Muslim Women's Right to Maintenance in India

Saumya Uma
MUSLIM WOMEN'S RIGHT TO MAINTENANCE IN INDIA

Saumya Uma

The erstwhile Rajiv Gandhi government enacted the Muslim Women (Protection of Rights on Divorce Act), 1986 to neutralise the effects of the Shah Bano judgement of the Supreme Court (Mohamed Ahmed Khan vs Shah Bano Begum, 1985). In that judgement, the apex court stated that Muslim women could claim life-long post-divorce maintenance under secular law S. 125, Criminal Procedure Code. The 1986 Act, rather than protecting, ironically sought to restrict Muslim women's right to post-divorce maintenance to three months after divorce. This was a clear case of the government succumbing to conservative and patriarchal forces from the Muslim community, thereby violating principles of justice and equality for women.

Judicial responses to post-divorce maintenance of women
A product of hasty drafting, one provision of the Act - Section 3 (1) - provides that a divorced woman shall be entitled to have from her husband, "a reasonable and fair provision and maintenance" which is to be made and paid to her within the iddat period. An issue that has come up before the courts time and again is the interpretation of the term "reasonable and fair provision". Some courts, such as Kerala, Gujarat and Maharashtra, had interpreted the term in a broad manner and stated that this should include maintenance for the woman's future extending beyond the iddat period. However, other states, such as Orissa, had interpreted the term to be maintenance for and during the period of iddat alone. For several years, the fate of Muslim women's post-divorce maintenance depended on the varying standpoints taken by each High Court.

This inconsistency has been put to rest by a Full Bench of the Supreme Court in Daniel Latifi vs Union of India, 2001. This judgement affirmed the beneficial interpretation adopted by the Bombay High Court and other courts, and confirmed that the clause "reasonable and fair provision" meant life-long post-divorce maintenance to be paid by the husband within the iddat period. It further said that this was a right of a lump sum provision to be made and paid to the woman soon after her divorce.

The Kerala High Court, through a judgement passed in November 2004 in Abdul Hammed vs Fousiya, has gone a step further and clarified that a Muslim woman would be entitled to post-divorce maintenance from her former husband even if she had remarried after the divorce. It granted the woman maintenance from the date of divorce to the date of remarriage, and stated that remarriage will not justify the former husband from withholding
the benefits payable to the wife. Section 125 of the Criminal Procedure Code stipulates that maintenance can be claimed only by a woman who has not remarried after divorce. This archaic provision essentially ensures an ex-husband’s control over the woman and her sexuality, even after her divorce, and has no place in modern jurisprudence. Fortunately, there is no such stipulation in the 1986 Act an omission possibly due to hasty drafting!

**Constitutional validity of the 1986 Act**
The 1986 Act has met with severe criticisms from women’s organisations, human rights groups and secular humanists since the time of its enactment. Some such criticisms include:

*The Act discriminates against Muslim women solely on the basis of religion, thereby violating the guarantee of equality and non-discrimination on the grounds of sex and religion, set out in Articles 14 & 15 of the Indian Constitution.
*The Act is impractical in its expectation that parents, brothers and other relatives will shoulder the responsibility for a divorced woman's and her children's maintenance;
*The expectation that a divorced woman will sue her parents/other relatives to obtain maintenance is unrealistic;
*The right of Muslim women to seek maintenance from Wakf Boards is illusory, as many State Wakf Boards are either disfunctioning or non-existent.
*A provision in the Act that gives the option of applying for maintenance under S. 125 Cr. PC if both parties agree is pointless as few husbands would give the requisite consent.

In Danial Latifi's case, the constitutional validity of the 1986 Act was challenged. It is interesting to note some of the arguments put forth by advocates representing various players in this process. The advocates for the petitioner argued that the Act was un-Islamic, unconstitutional and it has the potential of suffocating the Muslim women. The Solicitor General supported the Act by stating that personal law was a legitimate basis for discrimination, and that therefore it does not offend Article 14 of the Constitution. The All India Muslim Personal Law Board, as an intervener, defended the 1986 Act and stated that Section 4 of the 1986 Act (maintenance from family, relatives & State Wakf Boards) was good enough to take care of avoiding vagrancy of a divorced woman, and that she need not be dependent on her husband. The Islamic Shariat Board defended the Act by arguing that the 1986 Act was enacted to nullify the erroneous judgement in Shah Bano's case and to bring it in line with Muslim personal law. The National Commission for Women submitted that the court should adopt a broad interpretation of 'reasonable and fair maintenance', failing which Constitutional guarantees maybe violated.

The Supreme Court said that the provisions of the 1986 Act were a fair substitute to S. 125 Cr.P.C. as both the laws sought to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that such an object was being fulfilled. On this ground, the court upheld the Constitutional validity of the Act.

The Daniel Latifi case is significant for bringing the whole question of alimony within the right to life under Article 21 of the Constitution, which it emphasised, included the right to live with dignity. Earlier, Indian courts have been reluctant to test aspects of matrimonial law against the cornerstone of constitutional principles of equality, non-discrimination and right to life. The broader implications of the judgement are the potential it holds for affirmation of the centrality of constitutional values, vis-à-vis discriminatory aspects of matrimonial laws.

**Obstacles to accessing justice**
The All India Muslim Personal Law Board continues to propagate the view that a man should pay maintenance only till the iddat period; conservatives have popularised the belief among
community women and men that it would be sin (haraam) for the woman to claim maintenance from her former husband after the expiry of the iddat period, as by then, they would be strangers to each other. In reality, this, in itself, discourages many women from asserting their right to post-divorce maintenance rights. A lack of awareness, poverty, illiteracy, financial implications of litigation and community opposition against claiming post-divorce maintenance cause further obstacles to Muslim women accessing justice. This reinforces the fact that for progressive judgements by courts of law to have considerable impact, it is imperative that legal exercises are complemented by outreach, awareness raising and empowerment of Muslim women at the community level.

The author is a women's rights advocate and Co-Director of Women's Research & Action Group (WRAG), Mumbai.