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Clinical Legal Education and Study of Law Reform Related to Talak

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Abstract:
The research topic revolves around the legal education and its reforms in law related to talak in the ndian society and constitution

Introduction

The most popular form of Government in modern times is Democracy. The backbone of every democracy is its judicial system which relates to Legal Education. Thus, the bedrock of any judicial system is the imparting of right kind of legal education as it is from the law schools that the lawyers and the judges emerge.

The greatness and the honor of legal relations lies in the Code of its ethics governing the relations of lawyers between themselves and with others in their professional capacity. Law has to deal with problems of diverse magnitudes and a student of law has to be trained in professional skills in order to meet the challenges of globalization and universalization of law.

John Dewey argued that education is essential to a democratic state.He emphasized the need for the democratic citizens to understand and consider the welfare of the society as a whole. The goal of education should include the promotion of a humane, people sensitive democracy dedicated to promoting opportunities of life, liberty and pursuit of happiness to each and every person. The idea of equal access to justice has been around for a long time. Even though the access to justice movement did not take off too early, the concept of lawyers providing free legal service to the poor dates back to 1495 when King Henry VII legislated to require a judge to assign a lawyer to the poor when seeking justice. This could be said to be one of the first efforts to strive for equality before the law and practice was adopted in most parts of the British colonial empire.

In an interview about legal education reform, Professor Upendra Baxi expressed his concern that there is no new generation of lawyers coming up in India who will work to help the underprivileged get an access to justice. The reason behind this according to Professor Baxi is that there might be a lack on the part of the law schools to inculcate the proper curriculum, to make both public service and social service stand together at the center of young law student's education instead of encouraging the growth of corporate culture.

He was of the view:

"What do generations signify? Growth in self-reflection and wisdom and capacity to serve the underprivileged."

Clinical Legal Education thus aims at this sort of teaching method in order to inculcate the spirit and zeal of public as well as social service amongst law students. The objective of global legal education is not to create lawyers who can "practice" in several jurisdictions, but it should have an incidental effect. The

objective is to create trained minds who can settle cross border issues efficiently.13 Therefore, with the globalization of legal education and research becoming a universal trend, promoting Clinical Legal Education through institutional mechanisms is the need of our times.

Clinical Legal Education- Meaning

The concept of practical problem solving whether by working in a laboratory or in a field, as an important means of developing skills has been acknowledged since time immemorial. Research can contribute significantly towards the improvement in teaching and more importantly, addressing numerous challenges relating to law and justice.

The term, "Clinical Legal Education" or law clinic traditionally refers to a non-profit law practice usually serving a public interest or a group in the society that are in an underprivileged or exposed situation and lack access to legal system. It is a term which encompasses learning which is focused on enabling students to understand how the law works in action. The use of the word 'clinic' prompts the analogy of trainee doctors to meet real patients in their medical clinics. Clinical Legal Education is the only one way in which theory and practice can be brought together.

Law clinic or Clinical Legal Education is not a term of art, it can mean different things in different contexts. R. Grimes, a well-known author in the field defines "law clinic" as:

"A learning environment where students identify, research and apply knowledge in a setting which replicates, at least in part, the world where it is practiced…It almost inevitably means that the student takes on some aspect of a case and conducts this as it would be conducted in the real world."

According to Professor N.R. Madhava Menon, Clinical Legal Education plays the traditional role of conflict resolution in court. He refers to Clinical Legal Education as:

"Clinical Legal Education as a pedagogic technique has its focus on the learners and the process of learning."

Richard Lewis, also defines the concept as:

"Clinical Legal Education is essentially a multi-disciplined, multipurpose education which can develop the human resources and idealism needed to strengthen the legal system…a lawyer, a product of such education would be able to contribute to national development and social change in a much more constructive manner."

Thus, it can be said that the foundation of Clinical Legal Education is experimental learning or "Learning by Doing". In a typical legal clinic, students actively represent clients in cases or work on projects on behalf of the clients. Through this process they interact deeply with individuals. They learn to communicate with people who may not share their racial, caste, ethnic, religious or caste backgrounds. This window into the lives of marginalized and poor communities gives law students the ability to formulate and promote more inclusive policies in their own practice as lawyers as well as in their roles as judges or legislators.

Types of Law Clinics: Based on the actions to be taken, the legal clinics can be divided into three types:

Simulation Clinics: Students can learn from a variety of simulations of what happens in legal practice. Cases can be acted out in their entirety, from the taking of initial instructions to a negotiated settlement or Court hearing. Such sessions can be run as intensive courses or spread through all or part of the academic year in weekly slots. Other simulations can range from negotiation exercises, client interviewing exercises, transaction exercises etc.

The In-house real client clinics: In this model the clinic is based in law school. It is offered, monitored and controlled in law school. In this type of clinic, the clients require actual solutions to their actual problems hence it is called as real client clinic. The client may be selected from a section of the public. The service is given in the form of advice only or advice and assistance. In this type of Clinic, Clients are interviewed and advised orally or in writing and also helped with the preparation of their cases. The clinic may operate as a paralegal service or a fully-fledged solicitor's practice.

The out-house clinics: It is a clinic that involves students in exercising legal work outside the college or university. These types of clinics may operate on the basis of advice giving only. Such agencies are run by trade union councils and other non-statutory bodies. The clinic might take the form of placement also in solicitors' office or barristers' chambers.

Clinical Legal Education in India- Evolution

Spurred by desires to make law school experience more educational and relevant for the students and to promote equal justice and the rule of law, scholars have devoted considerable attention and resources to creating or expanding Clinical Legal Education in the developing countries in the last twenty years. In ancient India, law was understood as a branch of Dharma. The Vedas were considered to be the original sources of law and the Smritis announced the message of Vedas and Smritikars were considered to be great jurists.

The concept of Dharma in the Vedic period can be seen as the concept of legal education in India. Justice was done by the King or through the appointees who in turn were persons of known integrity and reputation of being fair and impartial. Legal historians record instances of legal practitioners known as 'Pleaders' or 'Niryogis' representing parties in litigation at least from the time of Manu Smriti. According to Dr. Kane, a person well versed in Dharma Shastra and procedure of law could be appointed as a representative. Formal legal education started in 1855, when the first professorship of law was introduced in the Government Elphinstone College. In 1857, three Universities in Bombay, Madras and Calcutta, bearing the respective names, formally introduced legal education.

During the British rule, legal education in India followed the general colonial model of producing clerks, not managers or advocates. The primary goal was to support the existing financial interests of England certainly not to reform the local legal profession.55 After independence, legal education was expected to bring the legal system in tune with the social, economic and political desires of the country. For the first time in 1949, The Bombay Legal Education Committee recommended that practical courses should be made compulsory only for students who choose to enter the profession of law and the teaching method should include seminar or group discussions, moot court competitions, etc.

In the year 1958, the 14th Report of the Law Commission of India recognized the importance of professional training and for a balance of both academic and vocational training. It recommended that University training must be followed by a professional course concentrating on practical knowledge to those who chose to practice in the Courts. The Commission's report concentrated on institutionalizing and improving the overall standards of legal education. The report also discussed the various teaching methods and suggested that seminars, discussions, mock trials and simulation exercises should be introduced.

The evolution of Clinical Legal Education gained momentum in the 1960's. The idea of involving law school in legal aid can be seen as the first attempt to introduce some kind of framework in India. The legal aid movement of the 1960's in India assumed that law schools would have a significant role in dispensing legal services. Reform was considered to be necessary to foster the country's nascent democracy and help

achieve the goals of good governance expressed in the Constitution of India by developing competent legal minds.

Clinical Legal Education in India has gone through many stages of development before a formal inclusion was made in the curriculum. Some of these stages are:

1. Clinical legal education took its roots in India in the late 1960's. In the mid-60's, Delhi University introduced the case method in teaching law, and in 1969, the faculty and students established a Legal Service Clinic.63 The efforts made by the faculty were purely voluntary and no attempts were made for institutionalizing and integrating Clinics into the curriculum.
2. Banaras Hindu University was the first to introduce a course on Clinical Legal Education in early 1970's. The course included court visits, participation in a Legal Aid Clinic established by the institution, and an internship in chambers of lawyers. The Legal Aid Clinic was supervised by a retired judge on a token honorarium. The entire Clinical legal education in Banaras Hindu University revolves around its Legal Aid Clinic.
3. In 1983-84, a Legal Aid Clinic was established in the Faculty of Law, University of Jodhpur. This Clinic was actively involved in the dissemination of information about social welfare legislation, helping in settling cases in accident and matrimonial disputes.
4. After five years of debate over a 3 year v/s 5 year LLB course, which began during a 1977 National Seminar on Legal Education at Bombay, the Bar Council of India unanimously agreed to introduce the new 5 year course from July, 1982 open to students after completing their senior secondary education. In this curriculum also the Bar recommended practical training.
5. National Law School India University (NLSIU) introduced both compulsory and optional Clinical courses. Three compulsory Clinical courses were introduced in the year 1992. In 1994-95 the Clinical courses were reorganized and two Clinical courses namely Client Interviewing and Alternative Dispute Resolution Clinic, and Trial Advocacy and Appellate Advocacy Clinic were made compulsory. Students could choose third Clinical course from several Clinics such as Corporate Clinic, Criminal Law Clinic and Labour Law Clinic.
6. In 1996-97 the Clinical programs were further revised to integrate them with legal aid extension services. Three Clinics offered in the final year have now been spread over to earlier year namely third and fourth year of study. In addition to these compulsory Clinical courses' students have optional Clinical courses like Moot Court, Community base Law Reforms Competition, and Legal Services Clinic.

Although the number of Law Colleges involved in Clinical education grew in this period, their programs remained fairly small, isolated and voluntary and they were compelled to work with limited financial resources. Further, the Clinics suffered due to lack of supervision, absenteeism and dearth of trained faculty. Almost all such initiatives aimed at serving the poor and no proper emphasis was laid on the skills that the law students required in order to work in the Legal Aid Clinics or the skills that they could develop by working in the same. Nevertheless, the efforts in developing and employing Clinical legal education programs in a voluntary manner in infrastructural deficient conditions at least resulted in sensitizing student in socio-economic issues hitherto alien to class room discussions in the teaching of law.

Law reform related to talak

Legal ban on triple talaq

The Muslim Women (Protection of Rights on Marriage) Act, 2019 passed on 30 July 2019 after a very

long discussion and opposition finally got the verdict (the Indian Supreme Court judgement of August 2017 described below) to all women. It made triple talaq illegal in India on 1 August 2019, replacing the triple talaq ordinance promulgated in February 2019. It stipulates that instant triple talaq (talaq-e-biddat) in any form – spoken, written, or by electronic means such as email or SMS – is illegal and void, with up to three years in jail for the husband. Under the new law, an aggrieved woman is entitled to demand maintenance for her dependent children.

The Government first introduced the bill to Parliament on 22 August 2017. MPs from Rashtriya Janata Dal, All India Majlis-e-Ittehadul Muslimeen, Biju Janata Dal, All India Anna Dravida Munnetra Kazhagam, Indian National Congress and All India Muslim League opposed the bill. Several Opposition lawmakers called for it to be sent to a select committee for scrutiny. It was passed on 28 December 2017 by the Lok Sabha, or lower house of the Indian Parliament, where the decision found support from majority members of the House.

In a major political win for the BJP government, the Rajya Sabha, or upper house of Parliament, where the ruling NDA did not have a majority, approved the bill (99–84) on 30 July 2019 after a lengthy debate. The bill followed a 2017 Supreme Court ruling that the practice of instant triple talaq is unconstitutional and a divorce pronounced by uttering *talaq* three times in one sitting is void and illegal. Muslim triple talaq petitioner Ishrat Jahan welcomed the Bill when it was presented. Also Arif Mohammad Khan welcomed and appreciated the decision taken by Government and Parliament of India.

The triple talaq bill proposed by the previous Modi government lapsed when an election was called and the Lok Sabha was dissolved before the bill was sent to the Rajya Sabha for approval.

Practice

Triple talaq is a form of divorce that was practiced in Islam, whereby a Muslim man could legally divorce his wife by pronouncing *talaq* (the Arabic word for divorce) three times. The pronouncement could be oral or written, or, in recent times, delivered by electronic means such as telephone, SMS, email or social media. The man did not need to cite any cause for the divorce and the wife need not have been present at the time of pronouncement. After a period of *iddat*, during which it was ascertained whether the wife is pregnant, the divorce became irrevocable. In the recommended practice, a waiting period was required before each pronouncement of talaq, during which reconciliation was attempted. However, it had become common to make all three pronouncements in one sitting. While the practice was frowned upon, it was not prohibited. A divorced woman could not remarry her divorced husband unless she first married another man, a practice called *nikah halala.*

The practice of *talaq-e-biddat* is said to have been around since the period of Caliph Umar, more than 1400 years ago. The Supreme Court described it as "manifestly arbitrary" and said that it allows a man to "break down [a] marriage whimsically and capriciously".

Instant divorce is termed talaq-e-bid'at. A hadith by An-Nasa'i stated that Muhammad had accused a man of mocking the Quran by uttering divorce thrice in one go. Talaq pronounced thrice simultaneously from Muhammad to the first two years of Umar's reign as caliph was only considered as a single divorce according to Sahih Muslim. The latter however allowed it, upon seeing the people did not observe the iddah, but also had men using such divorce flogged.

Imam Abu Hanifa, Imam Malik, Imam Shafi'i, Imam Ahmad bin Hanbal and majority of scholars from Salaf and Khalaf (later generations) are of opinion that triple talaq is valid. In Sunni Islam, there is a

consensus (ijma) that triple talaq is valid. Abu Hanifa and Malik ibn Anas considered it irrevocable despite its illegality. Al-Shafi'i considered it permissible and Ahmad ibn Hanbal considered it to be valid.
Triple talaq is not mentioned in the Quran. It is also largely disapproved by Muslim legal scholars. Many Islamic nations have barred the practice, including Pakistan and Bangladesh, although it is technically legal in Sunni Islamic jurisprudence. Triple talaq, in Islamic law, is based upon the belief that the husband has the right to reject or dismiss his wife with good grounds.
The All India Muslim Personal Law Board (AIMPLB), a non-governmental organization, had told the Supreme Court that women could also pronounce triple talaq, and could execute Nikah Namas that stipulated conditions so that the husbands could not pronounce triple talaq. According to AIMPLB, "Sharia grants right to divorce husbands because Islam grants men a greater power of decision-making."

Background

Muslim family affairs in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937 (often called the "Muslim Personal Law"). It was one of the first acts to be passed after the Government of India Act 1935 became operational, introducing provincial autonomy and a form of dyarchy at the federal level. It replaced the so-called "Anglo-Mohammedan Law" previously operating for Muslims and became binding on all of India's Muslims.
The sharia is open to interpretation by the ulama (class of Muslim legal scholars). The ulama of Hanafi Sunnis considered this form of divorce binding, provided the pronouncement was made in front of Muslim witnesses and later confirmed by a sharia court. However, the ulama of Ahl-i Hadith, Twelver and Musta'li persuasions did not regard it as proper. Scholar Aparna Rao states that, in 2003, there was an active debate among the ulama.
In traditional Islamic jurisprudence, triple talaq is considered to be a particularly disapproved, but legally valid, form of divorce. Changing social conditions around the world have led to increasing dissatisfaction with traditional Islamic law of divorce since the early 20th century and various reforms have been undertaken in different countries. Contrary to practices adopted in most Muslim-majority countries, Muslim couples in India are not required to register their marriage with civil authorities. Muslim marriages in India are considered to be a private matter, unless the couple decided to register their marriage under the Special Marriage Act of 1954. Owing to these historical factors, the checks that have been placed on the husband's unilateral right of divorce by governments of other countries and the prohibition of triple talaq were not implemented in India.

Opposition

The practice faced opposition from Muslim women, some of whom filed a public interest litigation in the Supreme Court against the practice, terming it "regressive" The petitioners asked for section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, to be scrapped, describing it as being against Article 14 of the Constitution (equality before the law).[46]
On 13 May 2017, during the hearings before its final judgment, the Supreme Court described instant triple talaq as the "worst form of marriage dissolution". It noted that the custom is banned in the Muslim-majority countries of Saudi Arabia, Morocco, Afghanistan, and Pakistan. On 8 December 2016, the Allahabad High Court observed in a ruling that the practice of instant triple talaq was unconstitutional and violated the rights of Muslim women.
In March 2017, over 1 million Indian Muslims, a majority of whom were women, signed a petition to end

instant triple talaq. The petition was started by the Muslim Rashtriya Manch, an Islamic organization affiliated to the Rashtriya Swayamsevak Sangh. The petitioners against instant triple talaq have given evidence showing how instant triple talaq is simply an innovation that does not have much to do with Quranic beliefs. This is supported by the interpretation of Quranic text by many Islamic scholars, historical evidence and legal precedent.

On 10 May 2017, senior cleric Maulana Syed Shahabuddin Salafi Firdausi denounced triple talaq and nikah halala, calling them un-Islamic practices and instruments to oppress women. The practice was also opposed by Hindu nationalists and Muslim liberals. Congress leader Kapil Sibal tweeted: "Absence of consensus in Court makes it more difficult to forge consensus within communities. Glad that Court set aside a 'sinful' practice." However, Sibal also made statements supporting triple talaq (see the following section).

Over the year women organizations like Bharatiya Muslim Mahila Andolan and several others opposed this practice in particular and further demanded more reforms in Muslim personal laws.

Support

Triple talaq has been supported by the All India Muslim Personal Law Board (AIMPLB), a non-governmental body that supervises the application of Muslim personal law. It believes that the State does not have the right to intervene in religious matters. The AIMPLB's lawyer Kapil Sibal had said that though instant talaq can be thought of as a sin by some, but that "setting the validity of customs and practices of a community is a slippery slope" Kapil Sibal cited Article 371A to state that even the Constitution does intend to protect matters of practice, tradition and customs of communities. However, Sibal has also made statements opposing the practice (see previous section).

The All India Muslim Personal Law Board (AIMPLB) defends the practice. In April 2017, citing a report prepared by Muslim Mahila Research Kendra in co-ordination with Shariah Committee for Women, AIMPLB claimed that Muslims have a lower rate of divorce compared to other religious communities, countering the argument that Muslims have the highest number of divorces in the country due to the practice of triple talaq. It also claimed that it had received forms from 35 million Muslim women across the country, supporting shariat and triple talaq.

AIMPLB issued a code of conduct in April 2017 regarding talaq in response to the controversy over the practice of triple talaq. It warned that those who divorce for reasons not prescribed under shariat will be socially boycotted, in addition to calling for boycott of those who use triple talaq recklessly and without justification. It also stated that it should be delivered in three sittings with a gap of at least one month each. Opining on this, Aakar Patel, Chair of the Board of Amnesty International in India, said Muslims are the only communities for whom divorce has been criminalized.

Legislation

The Muslim Women (Protection of Rights on Marriage) Bill, 2017

The Government formulated a bill and introduced it in the Parliament after 100 cases of instant triple talaq in the country since the Supreme Court judgement in August 2017.[On 28 December 2017, the Lok Sabha passed The Muslim Women (Protection of Rights on Marriage) Bill, 2017. The bill was planned to make instant triple talaq (talaq-e-biddah) in any form — spoken, in writing or by electronic means such as email, SMS and WhatsApp illegal and void, with up to three years in jail for the husband. MPs from RJD, AIMIM, BJD, AIADMK, and AIML opposed the bill, calling it arbitrary in nature and a faulty

proposal, while Congress supported the Bill tabled in the Lok Sabha by law minister Ravi Shankar Prasad. 19 amendments were moved in the Lok Sabha but all were rejected

The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018

On the grounds that practice of instant triple talaq was continuing unabated despite the SC striking it, the government issued an ordinance to make the practice illegal and void.

The provisions of the ordinance are as follows:

- Instant triple talaq remains cognizable with a maximum of three years imprisonment and a fine.
- Only complaints with the police by the wife or her blood relative will be recognized.
- The offence is non-bailable i.e. only a Magistrate and not the police can grant bail. Bail can be granted only after hearing the wife.
- The custody of the minor children from the marriage will go to mother.
- Maintenance allowance to the wife is decided by the magistrate.

The ordinance was cleared by the President on 19 September 2018.

The Muslim Women (Protection of Rights on Marriage) Bill, 2018

As the triple talaq ordinance of 2018 was to expire on 22 January 2019, the government introduced a fresh bill in the Lok Sabha on 17 December 2018 to replace the ordinance.

The provisions of the bill are as follows:

- All declaration of instant triple talaq, including in written or electronic form, to be void (i.e. not enforceable in law) and illegal.
- Instant triple talaq remains cognizable with a maximum of three years' imprisonment and a fine. The fine amount is decided by the magistrate.
- The offence will be cognizable only if information relating to the offence is given by the wife or her blood relative.
- The offence is non-bailable. But there is a provision that the Magistrate may grant bail to the accused. The bail may be granted only after hearing the wife and if the Magistrate is satisfied with reasonable grounds for granting bail.
- The wife is entitled to subsistence allowance. The amount is decided by the magistrate.
- The wife is entitled to seek custody of her minor children from the marriage. The manner of custody will be determined by the Magistrate.
- The offence may be compounded (i.e. stop legal proceedings and settle the dispute) by the Magistrate upon the request of the woman (against whom talaq has been declared).

The bill was passed by Lok Sabha on 27 December 2018. However, the bill remained stuck in the Rajya Sabha due to the opposition's demand to send it to a select committee.

The Muslim Women (Protection of Rights on Marriage) Ordinance, 2019

As the triple talaq ordinance of 2018 was to expire on 22 January 2019 and also because the triple talaq bill of 2018 could not be passed in the parliament session, the government repromulgated the ordinance on 10 January 2019. On 12 January 2019, the president of India Ram Nath Kovind approved the ordinance of 2019.

The Muslim Women (Protection of Rights on Marriage) Act, 2019

The Muslim Women (Protection of Rights on Marriage) Act, 2019 became law on 31 July 2019, replacing the earlier ordinance.

Case Law

Shayara Bano v. Union of India

The bench that heard the controversial *Shayara Bano v. Union of India & Others* case in 2017 was made up of multifaith members. The five judges from five different communities are Chief Justice J. S. Khehar (a Sikh), and Justices Kurian Joseph (a Christian), R. F. Nariman (a Parsi), U. U. Lalit (a Hindu) and S. Abdul Nazeer (a Muslim).

The Supreme Court examined whether Triple talaq has the protection of the constitution—if this practice is safeguarded by Article 25(1) in the constitution that guarantees all the fundamental right to "profess, practice and propagate religion". The Court wanted to establish whether or not triple talaq is an essential feature of Islamic belief and practice.

In a 397-page ruling, though two judges upheld validity of instant triple talaq (talaq-e-biddat), the three other judges held that it was unconstitutional, thus barring the practice by a 3–2 majority. One judge argued that instant triple talaq violated Islamic law. The bench asked the central government to promulgate legislation within six months to govern marriage and divorce in the Muslim community. The court said that until the government formulates a law regarding instant triple talaq, there would be an injunction against husbands pronouncing instant triple talaq on their wives.

According to The Economist, "Constitutional experts said [the judges] legal reasoning fell short of upholding personal rights over religious laws", whilst noting "The judgment did not ban other forms of Muslim divorce that favor men, only the instant kind."

Conclusion

The Clinical Legal Education in India has its roots in both the legal aid and legal education reform movements, as part of an effort to improve the quality of law practice, and to increase awareness among lawyers about professional and public responsibility. Prof. Menon in his book has rightly point out that, *"The law curriculum does not adequately reflect the changing role of law in a developing society, and law teaching does not take account of the new skills of social engineering required from the future lawyers."* Clinical Legal Education should devote its time on training students with an emphasis on improvement of their competence in advocacy skills, and should strive to develop the perception, attitudes, skills and sense of responsibility which the lawyers are expected to assume when they complete their professional education. When this is achieved, the ultimate goal of legal education to establish a just society based on the rule of law, would become attainable.