Socio-Legal Aspect of Triple Talaq

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Abstract

What is called Muslim Personal Law today in India was called Anglo Mohammedan law before Independence. It was enacted by the British when the Shariah Courts were replaced by the British Courts. The British judges could hardly understand the Islamic Law and hence some qadis were appointed to help British judges understand the Shariah Law. Then the source books like Hedaya – a hand book of the Hanafi law – was transalted into English by Hamilton which was extensively consulted by the British judges for giving their judgements and these judgements in turn became points of reference for other judges. This is how the whole corpus of what is known as Muslim Personal Law came into existence.

It was amended from time to time. The Shariat Act of 1937 and the Dissolution of Muslim Marriage Act are instances in point. The ulema like Maulana Ashraf Thanavi took lead in suggesting the amendments to the law. Thus it is not true that the Muslim Personal Law cannot be amended. The Law exists by virtue of enactment by a secular government and hence can be amended. However, What is important is that the ulema should either take initiative as Maulana Ashraf Ali Thanavi did or they should be consulted by those Muslim lawyers and intellectuals who take initiative in amending the law.

Today education is fast spreading which is creating a new awareness. Though illiteracy is still quite high among Muslim women, compared to a few decades ago modern enlightenment is much more. And it is increasing faster than we think. Also many Muslim women are part of the women’s movement and women’s organisations. Many Muslim women are playing an increasingly important role in these organisations. They are also quite aware of what is happening around them and desire to bring about improvement in their own conditions. It is very difficult to stop this process. It will in fact intensify at an increasing pace.

The ulama and the jurists had to take social conditions of their own times into account and came out with formulations accordingly. But once schools were formalized the subsequent ulama and juristic preferred to imitate their predecessors – which is known in the juristic literature as taqlid – and refused to rethink issues. Thus the Islamic Law became stagnant and indifferent to changing social conditions.
The law should not remain stagnant and should respond creatively to the changing situation. The Quranic principles mainly stress justice and if law becomes stagnant it loses its spirit of justice and injures the very basic principles. What is divine is the spirit of justice and not the actual formulation of the law which is always human and related to the situation in which law is made.

It is divine spirit which is humanity applied in the given situation. The mechanical perpetuation of this human formulation might become unjust with changing situations and time.

It is therefore high time that certain provisions of Muslim Personal Law like triple divorce and unregulated polygamy are changed. Triple divorce in one sitting is not even mentioned by the Holy Quran and in fact it was a pre-Islamic Arab custom which was integrated into Islamic law of the time. Since it was an Arab custom, it may not be appropriate to apply it to non-Arab nations. Its abolition, most certainly would serve the interest of the Islamic principle of justice and would restore to women what the Quran has given them as a matter of right.

Social Security of Marital Bond:

In Islam marriage is basically a social contract between members of the two sexes. It is therefore of paramount importance to study in detail the impact of talaq on Muslim social life. Contrary to the concept of older religions where the matrimonial bond cannot be broken by man, Islam for the first time presents a rational outlook of this most basic issue of human society. Islam in general teaches us to be tolerant to others and to forgive is rated better than to avenge Quran enjoins upon the Muslims the same spirit of tolerance in matrimonial relationships. However, it is but natural that in some cases it becomes impossible to carry on with the other partner. To meet such exigencies, Islam allows separation by dissolution of marriage as a last resort. It should not be forgotten that Quran makes it obligatory on men to observe a humane attitude at the time of separation. However, a talaq raises many socio-economic problems. The Holy Quran and Prophet’s traditions amply provide solutions to these problems and set a definite guideline as remedial measure.

Unawareness of Religious Laws:

In our present social set up, religion has been relegated to such an extent that religious values have become eclipsed. It has ceased to be a way of life, a guiding source and an inspiration. This is because Muslims have neglected their prime duty to learn, explore and acquire religious knowledge. They are trying to gain mastery over other fields of knowledge but there is a continuous deterioration in the acquisition of religious knowledge. To illustrate the paucity to their religious
knowledge, an editor of a urdu journal, narrated a dialogue with an MBBS doctor. During the conversation the names of Hazrat Umar and Hazrat Usman were also mentioned. The doctor very humbly asked him which of the two preceded the other. Such a ignorant person cannot be expected to be conversant with the law of talaq and to understand the dictates of the holy Quran and the Prophet’s traditions in this respect. There are a lot of people among the Muslims themselves who simply know that single talaq carries with it the option of retention so they do not take it to be a perfect talaq. Hence after divorcing even three times, when they find that talaq is strictly under tight Islamic Laws and there is no latitude they repent very much and seek the way out to retain their wives without the prescribed procedures of “Halala” (intervening marriage)

One More Socio – Legal Problem :

Some of drawbacks of the procedure legalising the wife for first husband are as follows :

If the divorcer is a follower of Hanafi Law and wants to abide by it he necessarily adopts the form of an interim dissolution of marriage. He gives her in marriage to another person on condition that he would divorce her next day. He is thus held as a sinner according to Islamic law.

Mufti Kifayat Ullah explains the correct form of “Halala” which has been recognized by Sharia as follows :

“The divorced woman after marrying another husband and again becoming separated from him due to talaq or death of the husband becomes lawful for the former husband. This is called “Halala”. But if there is a stipulation between the former husband or the wife or anyone on her behalf and the would be husband that he would divorce her afterwards then such a marriage would deserve divine curse”.

“Halala has assumed in Muslim society exactly like “muta” (Temporary Marriage) a conditional marriage is performed and the next day talaq is obtained from the husband. In this connection some very shameful stories haven been told and it is because of this likely result that Sharia does not recognize it. For this reason Umar had said “I will stone to death such persons”. Sometimes it happens that the second husband refuses to give talaq and thus a fresh dispute arises. Besides, this wrong procedure of “halala” also provides flimsy grounds for division to the opponents of Muslim personal law.

Miseries of Women and Children :

Sometimes people put forward false arguments like they divorced in a state of heightened emotionality or due to ignorance. This type of behaviour of the ignorant people creates a lot of
problems in society. Particular by separating a women in this way under the state of emotions, there occur very serious consequences. In such a way the life of a women may be disrupted. Immediately after this separation the problem of looking after the children crops up. This is absolutely clear that no women as a stepmother can pay proper attention to the children. The other women can never nurse and bring up the children like their own mother. Further another problem makes its appearance; how the divorced lady is to be adjusted in the society. After remaining for about 25 or 50 years with a man, she has no other way to adjust herself specially when the divorce occurs in the old age. In India there is no such fund from where she can be financially helped. Generally such women have no talents to earn their livelihood. Besides a lady who lives in strict purda is normally unable to express publicly her economic grievances. It is natural that she begins to lead a life of dissatisfaction and frustration.

For example once husband and wife are leading in a very happy married life and interestingly, though very poor, due to hard and untiring efforts of the family, became economically well off. They had everything they needed. One day the husband become angry on some particular domestic affairs and divorced the lady three times in a single breath. For sometime the divorced woman managed to pass her days with whatever jewellery she had with her. When all the money was spent she had face extreme poverty and strain and stress. The headings of newspapers are replete with these illustrations.

Though such incidents are being flared up by opponents of Muslim personal law yet there is some reality behind such events and it is because of this reason that legislators have also made such rule under sec. 125 Cr. P.C. of 1973 so that a husband must have to bear all expenses of his divorced wife till her second marriage. Under pressure of Muslim masses who felt it a direct encroachment on Muslim Personal Law and therefore the provision was withdrawn for Muslims. A new legislation [The Muslim Women (Protection of Rights on Divorce Act, 1986)] however passed as substitute for Muslims under which the divorcee is entitled to get maintenance from her parents or relations and in their absence from the Wakf Board. Everyone knows the treatment of parents and relations in Indian society to a woman once she is married and Wakf Boards financial restraints is also well known to all. How can they serve the purpose?

**Need of Social Reforms:**

It is the demand of the time that this gigantic problem of three talaqs at a time should be thoroughly examined by “Ulema” otherwise the outsiders would interfere in the personal law matter. Muslims must put their home in order otherwise they cannot prevent the interference of
judiciary ad legislature in their personal law. In 1994 Justice H.N. Tilhari of the Lucknow Bench of the Allahabad High Court pronounced that the practice of uttering the word “Talaq” at one go to effect an “irrevocable” divorce was both unconstitutional and illegal. This Judgement worked as fuel to the fire and increased the intensity of the debate on triple talaq. The judgment has created ripples in many sectors, on various angles including constitutionality of personal laws etc.

However, it is my humble submission that Talaq-al-Bidda (triple Talaq) should be reconsidered a fresh in order to give its effect as one single revocable divorce, keeping in view the social circumstances. But it is the job of legislators and not the judge after taking the Muslim community into confidence if we really want to achieve the end. Sharia can be interpreted only by those who are qualified for it and not by any and everyone. The knowledge and study of Arabic is one of the pre-requisites. However the different interpretations of various schools of Islamic law on Talaq–al-bidda (Triple Talaq) need codification. The legal opinion today agrees that this form of talaq is totally against the spirit of natural justice.

Irreverence of Ulema Towards Miseries of Woman :

Eighty years after the Shariat Act, the All India Muslim Personal Law Board (the body of Ulema belongs to all schools of Muslims) has not yet found the time to codify the Islamic Law on divorce and yet they are only crying and making slogans when the courts are trying and interpreting the law. Woman activists are rightly emphasizing that the question here not much of Islam as of Women’s right which have been trampled upon by the male dominated board. The fact that the Zamindari Abolition Act and the Statutes made under that law which take away the inheritance rights of Muslim women have never been challenged by our ‘Ulema’ in the country give the game away. No doubt in order to prevent the deprivation of women from inheritance Maulana Thanavi, an early 20th century Alim did strenuous efforts. The Shariat Act is the outcome of these efforts and accordingly a woman was first time held entitled to get her share in inheritance while under customary law she had been totally deprived of their rights.

It is not so much as question of defending Shariat not so much an issue of not tempering with God given law, as of firmly keeping the women in their place in society. The kind of Triple Talaq is like a sword hanging over the head of a Muslim woman leading to her feeling of insecurity adding to her vulnerability. But present Ulema do not think and feel the miseries of women in the present social set up like their predecessors of early 20th century who did a lot for emancipation of a woman from their undesired husband and save the society from unrest.
Insecurity amongst the Muslims – A major obstacle in process of Reform:

A major hurdle in the way of Muslim Personal Law reform is the present Political atmosphere of the country. One cannot remain blissfully oblivious to the fact that insecurity caused by communal tensions, riots agitation is much more serious than the insecurity spring from the lack of codified Islamic law of divorce. I do not agree with the statements of fundamentalists on the issue of triple talaq but at the same time it is my submission that a divorced woman can approach the courts for justice, but where can the woman humiliated in riots go? I feel that reforms within the minority community can come only when there is a feeling of security not when they speak from position of weakness and vulnerability.

Evaluation of problem of women in India vis-à-vis Islamic Law:

However, the problem of triple talaq should be considered keeping in view the present condition of women in Indian society. Unlike Muslim country even first marriage of a woman is difficult in India due to dowry and other social evils. Then, everyone can imagine how difficult task is to get the divorced woman remarried. Islam is revolutionary religion, which came to overthrow all unjust and wrong practices. The Quran repeatedly condemns what it calls Zulm (i.e. wrong doing). The Prophet had great sympathy with the oppressed and weaker sections of society. The Quran declares that Allah desires to empower the weaker sections and women certainly belonged to these categories. Unfortunately the male dominated society demolished all that empowered woman.

Ijtihad (interpretation) as a tool of Reform:

The corpus juris of Islam was evolved over several centuries and began to be compiled by several centuries and began to be compiled by several eminent jurists among whom Imam Abu Hanifa, Imam Shafai, Imam Hambal and Imam Malik gained great fame. Their schools of law survived apart from Ithna Ashari, Ismaili and Zaidi schools of law which draw inspiration from the sayings of the great Imam Jafar al-Sadiq. It will be seen that the formulation of Sharia is greatly based on human opinion and that is why the great jurists differed from one another on many fundamental issues. The great jurists of Islam never shield away from using Ijtihad which the great legal philosopher Dr. Iqbal describes as the dynamic principles of Islam. That is why Islamic Law is considered most progressive, if seen in the proper prospective.
Doctrine of Takhayyur

Dissolution of Muslim Marriages Act 1939 was passed on the basis of a near – total consensus among the ulema (religious scholars) and without any murmur of dissent from any quarter. Not that reform is anathema to Islamic jurisprudence and theology. On the contrary there are established principles and techniques by which reforms can be effected in Islamic Law, without in any manner disturbing the immutable fundamental tenets and doctrines as enunciated in the Quran and the Sunnah. One such technique is takhayyur which envisages the exercise of the eclectic choice from amongst similar legal principles of the various schools of Muslim law. It was this technique that was employed to create a consensus amongst the ulema for the introduction of the Dissloution of Muslim Marriages Act 1939

Muslim in India principally owe allegiance to the Hanafi school of Islamic jurisprudence. The Hanafi law, as strictly construed restraints a muslim woman’s right to seek dissolution of her marriage. This led to a tendency among muslim women to convert to other faiths to enforce their rights. Maulana Ashraf Aali Thanvi, a leading theologian and scholar took it upon himself to create a consensus among the ulema to agree to borrow from the Maliki law to provide various enumerated grounds of divorce to a Muslim woman. Ultimately the ulema themselves recommended that the federal government enact the act of 1939 providing for nine grounds of divorce to a muslim woman. This process clearly establishes that if principles of one school caused hardship and duress to its practitioners it was open to the ulema to arrive at a consensus on a parallel but less onerous provision of another school.

Takhayyur has become the basis for reforms in family laws in many muslim countries of the world. For example most of them have brought in laws to embody restrictions on polygamy and on the husband’s unilateral right to repudiate his marriage, abolition of triple talaq and such other socially pernicious practices. Illustratively, in Pakistan the marriage commission Report had recommended as early as in 1955 that the triple formula of talaq-al-bidah should be made equivalent in law to one single pronouncement and that the talaq-al-sunnah should become obligatory. Acting on the report and despite strong conservative opposition President Ayub Khan promulgated the Family Law Ordinance of 1961 which provided for the formation of an Arbitration council to effect reconciliation between the parties before the divorce became irrevocable after a ninety days period.
Such issues can be tackled in India too with the ulema coming to the fore to create a consensus and if need be to incorporate benevolent principles from other schools of Islamic jurisprudence into the Hanafi regime as practiced in India.

**Social Welfare under Spirit of Islamic Law of Divorce:**

Islamic Law is quite liberal. The triple talaq was a part of the Arab customary law which became its integral part. The time has come to do away with many such practices which are not socially good in present circumstances and contrary to the spirit of sharia. In this way muslims would enforce the true Islamic Law with its letter and spirit in this country like many other muslim countries. The true Islamic law of divorce is in conformity with the modern breakdown theory of divorce. The Quran did not specify any matrimonial offences. The Prophet of Islam laid down no bars to matrimonial relief. The law giver of Islam did not want the matter to be taken to the court at all, unless it become unavoidal for a wife due to the age old predominance of man. The Prophet warned the people to keep away from it:

"Enter into marriage and do not dissolve men and women who changes their bed partners for the sake of pleasure"

To set up a personal example he never divorced any of his wives. The law of divorce drawn from the teachings of such a Prophet can never be accepted as weapon against woman in the form of triple talaq which is unbridled and unjust in present social set up of our country.

**Present situation In Muslim Societies:**

As the interpretation of the triple talaq also adversely affected stability of marriage the codified law of many muslim countries derecognize it or made it impracticable. The same should be done in India in order to provide a relief to women. A talaq pronounced on a single occasion will remain revocable and cannot by words or implication be given the effect of a third talaq so as to make the dissolution of marriage final and irrevocable.
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