

Purposive Definition of Law With Reference To Triple Talaq

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Abstract - In this research, I have dealt with the topic purposive definition of law. I have covered the meaning and purpose, the changing society and their needs in change in law. The society is dynamic, and so should be our laws. Not all laws remain applicable at all times and at all places. The solution to re-integrate laws with the society is to modify them. Modifications give a new form and existence to the laws. It helps the society to trust more on laws. The laws, when made, the need and scenario of that particular time was kept in mind. So, with time it must be moulded. I have referred to various schools of jurisprudence which either favoring or criticizing the change of law with the changing time. Jurisprudence state the evolution of laws. So it plays a crucial role in change in law. I have researched on Triple Talaq which was practiced in Muslims in India, the consequences of the same, the misinterpretation by everyone and its actual meaning. The judgment of Supreme Court has opened the gates of Justice to many women of Muslim community. I have searched the incidences where even the husband regretted giving triple tale at the heat of the moment. But was helpless as nothing could superceed the law. The case of shah bano has led the new beginning by stating maintenance as a right to widows even in Muslims. The case of shayrabano and petitions of many other Muslim women who felt the violation of their rights by customary law of triple tale and Halala were clubbed together. After so many debates and discussions, finally the Supreme Court held that Triple Talaq is. invalid and should not be practiced. At the end of this research, I have dealt with the other countries with regards to what they follow on triple tale.

Keywords – society, law, jurisprudence, marriage, triple tale, justice.

I. INTRODUCTION

Purposive definition of law is the definition constructed for a particular purpose. It is an approach to study the law with its aims and objectives. It helps us to study the law as a whole. Whenever a statute is enacted by legislature, it is enacted keeping in mind .some aims and objectives which is needed to be fulfilled in society. Legislature states the purpose behind enactment of such law which is used by various courts to interpret the law. Purposive definitions are used when the courts use extraneous materials from the pre-enactment phase of legislation, including early drafts, committee reports and white paper. Not only the codified form of word is a law, there are other factors also which states the law, example: Customs, traditions, etc. statues are enacted according to the need of society at that time. But as we all know society is not static and is dynamic, so no law can be read as it is, that is why we have the provision of amendments. But not every time a statute can be amended because in India we have a long procedure to be followed for amendment. So laws are interpreted by courts according to the need of the hour. Every judge has different beliefs and thoughts. So it's the interpretation which states the purpose of law. However, judges keep in mind the purpose of legislation behind the enactment of a statue. They cannot completely ignore the law. In many of the cases we have seen judges giving decisions superceeding the provisions. Even Supreme Court in India is not bound by its own judgment, as provided by our constitution. We also

have provision of filing review petition in Supreme Court against its own judgment. Review petition means we request the honorable court to reconsider its decision given. They have the power to recognize the need of change in law. In India we have the system of check and balance, so nobody can extend its powers and authorities. Powers and authorities are codified in our constitution. And we consider constitution as supreme, so no one can turn despotic. Purposive definition of law considers factors like parliamentary debates and discussions, speech of ministers, precedents etc to derive the purpose of law and study the minds of legislature.

II.SCHOOLS RELATED TO PURPOSIVE DEFINATION OF LAW

1. SOCIOLOGICAL SCHOOL

This school believes in laws to be made according to need of society. It considers society as supreme. This school focuses on functionality of law. According to them laws are made to govern the society, so they must be changed according to change in society. Law cannot be separated from the society. Law and society go hand in hand. There are many theories given by exponents of this school of law, example:

i. Rudolph Von Inhering

Ihering's theory of social interest which states that laws must be according to interest of society. There will always be a conflict

between social interest and individual interest. Social Interest is where the interest of society lies whereas individual interest is the maximum benefit of an individual. So, there will be conflict between them because each will want maximum benefit of its own. Law is acting as means to achieve balance. He calls his theory as Social Interest because purpose of law is to welfare the society. He calls law as result of constant struggle[1].

ii. Leon Duguit

His theory is Social Solidarity. He says people cannot live in isolation. So, there is need of certain rules and conduct. He defines justice in terms of fulfillment of social needs. He calls justice as social reality because it depends on society. He used law as an instrument to promote justice in the society.

iii. Eugen Ehrlich

According to him, the gravity of law depends upon the society. He talks about living law and formal rules. Living law is extra legal control. For him real source of law is not any enactment, nor judgment, but society itself. Formal rules are rules enacted by state. To integrate law, formal rules have to be made considering living law.

iv. Dean Roscoe Pound

He gave the theory of social engineering. He also gave some jural postulates. He stated the categorization of interests of humans. He believed that protection of interests is the main subject matter of law. Interests may conflict, but law must equalize them and fit to adjust in different circumstances. His theory helps Jurists, legislature and judges to interpret law according to the needs of society.

There are many other exponents, who explain the sociological school of jurisprudence considering society above all.

2. AMERICAN REALISM

Sometimes, it is said to be the left wing of sociological school of jurisprudence. This school also focuses on functionality of law. It emphasis on judges. It says that law is not what is written but what judges do in a particular case. For them, society changes faster than law, that is the reason they do not rely on books. Some of the exponents of this school are –

i. Justice Oliver Wendell Holmes

He focuses on consequences. According to him, law is a set of prediction. He said “Life of Law is not Logic but Experience.”

ii. Karl Lewekyn

According to him focus point of legal research should shift from rules to behavior of judges. Law is what law officials do in a case.

iii. Jerome Frank

He says rules are not the basis of decisions given by judges. Judicial decisions are conditioned by emotions, intuitive hunches, prejudices, temper and other irrational factors. Rules just help judges. Certainty of law is a myth according to him. He supports discretion of judges according to the purpose of law and need of an hour.

3. Historical school

This school believes that law cannot be made but to be found. This school of jurisprudence focuses on customs to be considered as law. Customs are the source of law and they must be considered as supreme. Customs are the repetitive practice in society and hence they must be considered as law because humans themselves have made it and according to their needs so, purposive definition of law opposes this school. They believe that customary rules should define the law and not to be changed according to the needs of society [1].

Some of the exponents of this school of law are-

i. Fredrich Carl Von Savigny

He says that true guides of social actions are custom, history and traditions. According to him language, custom, tradition, law and government cannot be separated. Legislature does not represent consciousness of people. So he preferred customary law over legislature made laws.

ii. Sir Henry Maine

He said about primitive and progressive society. Primitive society is a patriarchal society where individual woman and children have no right. Only the male head member of the family had all the rights. The family is the unit. Many families together form a family group; many family groups form tribes and a collection of tribes form a society. Then, in the moment of progressive societies, there was a shift from status to contract. Because in progressive society, individuals were considered as a basic unit of society. Legal fiction plays an important role in the development law. It means changing law when change is required but not changing the word of law. This, in some means talks about purposive definition of law. He believed in legislature made laws. This society gave rights to women and children also which helped to bring equality in the society.

III. CURRENT EXAMPLE OF CHANGE IN LAW ACCORDING TO ITS

PURPOSE

TRIPLE TALAQ

The word “TALAQ” according to most people is an Urdu word for divorce, but the word is derived from Arabic and means “freeing or undoing knot”. Considering marriage is a bond between a man and a woman, the term refers to divorce, as the partners are free or the knot is undone.

The Quran refers to different types of divorce available in Islam – not just the Talaq, but others like khula, lian, zihar, etc. The chapter of Quran dealing with Talaq caught maximum eyes in recent times. Talaq is of two kinds- tale-e-sunnah and tale-e-biddat. Talaq-e-sunnah carries the approval of the prophet, whereas Talaq-e-biddat is regarded as an innovated form of divorce. Under Talaq-e-ahsan, the husband pronounces tale only once during the wife's clean period, without having established physical relations. They live in the same house, wife performs all her duties as she use to, but they do not maintain any physical relations. During this period if the husband establishes physical relations with her, the divorce stands annulled. Under, Talaq-e-ahsan, the husband pronounces one tale only, but follows it up with another single tale after the next menstrual cycle. If he repeats it for the third time after the next cycle, tale is effective. The husband and wife

are then a free man and woman. Another kind of tale-e-sunnah is talaq-hasan in which the husband pronounces the tale at three regular pronouncements. After which the divorce becomes irrevocable [2]. After the first pronouncement, the wife lives separately from the husband. After completion of each month, the husband says tale. And after third pronouncement the tale becomes irrevocable. This time period of three months is given so that they may not regret after the tale their decisions. During this time the family members try to reconcile the marriage between the couple. Once tale is done, the couple cannot marry each other again until the wife marries another adult male and consummate the marriage and the person voluntarily gives her divorce. This is known as halala. Talaq-e-biddat is however considered as bad form of tale which is though valid but sinful or irregular. It prevails only in sunnis and not in shia muslims. In this type of tale, husband altogether pronounces tale three times and the marriage becomes irrevocable. Wife has no say in this and is bound to accept the tale.

Women approaching Supreme Court argued that gap of one menstrual cycle is essential between pronouncement of divorce, and multiple pronouncements at the same time must be declared illegal. Many countries consider multiple pronouncements as one single divorce. Quran specifies that for Talaq, husband must pronounce it for three times with the gap of one month each [3]. After the second pronouncements, the husband and wife are supposed to live together peacefully. In case they decide to part following another pronouncement, it is to be on a note of decency and amity, with no filthy accusations hurled at each other or wrong claims made. Also, woman is allowed to remarry after the iddat period is over. The Quran gives ample chances to a man to learn from his mistakes. In case he does not and the marriage ends in an irrevocable divorce, his erstwhile wife becomes stranger to him. This is done to protect her honor.

Example when triple talaq led to end of marriage even when couple did not want-

A resident of Gali Gaddihya near Jama Masjid, Rukhsar belonged to the lower middle class, and lived in a joint family with her husband and his parents. One evening, her husband picked a quarrel with his father. Soon, his wife intervened on his behalf. In doing so, she lost her temper and ended up using inappropriate language for her father-in-law, forcing the old man to retreat to his room. Enraged, her husband pronounced instant tale, leaving his wife, who was by then making chapattis for the family, cowering in a corner. As he screamed his lungs out, she put both her hands on her ears to avoid listening to him. But failed. So loud was her husband's proclamation that even the neighbors heard him. The next morning, he realized his folly and wanted his wife back. He spoke to a number of clerics in the walled city. All of them expressed helplessness in restoring his conjugal rights, saying his marriage was over.

Triple Talaq became a game for many. So Quran put a limit and restricted that a man could divorce his wife two times only. If he did so for the third time, he could not have her back.

In **Sainuddin v. Latifanessabibi**, 1918, 46 Cal where the husband had vested his power of divorce with his wife in the nikahnama. In the

nikahnama, sainuddin agreed not to marry a second wife without the consent of the first wife, not to beat or ill-treat the wife and to allow her to visit her parents. When the husband did marry for the second time, his wife left him. The husband filed a case for restitution of his conjugal, whereupon she divorced herself three times in accordance with Muslim law under the authority vested in her at the time of the nikah. The court accepted her plea that she was no longer his wife, so there was no case for restitution of conjugal rights. So, here we can see that according to purposive definition the definition's interpretation was changed.

In the leading case of **Mohd. Ahmed Khan V. Shah Bano Begum** AIR 1985 SC 945, the court gave her right to alimony. She was at the age of 62 given divorce by her husband. Husband stopped giving maintenance to her and their five children. She approached to local court of Madhya Pradesh, filed a petition regarding her right to be maintained under section 125 of code of criminal procedure. Many were of the opinion that section 125 of CrPC; dealing with maintenance of wife and children violates the Muslim Personal law and is not applicable on Muslims. But court held that CrPC is applicable unbiased of religion, and hence Shah Banu won the case.

In the case of **Shayrabano**. A young graduate and the eldest of four siblings were married to Rizwan, a property broker in Allahabad. She was forced to undergo several abortions because her husband would not get a vasectomy and tubectomy, because he believed they were haram. He refused to let her meet her parents and siblings. Soon he asked her father to come and take her along with him. He sent triple tale by letter to shayrabano. Shayrabano went to Supreme Court, along with four other women who were also somehow victims of the triple tale. They insisted that they aren't challenging the Quran's admissible right to divorce but only the heinous 'Triple Talaq'.

Supreme Court invalidated triple tale in august 2017. The supreme courts constitutional bench, comprising the then chief justice of India, J.S. Khehar and Justices Kurain Joseph, R.F. Nariman, U.U. Lalit and S. Abdul Nazeer, through a split 3-2 verdict, set aside the practice of instant triple tale. The constitution bench, with judges belonging to five different religions, including just one representative of the majority religion, was hearing five writ petitions filed by Muslim women who were victims of instant triple tale. The petitions of Afreen Rehman, Gulshan Praveen, Ishrat Jahan and Atiya Sabri were clubbed with the lead petition of ShayaraBano, who sought a direction declaring the practice of triple tale, nikah halala and polygamy under the Muslim personal law illegal, unconstitutional and violative of the fundamental rights guaranteed to a woman under articles 14, 15, 21 and 25 of the constitution. Justice Kurian Joseph said that there cannot be any constitutional protection to the practice which is sinful.

IV. POSITION OF TRIPLE TALAQ IN OTHER COUNTRIES

Egypt – Egypt did not accept the instant triple tale. But with the change in time, judicial khula was introduced in which an arbitrator was appointed by the court. Wife gave away the part of her mehr so that husband accepts the divorce.

Syria – the system of divorce was reformed in 1953, and any number of tale pronouncements at one and the same time counted as a revocable divorce, except, of course, when a man did it for the third time- each occasion being separated by at least a month.

Jordan- triple divorce in one go is outlawed. The state's law is in consonance with the quranic injunctions on the subject of divorce. Jordan requires registration of divorce in courts. Divorce in a state of extreme anger or bewilderment is not held valid.

Kuwait- it regards instant triple tale invalid. It holds that any pronouncements of tale followed by any number of reiterations shall be considered only a single divorce.

Tunisia- according to Tunisia's code of personal status, 1956 a husband cannot unilaterally divorce his wife verbally. He has to consult a judge and explain the reasons for it. Thus, marriage and divorce is not regarded as a merely individual act.

V. CONCLUSION

Purposive definition of law solves the current problems of the society. It is a tool in the hands of judiciary to mould the society. It helps to declare laws invalid which are against the norms of society. Amendments are necessary for maintaining the relations between law and society. But the interpretations are also necessary for maintaining peace and harmony between law and society. We have various other current examples like declaring a part of section 377 as unconstitutional in India, declaring adultery as unconstitutional, etc so without changing the past laws, we cannot look into present laws. It creates a base for new laws to be enacted. This change helps in reconciliations and better governance in society. Giving a purpose to every work is necessary. Without any path, humans are like sailing

ships without magnet. Law provides this direction to move further and is the hopes of many to get justice, so the laws must be according to the purpose. Purpose can't be same at all times. In the example of triple tale refereed above, we have seen the consequences of the same. The laws are made for society and if society is not at peace, then such laws are not laws but a mere statement without any soul. The present must be better than past, to make the future best. For knowing past, we must see the scenarios and situations of that time. With every changing hour, the needs of society changes. Law must keep this in mind and interpreted accordingly. It must be in the best interest of public. So after the research I concluded that the modern school of jurisprudence suits the best to the needs of the society.

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AUTHOR'S PROFILE

I am a student of 4th year, persuing B.A.LL.B(Hons.) from Manipal University Jaipur, India. I did this research because I was interested to know the scenario behind the changing laws in India. I studied past, present and predicted future.



I aspire to be a good scholar and for that I keep on gathering knowledge from various sources. Jurisprudence is a subject interconnected with every country as it helps to know the basis of laws of different countries. Exploring much in law is my aim and I dream of India where justice is not delayed.