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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

MUSLIM PERSONAL LAW AND GENDER EQUALITY CONCERNS IN INDIA

AUTHORED BY - AMAN KHAN*

"The empowerment of women is the real litmus test for the development of a society."

- Benazir Bhutto

ABSTRACT

This analysis addresses concerns of gender inequality in relation to Muslim personal law in India, with a particular focus on property rights and dissolution of marriage. It is argued that the perceived inequalities within these laws are the result of cultural patriarchy rather than inherent religious teachings. This paper argues that the disadvantageous position of Muslim women in India is not due to Islamic teachings, but rather to cultural biases that support patriarchal norms. It is emphasized that a lack of familiarity with the principle of Islamic jurisprudence, *Usul-ul-Fiqh*, contributes to this inequality. This lack of awareness leads to ignorance about the rights guaranteed to women by Islamic teachings. Furthermore, this paper posits that the mistaken belief that Muslim personal law fundamentally oppresses women is due to this lack of understanding. In fact, Islamic teachings advocate gender equality and give women equal rights. This analysis attempts to unravel the complexity of gender inequality in Muslim personal law by highlighting the differences between religious principles and cultural practices. This report highlights the importance of a deeper understanding of Islamic jurisprudence in order for Muslim women to effectively exercise their rights and challenge discriminatory cultural norms enshrined in personal law. Ultimately, it aims to bridge the gap between perception and reality regarding women's rights under Muslim personal law in India.

Keywords: *Muslim personal law; India; Gender equality; Islam.*

Introduction

The position of women in society is neither a new nor a defining issue. But this position is different human societies of the world is different. Women occupy a unique position in developed, developing, and underdeveloped societies. Almost all human societies in different parts of the world are male-dominated. Men are the active part of society and women are the

passive part. Muslim women have been fighting for decades for gender equality in Islamic law, which regulates rights to marriage, divorce and property rights. Today, the issue of women's rights in Muslim private law is highly controversial. In particular, Muslim women's rights regarding marriage, triple talaq divorce, inheritance and maintenance have been given strong consideration in recent times. The main text states that the central debate surrounding the interpretation of Muslim personal law and the rights of Muslim women has both positive and negative aspects. Although India's constitution guarantees equality and freedom from injustice based on gender and religion, various practices exist based on a ruthless conservative culture. As you know, most of the personal laws of Muslims are not yet codified and most of the above decisions are formulated by courts based on the norms stated in the Quran and Hadith. The non-codified nature of Muslim personal law has led to misinterpretation and posed significant challenges for Muslim women, as per the reports of National Commission for Women¹.

Muslim Personal Law and Gender Equality Concerns in India

Islam is the first religion in the world which recognizes women as legal entity and gave her all rights that man enjoyed. Islam brought about freeing of women from bondage and gave her identical rights and recognized her uniqueness as human being. Islam improved the status of women by instituting rights of possessions, ownership, inheritance, education, marriage and divorce. The Qur'an came out with a thorough declaration that men and women are equal and women's rights are equal to their duties. Till today, because of conflict on the part of the ulama and jurist, this basic principle continues to be in midpoint². The Quran injunctions in respect of women were not acceptable in a particular culture, given that the injunctions directly challenged the apparent authority of men and made women equal to men in every respect. In the absence of the proper codified law in Muslim personal law women are at much difficult position, because of the un-clarity in the various rights and various analysis of Quran. Moreover, many baseless 'fatwa's' most of time go against the right of the Muslim women. Muslim women always remain the most economically and publicly depressed section in Muslim community itself³.

¹ 'Non-codified Muslim personal law has posed significant challenges for women: National Commission for Women', July 15, 2023

<https://www.thehindu.com/news/national/non-codified-muslim-personal-law-has-posed-significant-challenges-for-women-ncw/article67084074.ece> [accessed Dec 19 2023].

² <http://shodhganga.inflibnet.ac.in> [accessed Dec 19 2023].

³ (PDF) *Rights of Muslim women: An Analysis of...* Available from: https://www.researchgate.net/publication/274702838_Rights_of_Muslim_women_An_Analysis_of_Indian_Muslim_personal_Law [accessed Dec 19 2023].

- **Property rights and Gender equality concerns in India**

Similar to women's property rights in other countries, Muslim women's property rights in India have evolved out of continuous struggles between class levels and progressive forces. Muslim women in India have always had fewer property rights than men.

As we know Muslims personal law have not codified their property rights of Muslim women neither the Shias nor the Sunnis⁴. However, *Ma-hr* is a key concept in Islamic law which is unswerving connected with the right to property of the Muslim women and empowerment of the women. *Ma-hr* is basically is called as a present which becomes due from a Muslim husband to his wife on marriage as a token of admiration symbolizing his honesty and love for her⁵.

- **Marriage Under Personal Law**

The definition of marriage, or nikah, is a contract whose goal is to legalise and breed offspring. Islam views marriage from three perspectives: legal, social, and non-secular. In terms of law, it is not a forfeit but a contract. There are three prerequisites for the social aspect of marriage: Islamic law assured women of a high status after marriage; he confidently forbade marriage to anyone who could afford it. In actuality, marriage is an indication of Allah's blessing.

In India, individuals who are cognizant of the need for law are occasionally chosen as *Kazis* or *Mullas* to solemnise marriages between any two Muslim couples. On behalf of the catching parties, two individuals who have been officially assigned to the task function as sure witnesses. The difficulties women have in marriage are rooted in the stereotype of them as dependents who transfer responsibility from their father to their spouse, while Islam affirms that women have an equal right to make their own decisions. The Muslim woman is free to choose who she marries, and the legality of the marriage contract depends on her consent. When questioned about herself, a mature adult woman must give her consent in writing. If she declines, she has no need to say anything. Islamic law has granted women an advantageous status and recognised them as autonomous, responsible members of society. Even after marriage, a Muslim wife keeps her unique identity and never takes on her husband's name. Islam has always treated women with dignity and pride.

⁴ [http://www.muslimpersonallaw.co.za/inheritedocs/Property Rights of India](http://www.muslimpersonallaw.co.za/inheritedocs/Property%20Rights%20of%20India). [accessed Dec 19 2023].

⁵Supra note 3.

- **Dissolution of Marriage and Gender Equality Concerns in India**

Muslim intellectuals are to initiate measures for drafting a comprehensive law duly codified which will embody the Quran spirit. Triple Divorce have often been the cause of attacks on otherwise quite progressive Islamic personal law⁶.

The *Talaq-e-Biddat* has its origin in the second century of the Islamic-era. This Triple talaq is one of the obnoxious practices that have been followed by the Muslim where in pronouncement of talaq word three times leads to dismissal of marriage. It is a custom that is being followed by the Muslims. This Talaq is also known as *Talaq-i-Bain*. It is a disapproved mode of divorce. A peculiar feature of this Talaq is that it becomes effective as soon as the words are pronounced and there is no possibility of reconciliation between the parties. The Prophet never approved a *Talaq* in which there was no opportunity for reconciliation. Therefore, the irrevocable *Talaq* was not in practice during his life.

The Supreme Court, by majority of 3:2, has set aside the practice of *Talaq-e-Biddat* has hence declared it unconstitutional and also directed the central government by mean of notification in the official Gazette to make a legislation on the same within prescribed period⁷. Under the abidance of the orders of the Supreme Court of India, the central legislature introduced the bill called as “Muslim Women (Protection of Rights on Marriage) Bill 2017” which prohibit the practice of instant divorce by husband through pronouncing talaq and he if he does so, he will be punished⁸.

Moreover, other modes of divorce like *Talaq-ul-ahsan*, *talaq-ul-hasan*, etc are of such nature that husband has arbitrary power to pronounce unilateral divorce. Even in *Khula*, the wife can initiate the divorce process with the consent of husband. All these unilateral acts of divorce further inequality amongst Muslim women.

- **Polygamous Marriage and Gender Equality Concerns in India**

The Shariat Protection Act exempts Muslims in India from the ban on polygamy. One of the major issues the Courts have had to face cases is where a man converted to Islam from other religions in order to marry a second wife. While the Supreme Court, in its 1994 Sarla Mudgal

⁶ *Supra* Note 2.

⁷ *Shayara Bano v. Union of India* AIR 2017 9 SCC 1 (SC)

⁸ Kriti Aeron, Mar 5, 2019, ‘Triple Talaq – A Battle towards Gender Justice with Reference to Shayara Bano’, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644462

verdict⁹, declared that conversion solely for the purpose of a second marriage is invalid, the Law Commission reports from 1961 and 2009 have emphasized the need to clarify the legal position of the "second wife" in a converted Muslim marriage and address the rights of any children born from such a union.

Another issue is the debate over the Uniform Civil Code and the petitions filed in the Supreme Court seeking uniform marriage and divorce laws have raised concerns about the "discriminatory" provision that allows Muslim men to have multiple wives, as well as the rights of these wives and their children in terms of maintenance and inheritance¹⁰.

- **Maintenance for Muslim Women Under Personal Law**

The personal laws governing maintenance rights for Muslim women are the Muslim Dissolution of Marriage Act, 1939 and the Islamic Women (Protection of Rights to Divorce) Act, 1986. Muslim alimony laws are different from alimony laws in most other cases. Under this system, the obligation to support a Muslim other than his wife only arises if the applicant does not have the means or assets to support himself. Under the Muslim law, this is the duty of the husband to maintain his wife, irrespective of her debt against the husband and has priority over the right of all other persons to receive maintenance. Maintenance is called *Nafqah*, it includes food, raiment, and lodging and other essential requirements for livelihood¹¹.

- **Inheritance for Muslim Women Under Personal Law**

One of the important determinants in equality concern is financial dependence of women upon men. The women get equal share but according to Islamic jurisprudence, it is very important that women should be familiar about *usul-al-fiqh* (These are Principles of Islamic jurisprudence) to become aware about the shares in the property. This essential aspect is lacking in women as smaller number of women are aware about the logic of *usul-al-fiqh* due to patriarchy and lack of education and awareness of Islamic principles among women. Due to lack of education and awareness, brothers often use to cheat their sisters by unlawfully taking the share of sisters. This has created a concern in India with respect to women in the

⁹ *Sarla Mudgal v. Union of India* 1995 AIR 1531

¹⁰ 'Polygamy in India: Insights and debates surrounding Uniform Civil Code', INDIA TODAY (accessed on Dec. 19th 2023) <https://www.indiatoday.in/law/story/uniform-civil-code-polygamy-controversy-data-muslims-tribes-2400370-2023-06-30>

¹¹ <http://shodhganga.inflibnet.ac.in> (accessed on Dec. 19th 2023)

matters of property rights.

In the matters related to Inheritance, Quran gives equal rights to men and women. But present scenario depicts a different picture. The daughters, widows are kept in bottom line of the succession order and this discrimination is seen in customary practices. In *Shariat*, daughters and widows are not excluded by any other heirs. But brothers and other male member of the family use to cheat them as they have lack of awareness regarding their property rights. In many instances, *Mahr* which is considered as consideration in a Muslim marriage is not being paid even after the divorce (neither in *Faskh* or nor in *Khula*). Most of the time sisters are made to surrender their rights over their share in the joint property due to lack of knowledge of Islamic principles and emotional attachment and this again leads to Gender Inequality.

- **Option of Puberty (*Khyar-ul-bulugh*) and Gender Inequality**

Option of Puberty is a right of a minor who after attaining the age of puberty can approve or repudiate the marriage which has been contracted by guardian except father and grandfather. So, Contract of marriage is voidable at the option of minor. Married females have this right after attaining the age of puberty and it exist till the age of 18 if marriage is not consummated. On the other hand, there is no such age limit for the males to exercise this right. Therefore, again there is gender inequality in Muslim law.

The Response of The Judiciary

Judicial response to the status of women in Muslim personal law was hesitant. Many of the cases suggest that the role of the judiciary in our country is healthy and satisfactory. In many cases, the Supreme Court has long-standing personal law regarding fundamental rights standards and their reliance on fundamental rights. In some cases, the legitimacy of personal law cannot be challenged on the ground that it violates fundamental rights, but in reality, parties to personal law are not vulnerable to fundamental rights. What is interesting is that there were important judgments in favor of Muslim women. Although these are not considered milestones, they are very important in this regard.

- **Mohd. Ahmad Khan v. Shah Bano Begum¹²**

In instant case issue was that, up to what extent of Muslim husband's liability to maintain his

¹² *Mohd. Ahmad Khan v. Shah Bano Begum* AIR 1985 SC 945

divorced wife under Section 125 of the Cr.P.C 1973? In instant case court went into the details of various authorities and translation of the verses of the holy Quran in support of the view that a Muslim Woman who has been divorced by her husband has all right to be maintained even after the period of *Iddat*. Further court upheld that provision of the maintenance under section 125 of the Cr.P.C is not dependent on the religion of the spouses. It is a secular law applicable to all irrespective of the religion. Therefore, the judgment evoked unprecedented debate and controversy on the Muslim woman's rights to claim maintenance from the husband after divorce. It ultimately led to the enactment of the Muslim women (Protection of rights on Divorce) Act 1986¹³.

- **Shamimara v. State of Uttar Pradesh¹⁴ (2002) 7 SCALE 183**

In instant case Court held that, Talaq to be effective, has to be explicitly pronounced. Further court held that, a mere plea taken in the written statement of a divorce having been pronounced sometimes in the past cannot by itself be treated as effectuating talaq on the date of the delivery. Hence, judgment seeks to provide some norms and parameters within which the husband can pronounce a talaq. The very concept and right of unilateral triple talaq has however being assailed. Hence, from the above cases it becomes abundantly clear that court had played a very vital role for the protection of the women's rights under Muslim personal law¹⁵.

Proposed Reforms to Achieve Gender Equality

- **Towards a Uniform Civil Code**

A new path towards gender equality: Uniform civil code (UCC) is proposal to replace all Personal law by a common set of law that would govern every citizen. Whenever there is a debate on UCC, it is always discussed under the light of mainly Muslim Personal Law. Though the Muslim law are more discriminatory, but it is not just Muslim Personal law rather all other personal laws are also discriminatory too. So, instead of targeting only Muslim religion, all injustices against women of all religion shall be eliminated from personal laws of our country. By the implementation of Uniform civil code, every person will be governed by the single set of rules and regulations regarding their personal matter and this in turn would ensure equal rights to all.

¹³ *Supra* note 3.

¹⁴ *Shamimara v. State of Uttar Pradesh* (2002) 7 SCALE 183

¹⁵ *Supra* note 3.

However, if we implement Uniform civil code, the minorities would see it as an attempt to destroy their identity and culture. They would feel majority opinion is being imposed on them. India is a land of diversity and its beauty lies in its diverse culture, tradition and people. Moreover, the prevalent socio-political condition of the country does not allow the immediate implementation of Uniform civil code. So, it would be better that until the Uniform Civil code is implemented, some internal amendments be made in personal laws to uphold the basic human rights and human dignity. Also, this reform would provide equal rights to both men and women and justice to women.

Not only this will serve the same purpose of Uniform Civil code (UCC) but will also be seen as gradual step towards having a UCC in the country. As the time will come when all personal laws are at the equal footing, we can have a Uniform civil code which will not destroy the feelings and sentiments of minorities and ensure peace.

- **Reforms in Law of Divorce:**

A great step has been taken in this direction by the honourable Supreme Court of India when it declared that practice of Triple talaq (*Talaq-ul-biddat*) which is considered as sinful and irregular form of talaq as unconstitutional. Moreover, The Supreme court in the case of *Mohd. Ahmed Khan v Shayara Bano*¹⁶ has recently struck down section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 through which the practice of Triple Talaq derived its authority. Bringing an end to triple talaq would automatically shut the cases for *Nikah halala* (Muslim man has the liberty to divorce and remarry the same woman but in order to remarry the former wife, she has to marry someone else and such marriage should be consummated and only after the dissolution of the second marriage she can get remarried to her former husband). The Supreme Court clearly issued an injunction for a period of six months prohibiting a Muslim husband to pronounce Triple Talaq and further directed Government of India to enact a law to regularise the proceedings of divorce as per Shariat law.

The instant injunction will be a force for a period of six months. If legislative process commences before expiry of the period of six months, and a positive decision emerges towards redefining '*Talaq-ul-biddat*'- as one can alternatively. If it is decided that the practice of '*Talaq-ul-biddat*' be done away altogether the injunction would continue, till legislation is

¹⁶ *Mohd. Ahmed Khan v Shayara Bano* AIR 1985 SC 945

finally enacted. If it fails, then injunction shall cease to operate¹⁷.

Similarly, section 2 of dissolution of Muslim marriages Act, 1939 provides for various numbers of grounds on which a Muslim woman can ask for divorce. On the other hand, Men are not allowed to give their decisions on these grounds. Therefore, the uniformity must be there in order to ensure equality between men and women. These steps will have a great impact in ensuring equality within community rather than equality between different communities. The judiciary should try to check such laws that are colourable in nature and through judicial review there is need to check the laws that create inequality amongst women. Thus, in this way the present scenario can be changed and, in the end, justice should be ensured to every person of the country.

- **Reforms in Muslim Maintenance:**

Likewise, in the case of maintenance, previously the Muslim women were entitled get maintenance only during the *iddat* period. In case of *Mohd. Ahmed khan v Shah bano begum*¹⁸, the court held that Muslim women are entitled to get maintenance beyond the period of *iddat* under section 125 of Code of criminal procedure¹⁹. The true position is that if a woman is able to maintain herself then she will get the maintenance only during the period of *iddat* but if she is unable to maintain herself then she can take recourse to section 125 of code of criminal procedure. After this judgement, there was a huge outcry among the orthodox

¹⁷ India : Triple Talaq, judgment Of Hon'ble Supreme Court And The Most Anticipated Triple Talaq Bill . Available at:

<http://www.mondaq.com/india/x/668468/divorce/Triple+Talaq+Judgment+Of+Honble+Supreme+Court+And+The+Most+Anticipated+Triple+Talaq+Bill>

¹⁸ AIR 1985 SC 945

¹⁹ 125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

1. Subs. by Act 45 of 1978, s. 12, for " Chief Judicial Magistrate" (w. e. f, 18- 12- 1978).

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or

mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order

such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding

five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time

direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she

attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Muslims and many protested. To settle this unrest, the government enacted Muslim women (Protection of rights on divorce) Act 1986. Section 3(1)(a) of the act states that “*a reasonable and fair provision and maintenance to be made and paid to her within the **iddat** period by her former husband*”. The constitutionality of this act was challenged in case of ***Daniel Latifi v Union of India***²⁰ on the ground that it did not provide sufficient maintenance to divorced Muslim women beyond the period of **iddat**. The Supreme court interpreted section 3(1)(a) of the act in the favour of Muslim women and held that according to section 3(1)(a) of the act, the husband has to make provision for maintenance within the **iddat** period as is evident from the word ‘within’. Also, responsibility will shift to the parents and relatives of the women in which they would inherit the property and if they fail to provide the maintenance then the responsibility shifts on the waqf board.

Thus, apart from implementing Uniform civil code and securing uniformity among different communities, it will be again a better step that uniformity is secured within community and this would surely ensure equality among women.

- **Steps to educate women:**

Lack of knowledge and awareness among Muslim women facilitate the violation of their rights. For example, though prescribed in Islam, the consent of women is one of the essentials of marriage. But consent is treated more as a kind of rituals and thus it has become a choice rather than one of the essentials of marriage. Women due to lack of education and knowledge about Islamic jurisprudence are being cheated and this results in hampering their rights. Moreover, various campaign and organisation must be formed to organise awareness programme to make the women aware of their rights. Therefore, there is an urgent need to educate the Muslim women of our country and launch various awareness campaign against violation of rights of women regarding personal matters like marriage, property rights etc.

Conclusion

In conclusion, Islam has improved the standing of women in society by passing numerous laws that provide for their protection and an honourable, dignified existence. Muslim women have a number of privileges under Islamic personal laws, including the right to inheritance and preference in marriage. After marriage, Islamic law grants women a definite high social rank.

²⁰ ***Daniel Latifi v Union of India*** (2001) 7 SCC 740

The Muslim woman is free to choose her husband, and the legality of the marriage contract depends on her consent. Islamic law recognises women as autonomous, contributing members of society. The third big issue is getting three divorces in one sitting. Many Muslim women in India have experienced great suffering as a result of this type of divorce. The Prophet granted women the authority to acquire a division based on justifiable grounds and reserved the option to divorce in cases where a husband was unable to support them. The divorced woman is free to live anywhere she pleases for as long as her *iddat* is valid. In comparison to men, Indian Muslim women used to have fewer rights when it came to their property. As far as we are aware, neither Sunni nor Shia personal law has formalised the property rights of Muslim women. Nonetheless, *Ma-hr* is a fundamental idea in Islamic law that is inextricably linked to Muslim women's property rights and their emancipation. The Act's preamble outlines its goals as "*the protection of Muslim women's rights who have been separated from or granted a divorce from their husbands.*" The Act's Section 3 refers to "*provision and maintenance,*" however Section 4 exclusively addresses maintenance. The ability for women to inherit property is among the most significant social reforms brought about by Islam. Depending on the circumstances, the number of surviving relatives, and their relationship to the deceased, a woman's part of the inheritance may be greater, less, or equal to a man's. Moreover, Islam is the only religion that grants women equal inheritance rights. The judiciary has been reticent to respond to questions about women's status under Muslim personal law. Numerous incidents suggest that our judiciary has played a positive and fulfilling role in society. It is worth noting that there have been significant, if not ground breaking, judgements that have been made in favour of Muslim women.

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