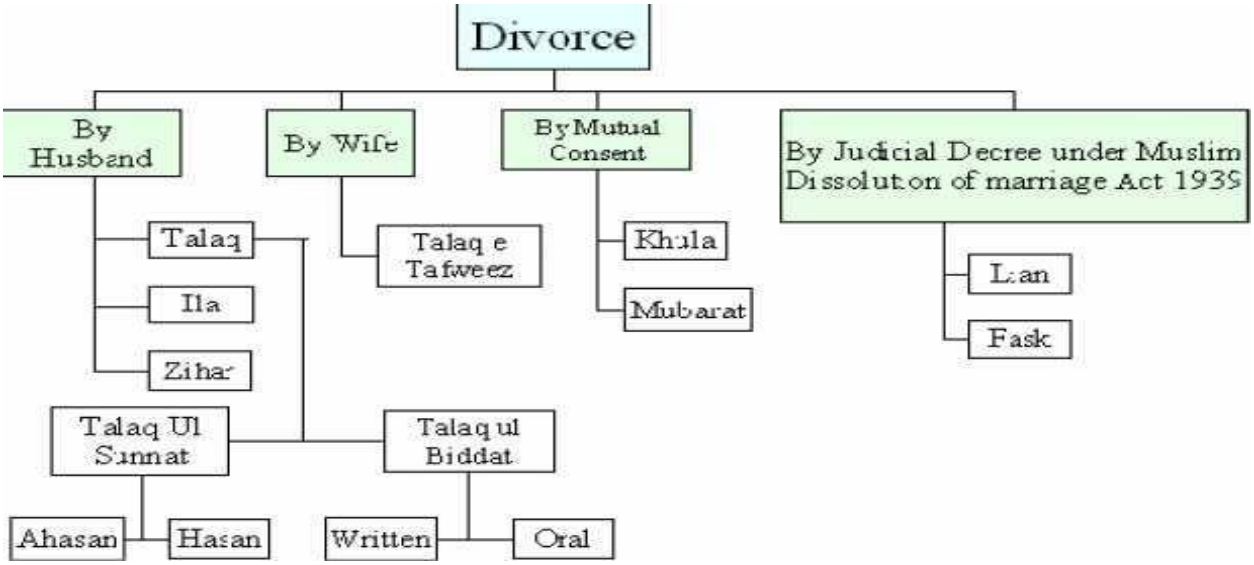
"Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers."

"And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah. These are the limits of Allah, which He makes clear to a people who know"

Nikāḥ al-mutʿah ("pleasure marriage"), is a type of temporary contract marriage permitted in Twelver Shia Islam, where the duration of the marriage and the mehr must be specified and agreed upon in advance. It is a private contract made in a verbal or written format. In this the Amount is fixed earlier and the time duration

of the marriage is also fixed and upon the expiration of the term fixed the male gives the female the amount agreed and they both separate.

Divorce: Talaq



Consequences Arising from Talaq

1. Marriage - Parties are entitled to contract another marriage. If the marriage was consummated the wife has to wait until the period of iddat is over, otherwise, she may remarry immediately. If the marriage was consummated and if the husband had four wives at the time of divorce, he can take another wife after the period of iddat.

2. Dower - Dower becomes payable immediately if the marriage was consummated, otherwise, the wife is entitled to half of the amount specified in dower. If no amount is specified, she is entitled to 3 articles of dress. Where the marriage is dissolved due to apostasy of the wife, she is entitled to whole of the dower if the marriage has been consummated.

3. Inheritance - Mutual rights of inheritance cease after the divorce becomes irrevocable.

4. Cohabitation - Cohabitation becomes unlawful after the divorce has become irrevocable and children from such intercourse are illegitimate and cannot be legitimated by acknowledgment as held in **Saiyyad Rashid Ahmad v. Anisa Khatoon, 1932**.

5. Remarriage - Remarriage between the divorced couple is not possible until:

1. The wife observes iddat
2. After iddat she lawfully marries another man
3. This intervening marriage is consummated

4. The new husband pronounces divorce or dies
5. the wife again observes iddat

A marriage done without the fulfillment of the above is irregular, not void. But mere cohabitation after an irrevocable divorce is void.

6.) Maintenance - The wife becomes entitled to maintenance during the period of iddat but not during the iddat of death.

Maintenance

Maintenance includes all those things which are important for survival and contains suitable food, raiment and lodging and cost of education. The term "Maintenance" also includes expenses for mental and physical well-being of a minor child in accordance to the status of the family in the society. In some cases, there are conditions laid down on the duty of providing maintenance and the right of receiving maintenance. And in some cases the right and duty of providing and receiving maintenance depends on the circumstances and condition of the persons bound to maintain and the persons who are entitled to receive respectively.

Conditions for the right to maintenance

Under Mohammedan law every person's maintenance should be given from his own property whether he is a minor or a major. As a general rule, the right of maintenance is available only to the necessitous persons who are poor and cannot earn their maintenance. The exception to this general rule provides that in certain cases the persons who are not necessitous are also entitled to maintenance.

"If, when called upon to remove to his house, she refuses to do so of right, that is, to obtain payment of her dower, she is entitled to maintenance; but if she refuses to do so without rights, as when her dower is paid, or deferred, or has been given to her husband she has no claim to maintenance. If a woman be a nashizah or rebellious, she has no right to maintenance until she returns to her husband's house. By this expression is to be understood a woman who goes out from her husband's house(manzil) and denied herself to him, in contradiction to one who merely refuses to abide in her husband's apartment(beit), which is not necessary for the purpose of restraint. If, however, the house her own property, and she forbids him from entering it, she is not entitled to maintenance unless she had asked him to remove her to his won house, or to hire a house for her. When she ceased to be a nashizah or rebellious, she is again entitled to maintenance."

Also it has been observed in Ameer Ali's Mohammedan Law "***but the right of the wife to maintenance is subject to the condition that she is not refractory or does not refuse to live with her husband without the lawful cause."***

Order of Priority of Obligation to Maintenance:

1. Firstly, on the husband,
2. Secondly, on the father,
3. Thirdly, on the mother,
4. Fourthly, jointly on the grand-parents and grand-children,
5. Fifthly, on the children,
6. Finally, on the collateral relations.

Maintenance to Wife

In case of maintenance after dissolution of the marriage by divorce, the wife is entitled to maintenance, except where the divorce is the result of her own misconduct, till the date of the expiry of the period of iddat or the date of communication of the divorce to her, whichever is later but not after that.

According to the percepts in Quran and the traditions, maintenance of the wife is the duty of the husband. In some cases even the wife is entitled to a separate apartment for herself. According to Abu Hanifa and Muhammad, a husband, in certain circumstances, is liable to maintain one servant of the wife. But, according to Abu Hanifa, a poor husband is not required to maintain the servant of the wife. According to the Shafei law, the husband even though he is poor is under a duty to maintain a servant for his wife.

The wife is absolutely entitled to get maintenance from the husband even though she may have means to maintain herself, and the husband may himself be without any means. The obligation to maintain the wife cannot be shared.

In Mulla's Muhhamedan Law, it is stated as follows:

"278. Order for maintenance – If the husband neglects or refuses to maintain his wife, without any lawful cause, the wife may sue him for maintenance, but she is not entitled to a decree for past maintenance, unless the claim is based on a specific agreement. Or, she may apply for an order of maintenance under the provisions of the Code of criminal Procedure, 1898, s. 488, in which case the court may order the husband to make a monthly allowance in the whole of her maintenance not exceeding five hundred rupees."

Maintenance after dissolution of Marriage

The wife is entitled to maintenance only when the marriage is in continuance but not during the term of natural life. As a general rule, a husband is bound to maintain her wife as long as she is faithful to hum and obeys his reasonable orders, but she will not be entitled to past maintenance until there is an agreement to the contrary. A marriage may be dissolved in several ways, such as, by the death of wither party or divorce or may be because of some defect. Now in order to claim the right of maintenance a wife should have a proof of her marriage then only she will be entitled to the right of maintenance.

Dissolution of marriage by death

Where the marriage is dissolved as a result of the death of the husband, then in that case the widow is not entitled to maintenance either during *iddat* or even though she is pregnant. Shia Law has also proposed the same thing.

Dissolution of Marriage by Divorce

Where the marriage is dissolved as a result of divorce, then in that case the wife is entitled to maintenance irrespective of the fact that the divorce is a revocable one or an irrevocable one, or, whether the wife is pregnant or not. In this case the wife is entitled to maintenance only till the expiry of *iddat*,

or till the communication of the divorce.
However, if the divorce is a result of the misconduct of the wife then she is not entitled to maintenance during iddat .Under Hanafi Law, a wife is entitled to maintenance on divorce during the *iddat*; but under Shafei and Shia Law, a wife is entitled to maintenance only when the divorce is revocable; but if the wife is irrevocably divorced then she will be entitled to maintenance only when the wife is pregnant.

Dissolution of Marriage by Apostasy

Where the marriage is dissolved in the ground of apostasy of the husband the wife would be entitled to maintenance during *iddat* but not in the case where she herself had apostatized. In the case where the *talaq* was revocable and the woman apostatizes during *iddat*, then also she will not be entitled to maintenance but if the *talaq* was irrevocable and she returns to faith, then she would be entitled to maintenance. Shia Law says that, if a wife returns back to faith then her right of maintenance would revive immediately even though the husband was absent.

Maintenance of Muslim Wife U/S 125 of Cr.P.C., 1973

Under section 125 of Cr.P.C.,1973, a wife, whether Muslim or non-Muslim is entitled to claim maintenance against the husband on the ground of the husband's neglect or refusal to maintain her.S.125 of the new code includes every divorcee-wife, Muslim or non-Muslim.

Second proviso to s. 125(3) lays down that if the husband makes an offer to the wife to maintain her provided that she should live with him and if the wife refuses to live with the husband, then the Magistrate may consider any ground on which the refusal has been made and may make an order for maintenance notwithstanding the offer made by the husband. The section also lays down that if the husband has contracted marriage with another woman, then it is a just ground for wife's refusal to live with the husband. Similarly, where a husband is impotent and is unable to discharge the marital obligations, this would also amount to a just cause.

Sub-section 4 of section 125 contemplates that if a wife is living in adultery or without any reason refuses to live with her husband; the wife would not be entitled to maintenance. The question as to whether Section 125 of the code of Criminal Procedure applies to Muslims also was concluded by two decisions of this court in ***Bai Tahira v. Ali Hussein Fidaalli Chothia***. The Criminal Procedure Code provides maintenance under Section 125 for wife, sons, and daughter up to age of majority only permitted. Section 125 of Criminal Procedure Code is common to all people to move to the court for getting maintenance.

Section 3(1) (b) of the Muslim Women (Protection of Rights on Divorce) Act provides statutory liability of providing maintenance extends beyond attainment of a dependent girl till marriage. In this circumstance she has to move to the Civil Court unde the personal law to obtain maintenance. This process leads to delay and multiplicity of proceedings.

In ***Bai Tahira's case Justice Krishna Iyyer*** held that:

"Welfare laws must be so read as to be effectively delivery system of salutary objects sought to be served by the legislature and when the beneficiaries are weaker section like the destitute women. The spirit of

Article 15(3) has compelling compassionate relevance in the contest of Section 125 Cr.P.C. and the benefit if any in the statutory interpretation goes in favour of ill-used wife and the derelict divorcee. So the Section 125 and the sister clauses must receive a compassionate expansion of sense that the words used permit."

In ***Mst. Zohara Khatoon v. Mohd. Ibrahim*** the question before the court was that whether a Muslim wife who has obtained divorce from her husband under Dissolution of Muslim Marriage Act, 1939 entitled to claim maintenance under Section 125 of CrPC. Answering to this question the Allahabad High Court was of the view that clause(b) of the explanation to Section 125 would apply only if divorce proceeds from the husband that is to say that the said clause would not apply unless the divorce was given unilaterally by the husband or was obtained by the wife from the husband. But on appeal the Supreme Court held that the view taken by the Allahabad High Court was erroneous and is based on wrong interpretation of clause (b) of the explanation to Section 125. Therefore, it suggests that a Muslim wife whose divorce has been done under the Dissolution of Muslim Marriage Act, 1939 may also claim maintenance from the husband.

The Supreme Court, in ***Mohd. Ahmed Khan v. Shah Bano Begum*** and others has held that if the divorced woman is able to maintain herself, the husband's liability ceases with the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to maintenance under section 125 of the Code of Criminal Procedure. This led to controversy as to the obligations of the Muslim husband to pay maintenance to the divorced wife.

Mohd. Ahmed Khan v. Shah Bano Begum Case

The Mohd. Ahmad Khan v. Shah Bano Begum & Ors. or the Shah Bano maintenance case is seen as one of the legal milestones in battle for protection of rights of Muslim women. While the Supreme Court upheld the right to alimony in the case, the judgment set off a political battle as well as a controversy about the extent to which courts can interfere in Muslim personal law. The case laid the ground for Muslim women's fight for equal rights in matters of marriage and divorce in regular courts, the most recent example being the Shayara Bano case in which the Supreme Court invalidated the practice of instant triple talaq.

In April 1978, a 62-year-old Muslim woman, Shah Bano, filed a petition in court demanding maintenance from her divorced husband Mohammed Ahmad Khan, a renowned lawyer in Indore, Madhya Pradesh. Khan had granted her irrevocable talaq later in November. The two were married in 1932 and had five children — three sons and two daughters. Shah Bano's husband had asked her to move to a separate residence three years before, after a prolonged period of her living with Khan and his second wife.

Shah Bano went to court and filed a claim for maintenance for herself and her five children under Section 123 of the Code of Criminal Procedure, 1973. The section puts a legal obligation on a man to provide for his wife during the marriage and after divorce too if she isn't able to fend for herself. However, Khan

contested the claim on the grounds that the Muslim Personal Law in India required the husband to only provide maintenance for the iddat period after divorce.

Iddat is the waiting period a woman must observe after the death of her husband or divorce before she can marry another man. The length of the iddat period is circumstantial. The period is usually three months after either of the two instances. In case the woman is pregnant, the period carries on until the childbirth.

Khan's argument was supported by the All India Muslim Personal Law Board which contended that courts cannot take the liberty of interfering in those matters that are laid out under Muslim Personal Law, adding it would violate The Muslim Personal Law (Shariat) Application Act, 1937. The board said that according to the Act, the courts were to give decisions on matters of divorce, maintenance and other family issues based on Shariat.

After detailed arguments, the decision was passed by the Supreme Court of India in 1985. On the question whether CrPC, 1973, which applies to all Indian citizens regardless of their religion, could apply in this case.

Then Chief Justice of India Y.V. Chandrachud upheld the decision of the High Court that gave orders for maintenance to Shah Bano under CrPC. For its part, the apex court increased the maintenance sum.

The case was considered a milestone as it was a step ahead of the general practice of deciding cases on the basis of interpretation of personal law and also dwelt on the need to implement the Uniform Civil Code. It also took note of different personal laws and the need to recognise and address the issue of gender equality and perseverance in matters of religious principles.

Justice Y.V. Chandrachud said in his decision: "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 sufficient 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. 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."

The following events were unfavorable to a great extent with the then Rajiv Gandhi Congress government, elected in 1984, passing the Muslim Women (Protection on Divorce Act), 1986. This law overturned the verdict in the Shah Bano case and said the maintenance period can only be made liable for the iddat period.

The new law said that if a woman wasn't able to provide for herself, the magistrate had the power to direct the Wakf Board for providing the aggrieved woman means of sustenance and for her dependent children too.

Shah Bano's lawyer Danial Latifi had challenged the Act's Constitutional validity. The apex court, though upholding the validity of the new law, said the liability can't be restricted to the period of iddat. One of the key points of relevance in the verdict that set it apart from previous cases was the recognition of women's claim for treatment with equality and dignity, particularly in cases of marriage.

Triple talaq: From Shah Bano to Shayara Bano

The Congress Government, panicky in an election year, caved in under the pressure of the orthodoxy. It enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986. The most controversial provision of the Act was that it gave a Muslim woman the right to maintenance for the period of *iddat* (about three months) after the divorce, and shifted the onus of maintaining her to her relatives or the Wakf Board. The Act was seen as discriminatory as it denied divorced Muslim women the right to basic maintenance which women of other faiths had recourse to under secular law.

The Supreme Court avenged itself, 32 years after former prime minister Rajiv Gandhi overturned its 1985 verdict which had given 62-year-old Shah Bano the right to alimony from her husband, who had thrown her out after living with her for several decades and siring five children.

Case Description

Shayara Bano, a Muslim woman has petitioned the Supreme Court to declare the practice of triple talaq (talaq-e-bidat) to be unconstitutional as it violates her fundamental rights. The court will decide whether these practices are violations of her fundamental rights or otherwise protected by the right to religion.

Background

Shayara Bano was married to Rizwan Ahmed for 15 years. In 2016, he divorced her through instantaneous triple talaq (talaq -e bidat). She filed a Writ Petition in the Supreme Court challenging the constitutional validity of three practices – talaq-e-bidat, polygamy, nikah-halala – for violating Articles 14, 15, 21, 25 of the Constitution.

Talaq-e- bidat is a practise which gives a man the right to divorce to his wife by uttering 'talaq' three times in one sitting without his wife's consent. Nikah Halala is a practise where a divorced woman who wants to remarry her husband would have to marry, and obtain divorce, from a second husband before she can go back to her first husband. And polygamy is a practice which allows Muslim men to have more than one wife.

The court in its Feb 16th order asked Shayara Bano, the aggrieved petitioner, the Union of India, women' rights bodies and the All India Muslim Personal Law Board (AIMPLB) to give written submissions on the

issue of talaq-e- bidat, nikah-halala and polygamy. The Union of India and the women rights organizations like Bebaak Collective and Bhartiya Muslim Mahila Andolan(BMMA) have supported the petitioner's plea that these practices are unconstitutional albeit on different grounds. The AIMPLB has argued that uncodified Muslim personal law is not subject to constitutional judicial review and that these are essential practices of the Islamic religion and protected under Article 25 of the Constitution.

After accepting the Shayara Bano's petition, the Apex Court formed a 5 judge constitutional bench on 30th March, 2017. The first hearing of the bench started on 11th May, 2017.

Issues

(1) Whether the practice of talaq-e-bidat (or more specifically instantaneous triple talaq) are essential practices of the Islamic religion?

(2)Whether such practices violate any fundamental rights guaranteed under the Indian Constitution?

Final Judgement of the Apex Court

On 22.08.2017, the 5 Judge Bench of the Supreme Court of CJI J.S. Khehar, Abdul Nazeer J., Rohinton Nariman J., U.U. Lalit J., and Kurien Joseph J. pronounced its decision in the Triple Talaq Case, declaring that the practice was unconstitutional by a 3:2 majority.

Triple Talaq or Talaq-e-Biddat, a practice that allowed for a Muslim man to instantaneously and irrevocable divorce his wife by saying the word 'talaq' three times successively was challenged before Supreme Court as being violative of Muslim women's Right to equality among other constitutional freedoms. The the five judge Constitutional Bench of the Supreme Court heard the matter on 11.05.2017 and after having six days of arguments from both sides, reserved the case for judgement.

The decision dated 22.08.2017 though by a narrow majority has struck down the practice as unconstitutional, further directing the Parliament to take legislative measures to the said effect, the said verdict has been reached with a clear divergence of opinions, that of Rohinton Nariman and U.U. Lalit JJ. holding that Talaq-e-Biddat is regulated by the Muslim Personal Law (Shariat) Application Act, 1937, as contrasted with the decision furthered by Kurien Joseph J. While the former two judges have held the practice to be unconstitutional owing to its manifestly arbitrary nature that permits a muslim man to bring into effect a unilateral termination of marriage rather capriciously and whimsically with no scope for reconciliation, thus violating Article 14 of the Constitution, Kurien Joseph J. on the other hand, in his concurring but separate opinion records that the reason the practice lacks legal sanction is because it is against the tenets of the Quran. To quote " **What is held to be bad in the Holy Quran cannot be good in Shariat and, what is bad in theology is bad in law as well"**

Notably, the dissenting minority opinion of CJI Khehar and Abdul Nazeer J. traces the the elevation of Personal Law to the status of fundamental rights in the Constituent Assembly Debates on Articles 25 and 44, holding that the practice of Triple Talaq is not regulated by the Shariat Act of 1937, but is an intrinsic part of personal law, thus enjoying constitutional protection under Article 25. Further, the remedy against the gender discriminatory practice of Talaq-e-Biddat lies not in challenging its constitutionality but by way of legislative action. To this effect, the minority opinion further proposed that Triple Talaq be made

inoperative for 6 months in which time the Pariamnet must frame a law on the said aspect. However, given that the majority opinion has explicitly outlawed Triple Talaq, the aforesaid directive holds no force.

Analysis of The Majority Judgments in Triple Talaq Case

The majority judgments delivered by Kurian Joseph,J. and Nariman,J. (for himself and for Lalit,J.) arrive at the same destination via entirely different paths. This could be a great illustration for students of Judicial Process, the Justice Cardozo way. The different paths adopted led to different ratio and identifying the majority ratio is again a matter to dissect, in each of the issues decided.

Kurian,J. explains the question, the answer and the reasoning in a simple manner. According to him, S.2 of The Muslim Personal Law (Shariat) Application Act does not per se sets down the rules of talaq. The provision merely declares that notwithstanding any custom or usage to the contrary, the law applicable to Muslims in matters including talaq shall be the shariat law or the Muslim personal law. The 1937 Act is thus only a statutory peg to reach to Shariat Law. The emphasis is laid on the non obstante clause with which the provision starts. It is held that the Act merely assert and declare that customs and usages contrary to shariat will not apply and that shariat alone shall apply to parties who are Muslims. Shariat, it is further held, means the Quran, Hadith and other sources of Islamic Law. Of these Quran is the apex law.

The reasoning applied here by the learned judge is analogous to the maxim that delegated legislation shall not contravene the parent act. Neither Hadith nor anything else can conflict with Quran. Since Quran does not provide for triple talaq, any other source that provides for it is, sort of ultra vires the Quran and hence is not good law. In short, triple talaq is not Muslim personal law. Therefore, it is not valid.

Down the reasoning line, as a student of law reaches this point, he is bound to halt and think aloud: The Court is checking the 'Quranic-ality' of a practice that has long been followed. The Shamim Ara (2002) principle that talaq not according to Quran is no dissolution of marriage at all, was extended by Kurian, J. to triple talaq and holds it did not at all delve into the question of constitutionality of it, as against Arts. 14 and 21 ; decided solely based on Shamim Ara and held triple talaq invalid.

The judgment answers the prime question raised namely the validity of triple talaq, yet the constitutionality issue was left unattended, same as when the subordinate legislation is ultra vires the parent act, constitutionality of the parent act could be conveniently kept outside the judicial pavilion by pronouncing immediate relief from the unjust rule. The judgment satisfies the immediate rationale, but it appears uncanny that a Constitution Bench of the Supreme Court in the exercise of its writ jurisdiction arrives at a decision shying away from any discussion on fundamental rights or even the Constitution itself. Has the Supreme Court become the forum for checking contraventions of the canonical law?

On the contrary, Nariman,J. held that the 1937 Act recognize and enforce triple talaq and therefore should be tested on the anvil of Art.14. The disagreement of Kurian,J. on this view of Nariman,J is that the 1937 Act does not regulate triple talaq and therefore it cannot be tested under Art.14.

So the avoided question looms high: Is personal law subject to the discipline of Art 13(1)?

It is here that Nariman,J. embarked on the road less travelled. The issues he focused on were two folded:

(1) Whether the 1937 Act recognize and enforce Triple Talaq as a rule of law to be followed by the Courts in India?

(2) If not whether Narasu Appa Mali (1951) which states that personal laws are outside Article 13(1) of the Constitution is correct in law?

Here lies the sharpness and relevance of the view held by Nariman, J. regarding the first issue. Based on authorities on shariat, he refused to accept the argument that the Act only meant to do away with custom or usage contrary to Muslim personal law. He held that the 1937 Act does prescribe and enforce triple talaq and therefore is "the rule of law in the courts in India" and therefore falls under the meaning of "laws in force" under Art.13(3)(b) and is hit by Art.13(1) of the Constitution. This finding is significant as it foreclosed any query into the correctness of Narasu which held that personal laws do not fall within the mandate of Article 13(1).

The finding that the 1937 Act is a codified law forming the "rule of law in the Courts in India", is the finest part of the judicial maze. Thus the question whether personal laws per se can be tested in the Constitutional anvil remained unopened, and the going into the correctness of Narasu was considered "unnecessary".

Constitutionality of the 1937 Act thereby opened to be tested on the touchstone of fundamental rights. On this point, Nariman, J. destined to focus on Article 14 alone, leaving out Arts.15 and 21 for reasons undetailed. On Art.14, the challenge was limited to arbitrariness and not equality in the gender filament.

The judgment examined in length the applicability of test of arbitrariness to legislations. Precedents were meticulously analysed and Mc Dowell (1996) was declared per incuriam, as "not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed" and the decisions that followed McDowell were declared no longer good law. After extensive analysis on arbitrariness concept, the 1937 Act recognizing triple talaq was held arbitrary and hence violative of Art.14. Substantive due process received a majestic entry and McDowell fell gloriously. Thus **Counsel R. F. Nariman's contentions which were discarded by the Mc Dowell 3 Judge Bench found its way through Justice R.F.Nariman's majority judgment in Shayara Bano v. Union of India.**

However the grounds on which triple talaq is rendered arbitrary is unexplained, except that Hanafi Shariat law considers triple talaq as lawful yet sinful in that it incurs the wrath of God. It is indeed surprising to note that inspite of the initial refusal to hold the 1937 Act as a mere declaration of Shariat as the Muslim personal law, the learned Judge later on looks at Quran as the basis for holding triple talaq "arbitrary" and therefore violative of Article 14.

The majority views rendered by both the judges meet here, that triple talak in one go, is un-Quranic. If Kurian,J. found the inconsistency with Quran as the basis for declaring triple talaq invalid without going into the constitutionality of it, Nariman,J. addresses the constitutionality of triple talaq by resorting to (Art.14) arbitrariness as per Quran standards.

Discerning the majority ratio in this case is an interesting task. On the question of whether the 1937 Act deals with the rule of triple talaq, three judges held in the negative. That leaves Justice Nariman's finding a 2:3 ratio. It is on the affirmation that the 1937 Act is the rule of law on triple talaq in the courts in India that he ventured to examine the constitutionality of the same. On the issue whether arbitrariness can be a ground to test the validity of legislations, interestingly Justice Kurian agreed with Justice Nariman and

observed: "…**on the pure question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness, I agree with the illuminating exposition of law by Nariman, J. I am also of the strong view that the Constitutional democracy of India cannot conceive of a legislation which is arbitrary"**. Both Kurian and Nariman, JJ. held that triple talaq is not protected under Article 25 and thereby differed from the view of Khehar,CJ.

The Muslim Women (Protection of Rights on Marriage) Bill, 2017 | Introduced by Shri Ravi Shankar Prasad, Minister of Law and Justice in Lok Sabha | Objects and Reasons

The Supreme Court in the matter of Shayara Bano Vs. Union of India and others and other connected matters, on 22nd August, 2017, in a majority judgement of 3:2, set aside the practice of talaq-e-biddat (three pronouncements of talaq, at one and the same time) practiced by certain Muslim husbands to divorce their wives. This judgement gave a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation.

2.The petitioner in the above said case challenged, inter alia, talaq-e-biddat on the ground that the said practice is discriminatory and against dignity of women. The judgement vindicated the position taken by the Government that talaq-e-biddat is against constitutional morality, dignity of women and the principles of gender equality, as also against gender equity guaranteed under the Constitution. The All India Muslim Personal Law Board (AIMPLB), which was the 7th respondent in the above case, in their affidavit, inter alia, contended that it was not for the judiciary to decide matters of religious practices such as talaq-e-biddat, but for the legislature to make any law on the same. They had also submitted in the Supreme Court that they would issue advisories to the members of the community against this practice.

3. In spite of the Supreme Court setting aside talaq-e-biddat, and the assurance of AIMPLB, there have been reports of divorce by way of talaq-e-biddat from different parts of the country. It is seen that setting aside talaq-e-biddat by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims. It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce.

4. In order to prevent the continued harassment being meted out to the hapless married Muslim women due to talaq-e-biddat, urgent suitable legislation is necessary to give some relief to them. The Bill proposes to declare pronouncement of talaq-e-biddat by Muslim husbands void and illegal in view of the Supreme Court verdict. Further, the illegal act of pronouncing talaq-e-biddat shall be a punishable offence. This is essential to prevent this form of divorce, wherein the wife does not have any say in severing the marital relationship. It is also proposed to provide for matters such as subsistence allowance from the husband for the livelihood and daily supporting needs of the wife, in the event of husband pronouncing talaq-e-biddat, and, also of the dependent children. The wife would also be entitled to custody of minor children.

5. The legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help subserve their fundamental rights of non-discrimination and empowerment.

6. The Bill seeks to achieve the above objects.

Conclusion

As we all know that the above bill was passed in the Lok Sabha but is still pending in the Rajya Sabha. We expect that the members of the Lok Sabha will again introduce the bill in the Lok Sabha with some modifications in the original bill as per their understanding. Secondly, we don't expect that the members only quote the different provisions of laws and constitution in the house. We expect that the members should understand the philosophical aspects of the provisions and their applicability.