

# Divorce, triple talaq and Muslim personal law - Muslim Women's Agitation in India against Patriarchy

Will their grievances be redressed?

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Shayara Bano, an Indian Muslim woman was married to Rizwan Ahmad on 11<sup>th</sup> April 2002 and they have a son and a daughter from the wedlock. She was unilaterally divorced by her husband on 10<sup>th</sup> October 2015 vide a *talaqnama* (deed of divorce) wherein before two witnesses her husband pronounced the word "talaq" thrice in one breadth without attempting any process of reconciliation thus ending 13 years of their marriage in a stroke. This form of divorce is called as *talaq-e-bidat* or sinful (but valid) form of divorce.

Shehnaz Shaikh (and many others too) was similarly divorced by pronouncement of the word 'talaq' thrice by her husband in a fit of anger and thrown out of their matrimonial house midnight. Shaikh didn't know where to go at such an odd hour and spent the rest of the night on the staircase of the building. *Talaq-e bidat* is not only valid form of divorce, it is also irrevocable. This means that the divorced husband and wife cannot be reunited by performing fresh *nikah* (marriage) even if the husband repents, unless what is termed as *halala nikah* is performed – that is, the wife marries another man, the marriage is consummated, and the man, as agreed, divorces her by pronouncing the word 'talaq' thrice. The repentant husband can then remarry his former wife whom he had divorced by *talaq-e-bidat*.

Shayara Bano decided to invoke the writ jurisdiction of the Supreme Court of India and pray for declaring *talaq-e-bidat*, *halala nikah* and polygamy permissible under shari'a (Muslim family laws) as un-Constitutional and discriminatory. Unlike challenges to the shari'a in previous judicial proceedings, Shayara Bano does not pray that the entire shari'a be declared null and void nor does she pray for a Uniform Civil Code to be enacted. Bano seeks relief only against the rough edges of Muslim family law in so far as they are discriminatory against Muslim women – *talaq-e-bidat*, *halala nikah* and polygamy – be declared un-Constitutional as it violates their fundamental rights.

*Talaq-e-bidat* is not the only form of divorce in Islam and is in fact considered sinful. It was a pre-Islamic practice which was re-validated much later. Quran prescribes a procedure for divorce which entails arbitration and reconciliation after talaq is pronounced by the husband. "And if you fear a separation between the two of them, appoint an arbitrator from his family and an arbitrator from her family. If they desire reconciliation, Allah will bring them into agreement. Verily Allah is Knowing, Knowledgeable." [Qur'an 4:35]. "A divorce is only permissible twice: after that, the parties should

either hold together on equitable terms, or separate with kindness” [Qur’an 2:229]. If *talaq-e-bidat* is not in accordance with the procedure prescribed by the Quran, the issue of *halala nikah* will not be an issue.

Polygamy also is not prescribed for all Muslim men; it was permitted in certain circumstances (in order to do justice to orphans whose affairs they may be dealing with). Unless a Muslim man is marrying to do justice to orphans, the norm laid down is to marry only one. “If ye fear that ye shall not be able to deal justly with the orphans, marry two, or three, or four; but if ye fear that ye shall not be able to deal justly with them, then only one... that will be more suitable, to prevent you from doing injustice.” [Qur’an 4:3] Monogamy is the norm and polygamy is an exception with the objective of doing justice to the orphans and with the strict condition that all are treated justly. However the Qur’an [4:129] warns “Ye are never able to be fair and just as between women even if it is your ardent desire”. When Bano challenges *talaq-e-bidat*, *halala nikah* and polygamy as un-Constitutional, it is not against the spirit of Islam.

### **Islam, Gender justice, marriage and divorce**

The normative framework of the Qur’an is gender justice. There are certain contextual verses which may be interpreted to give superior rights to men, but they are more contextual than the norm viz. that economic position of women in Arabia was weaker. Men therefore had corresponding liability to maintain and protect women. Verse 2:228 (the Qur’an) states “And women shall have rights similar to the rights against them in a just manner” This must have been a revolutionary declaration and unsettled the society which treated women as mere chattels. Qur’an for the first time refers to rights of women. Qur’an reveals (verse 4:1) that “Mankind! Revere your guardian Lord, who created you from a single being (min nafsini wahidatin), created of like nature, his mate and scattered countless men and women...” Men and women are equal in creation itself.

Qur’an gave women same rights that were before revelation available only to men: right to divorce at will and without obtaining consent of her husband after a suitable compensation, viz. returning her dower (the Prophet permitted Jamila to free herself from the marriage as she did not like her husband even though she admitted that he loved her immensely and was very generous to her in bearing her expenditure); *talaq-e-tafwidh* or delegated right to divorce wherein the husband delegates his right to divorce to his wife at the time of nikaah; right to appoint arbitrator to settle a marital dispute or to divorce (verse 4:35); Qur’an commands men keep their wives in a goodly manner or to leave them with benevolence (4:19); Women cannot be married off against their will (4:19) and even if treasures had been given in dower, not to take it back (4:20); God addresses both believing men and believing women and command them to be protectors of one another and are called to enjoin what is just, observe regular prayers, practice regular charity and obey God and His Apostle and on them will God shower his mercies (9:71). Verse 33:35 addresses “Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast (and deny themselves), for men and women who guard their chastity, and for men and women who engage much in God’s praise – for them God prepared forgiveness and great reward.”

Women have their financial independence, including right to work and earn (4:32). Women can serve as Qadi and have fought wars. In the battle of Uhud, Umm ‘Umarah protected the Prophet from being harmed. Umm ‘Umarah took sword in her hand and attacked one who tried to come near the Prophet and pierced the sword into his body. She was, therefore, popularly known as ‘woman of Uhud’. We also have to instance of Ghazalah, a Kharijite woman who was known for her bravery and

who challenged Yusuf bin Hajjaj in the battle, an Umayyad governor who was feared by all Arabs. Hazrat Ayesha, wife of the Prophet led an army riding a camel in the battle which later became famous as the 'Battle of Camel'. The patriarchal mindset in the society in general and of the religious jurists in particular found a way out of these verses and explained away using hadith - genuine and not so genuine - and continued their patriarchal traditions and cultural practices.

## **Muslim Personal Law Board**

The Muslim Personal Law Board (AIMPLB) has intervened in the petition and claimed that shari'a is divinely ordained and cannot countenance any interference by human agencies like judiciary or legislature. They further submitted that Muslim family law was protected by Art. 25 of the Constitution which gives all persons in India freedom of conscience to practice their religion. By defending talaq-e-bidat, halala nikah and polygamy as a right of Muslim men, the AIMPLB is clearly defending the indefensible practices which are not in accordance with the Qur'an as is evident from the aforesaid. The AIMPLB is in fact defending the practices that were pre-Islamic and which Islam wanted reformed.

The issue for AIMPLB is not defence of talaq-e-bidat, halala nikah and polygamy, as these practices are not essential or farz (obligatory) or even wajib (recommended), not even mustabah (desirable act). These practices at best may be called mubah (neither recommended nor prohibited for which there is neither reward nor punishment) or makruh (undesirable in Islamic law and discouraged) if not haram (totally forbidden). However, if the courts adjudicate on what the shari'a should or should not be and Indian legislature legislate on family laws for Muslims - whether or not according to Islamic law, the conservative religious leadership would find it difficult to be relevant except in leading the community in prayers and giving religious instructions. They would cede a major area to secular institutions and loosen their hegemony over the socio-economically most backward community in India. The AIMPLB was formed on 7<sup>th</sup> April 1973 in a convention held in Hyderabad. The convention was organised in the background of Adoption Bill being tabled in the Parliament by the then Law Minister H R Gokhale who stated that the bill was first step towards Uniform Civil Code. As religious leadership of all fiqhs (jurisprudential schools of law), who otherwise do not see eye-to-eye as each one claims to be superior over other, assembled in Deoband on 27<sup>th</sup> and 28<sup>th</sup> of April as they saw a threat to their leadership and in principle decided to constitute AIMPLB.

The stated objective of AIMPLB is "To take effective steps to protect the Muslim Personal Law in India and for the retention, and implementation of the Shariat Act". Interestingly, the Shariat Act that they want to defend is not divine! It is a legislation enacted in 1937 during colonial period and shari'a as applied by the courts under colonial rule presided by British Judges.

The second objective of the AIMPLB is "To strive for the annulment of all such laws, passed by or on the anvil in any State Legislature or Parliament, and such judgments by courts of Law which may directly or indirectly amount to interference in or run parallel to the Muslim Personal Law or, in the alternative, to see that the Muslims are exempted from the ambit of such legislations." The second objectives essentially means that the AIMPLB would defend status-quo and even those family laws that may not be in accordance with the spirit and values of Islam but are being applied since colonial rule and by the British Judges and as they understood what Islam was. Moreover, the colonial power adjudicated shari'a laws with the objective of divide the Hindus and Muslims and rule the country. Interpretation of every law is dynamic and evolves according to the times. Same is the case with our comprehension of meaning of verses in the Qur'an which continuously evolves as frontiers of our knowledge expand. However, the objective of the AIMPLB is to ensure that the legislatures and courts in India do not "interfere" directly or indirectly or "run parallel" to the "Muslim Personal Law".

Not one of their several objectives is to strive to evolve understanding of Qur'anic verses and its guidance to human beings in the changing context. Neither they would undertake ijihad (independent reasoning) nor would they allow others to undertake it.

That is why, many Muslim majority countries, including Pakistan and Bangladesh have done away with talaq-e-bidat, halala nikah and regulated polygamy to exceptional cases if not completely abolished it. However, the AIMPLB's objective is to secure annulment of any law passed by legislature or judgments of courts which even indirectly amount to interference in the family laws applicable to Muslims, whether or not they are within the Qur'anic and Islamic framework. The AIMPLB is guarding the hegemonic interests, turf and terrain of the Ulemas and the plea they take is that Muslim Personal Law as legislated during the colonial period and interpreted by the British Courts is divine.

### **Divinity of shari'a**

The claim of AIMPLB that shari'a is divine is far from the truth. There are human elements in shari'a, particularly in comprehending and understanding the true import of the Qur'anic verses. That is the reason why there are several fiqhs or schools of jurisprudence and they all have different rules. The two major divisions among fiqh are Shi'a and Sunni. Among the Shi'as, the major fiqhs are - Ja'fari, Batini, Tayyebi-Musta'liyya, Nizar'iya, Zaydis and Isma'lis. Among the Sunnis, the major fiqhs are - Hanafi, Hanbali, Sha'afi, Maliki and Zahiri besides other minor fiqhs. Talaq-e-bidat and halala nikah is largely permissible within the Haafi fiqh. In other fiqhs talaq-e-bidat and halala nikah is not even permissible. Similarly, mutah nikah (nikah or marriage for a fixed duration after which talaq is ipso facto) is permissible among Shi'a fiqhs but not in Sunni fiqhs. It is evident from the existence of diverse fiqhs following different laws that human interpretation and comprehension of divine laws is part of shari'a and therefore diverse.

While Qur'an is an important source of shari'a, it is not the only source. The other sources are hadith (pronouncements of the Prophet), qiyas (deductive analogy) and ijma (consensus of the Muslim community). Qiyas, enables the mujtahid (qualified Muslim jurist who interprets law) to use deductive analogy, understand the application of Qur'anic verses and hadith in a known case and compare and distinguish circumstances to create an injunction in a new situation. When a situation arises wherein there is neither any guidance from Qur'an, nor anything in the hadith literature, and no parallel situation to deduce from, then reliance is to be placed on the general consensus among the learned of the community. This source is called as ijma.

For example, when the issue of permissibility of organ transplant in Islam arose, there was nothing in Qur'an or hadith literature to guide. The Muslim jurists got together and developed a consensus that under certain circumstances organ transplant was permissible on the doctrine of necessity - which permits even things that are forbidden under dire necessity. As human reasoning is involved, and even encouraged in Islam, diverse fiqhs evolved and became integral part of shari'a. That Prophet himself was in favour of reasoning and evolution of shari'a is evident from the well-known tradition of Prophet. When the Prophet sent Mu'adh bin Jabal as governor of Yemen as well as dispenser of justice, the Prophet asked Mu'adh, 'according to what shall you judge? Mu'adh replied, 'According to the Qur'an'. He was further asked, 'and if there is nothing therein?' 'According to the finest tradition of the Prophet', Mu'adh replied. The Prophet then asked, 'and if you find nothing therein?' Mu'adh replied, 'then I shall strive to interpret with my reason'. Hearing this, the Prophet said, 'praise be to God who has favoured the messenger (Mu'adh) of His Messenger (Prophet) with what His Messenger is willing to approve'.

In India, Islamic jurisprudence was an evolving science till the colonization of the country under British. The Warren Hastings' Plan of 1772 provided for establishment of civil and criminal courts and protected the right of Hindus and Muslims to apply their own personal laws in inheritance, marriage etc. In the year 1791 under directions of Hastings, Charles Hamilton translated from Arabic the Hedaya (The Guide) into English. With the reliance of the British courts on written text, the evolution of shari'a came to a halt.

AIMPLB's plea of divinity is a ruse to ensure that shari'a does not evolve further and is not implemented in true Qur'anic spirit of justice and to achieve Islamic ideals of human dignity, brotherhood and sisterhood and equality. That is why they are resisting Bano's petition before the Supreme Court. What the AIMPLB is defending is not shari'a, which encompasses all human activities and is ever evolving. AIMPLB is defending sectarian schools of jurisprudence, in the present case Hanafi fiqh. The fiqhs require taqlid, i.e. unquestioningly submitting to the jurisprudential authorities and past precedents irrespective of ever changing circumstances.

### **Muslim women's struggle for gender justice**

It is worth visiting some of the fatwas (opinions of the jurists) issued by the muftis (those who are trained in Islamic jurisprudence and authorize to issue fatwas), even though they are not binding. Given the socio-economic and educational backwardness of the community, these fatwas cannot be ignored, particularly those against the women who find themselves in a hopeless and helpless situation. In the year 2010 there was a fatwa of Darul-ul-Uloom Deoband opining that Muslim women working in establishments which required interaction with male colleagues was haram (forbidden). An all Kashmiri girls' music band was called haram by another fatwa. There have been fatwas banning Muslim women from exercising their voting rights, contesting elections, viewing most channels on TV or listening to music. In the Imrana case, fatwa was issued directing Imrana who was sexually assaulted by her father-in-law to be divorced as she was now haram to her husband. Fatwas have upheld divorce when given in fit of anger, or under influence of liquor, in a fit of anger, via text messages, over telephone and in one case even in a dream.

Muslim women's organizations have agitated against such interpretations of Islam. They have engaged with the religious leadership, including the AIMPLB. Uzma Naheed from IQRA International Women's Association has been engaging with the religious leadership for quite some time and even finds some Ulema to be sympathetic. The only difference her long engagement and hard efforts to reason with the religious leadership in general and AIMPLB in particular is for all to see - MLPB has opposed Bano's petition in Supreme Court for a declaration that talaq-e-bidat is null and void. The only silver lining in the otherwise dark cloud is that a tiny minority of women have now been included as members of the AIMPLB, including Uzma Naheed.

Bhartiya Muslim Mahila Aandolan (BMMA) has been agitating for rights of Muslim women within the Islamic framework. Having membership of about one lakh Muslim women, they have come a long way. Organizing Annual conventions and flagging issues of Muslim women, they have established Shari Adalat wherein women Qadis try to adjudicate matrimonial disputes brought before them by Muslim women in accordance with Qur'anic principles. However, Shari Adalats have achieved limited success as it is difficult to get men to attend counselling and if they do, it is difficult to convince them about equal rights of women in Qur'an given the fatwas of religious leadership which favour them. BMMA has also developed a model nikaahnama wherein marriages are solemnized on equitable terms to both and the husband delegates his right to divorce to his wife and agrees not to go in for second wife during the lifetime of their marriage.

BMMA has also approached the Government to bring in suitable legislation against talaq-e-bidat, halala nikah and polygamy. Islamic scholar Dr. Asghar Ali Engineer, Institute of Islamic Studies and BMMA collaborated to draft a legislation regarding Muslim family affairs within the Qur'anic framework taking the best provisions from various fiqhs and Muslim majority countries. Dr. Asghar Ali Engineer has consulted Muslim scholars and debated with them before evolving this draft legislation. He approached the AIMPLB to discuss the draft legislation proposed by him but they did not show any interest whatsoever.

SAHIYO, a group of Bohra (Shi'a Muslim) community women have written letters to their religious leadership to stop the practice of Female Genital Mutilation, but the religious leadership is only advising the members of SAHIYO not to interact with media as that brings a bad name to the community.

What options are the victims of patriarchal Muslim religious leadership – Muslim women – left with except to agitate before courts and secular institutions of secular democratic country which is duty bound to ensure non-discrimination on grounds of gender and religion and ensure that women are treated with dignity and as right bearers and not as chattels.

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**P.S.**

\* "India: Muslim Women's Agitation against Patriarchy: will their grievances be redressed?". SIAWY. Tuesday 5 April 2016:  
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