

## Legal status and rights of Muslim women in Indian Muslim personal laws

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### ABSTRACT

Today, the issues of women rights in Muslim personal Law is highly controversial. Specially, Muslim women rights relating to triple talaq divorce, inheritance, maintenance has got much attention now a days. However, Indian Constitution has guaranteed equality and freedom from discrimination based on gender or religion, but still there are various practices which are based on heartless conservative culture. As we know a large part of Muslim Personal Law is still uncoded and most of the legal decision pronounced by the courts based on the norms mentioned in Quran and hadith.

The central debate on interpretation of Muslim personal laws has both positive as well as negative aspects. Some authors have supported that, Muslim personal laws have given various rights to Muslim women such as choice in marriage, inheritance etc. Whereas, some are of the opinion that, there are various practices which are against the spirit of Indian Constitution. In this line this research paper attempts to analyse the on-going debate on the implications of Muslim Personal Law in India and suggests various solutions to empower Muslim women. Therefore, certain anomalies need to be eradicated by giving a true essence of Holy Quran for the benefit of the Muslim women's rights. Moreover the focus of this research paper would be on certain areas of reform in Muslim personal law like Polygamy, divorce, maintenance after the divorce, etc.

*Keywords: Muslim personal law, women's rights, legal status.*

### INTRODUCTION

The personal law in India is a law for people of different religion and applicable according to the religion of the person. For many decades Muslim women are fighting for gender equality in the Islamic law that governs rights related to marriage, divorce and property rights. However, All-India Muslim Personal Law Board is, is one of the main influential body in Muslim community. There are lots of supports as well as criticism about this board. Many times this board rejected the proposal to change the Muslim personal law as they believe it will infringe the basic principles of Islam. Further, there are many male members' domination in that particular board. Whereas Quran does not support a system that is only managed by the patriarchy system. Muslim women's rights of marriage, divorce, inheritance has encouraged many Muslim women activists to fight for their rights.

Personal laws in India and especially Muslim personal law has been a major political and controversial issue, and has been extensively debated. Since independence it has been a rallying point for not only Muslim organisations, but also for Hindu rights wing politics.

After the 1986 Shah Bano Case, and the enactment of the Muslim Women (protection of Rights on Divorce) Act thereafter, the debate has assumed a central position, and majority identity politics has gained mileage, evident in the weakening of centrist secular parties<sup>1</sup>

In the absence of the proper codified law in Muslim personal law women are at much disadvantage position, because of the unclarity in the various rights and various interpretation of Quran. Moreover, many baseless 'fatwas' most of time go against the right of the Muslim women. Muslim women always remain the most economically and socially depressed section in Muslim community itself.

There is great need for the codification of Muslim personal Law today. It should be done as early as possible. What is known as Muslim personal law today, was known either's as Anglo-Mohammendan law during the British period or simply as Mohammendan law and was enacted by the British. But after independence the terminology changed and the Anglo Mohammendan law in order to wipe out its colonial stamp, came to be renamed as Muslim personal law. However, its contents did not change. Thus changes in its terminology was a political act, not a harbinger of Social Change as in other Muslim countries to de colonise its name is not enough, one must de colonise its contents as well. During the colonial period women were not supposed to play an active role in socio political matters, at least among Muslims though there were exception like Biamma (mother of Ali brothers) and many other women who played important role in freedom struggle<sup>2</sup>.

## MARRIAGE UNDER MUSLIM PERSONAL LAW

In Muslim law, marriage is a contract having as its object, the procreation and legislation of children. Marriage contracts are often reduced to writing in the form of a kabinnama. But failure to prove the Kabinnama cannot possibly be held to disprove the marriage. In the case of the marriage under the Muslim law, it is to be noticed that neither writing nor any religious ceremony is essential. All that is necessary is that there should be a proposal and an acceptance in the presence of witness<sup>3</sup>.

Marriage may be established by direct proof or by indirect proof i.e. by presumption drawn from certain factors. It may be presumed from acknowledgement of legitimacy in favour of child or the

<sup>1</sup> Razia Patel, Indian Muslim Women, politics of Muslim personal Law and struggle for life with dignity, Economic and Political Weekly, page 44, Vol. 44, No 44.

<sup>2</sup> Asghar Ali Engineer, Abolosing Triple Talaq what next?, Economic and Political Weekly, page 3093. Vol 39, no 28.

<sup>3</sup> Dr. Nanda Chiranjeevi Rao, presumption of marriage under Muslim Law, Indian bar review, page 133, Vol. 39, issue 4,



fact of the acknowledgment by the man of the woman as his wife or from prolonged cohabitation combined with other circumstances. It is true that the presumption does not apply if the conduct of the parties is inconsistent<sup>4</sup>.

Further, one of the most important and well established principle of Islamic law is that nikah cannot be performed without the free consent of the bride. She has a right to agree or refuse certain terms and condition in marriage. However, issue is that how to ensure the free consent of the Muslim women because many Muslim women who do not want to give the consent some time forced by family to give the consent. Therefore, there is need to apply all the holy verses of Quran in letter and spirit.

### **TALAQ AND POLYGAMY UNDER MUSLIM PERSONAL LAW**

Muslim intellectuals are to initiate measures for drafting a comprehensive law duly codified which will embody the Quranic spirit. Triple Divorce and unregulated polygamy has often been the cause of attacks on otherwise quite progressive Islamic personal law. Polygamy may not be abolished completely but strictly regulated as directed by the Quran. In fact both the verses on polygamy i.e 4:3 and 4:129 should be read together to understand the real Quran intent. Even the first verse, i.e, 4:3 requires rigorous justice to all wives by warning that “if you cannot do equal justice then marry only one. The second verse, i.e, 4:129 makes it clear that equal justice is humanly impossible. With such warning polygamy should not be practised unregulated. Other Muslim countries except Saudi Arabia and Kuwait have introduced strict measures to regulate it. Thus a draft law should introduce such regulatory measures and specify circumstances in which one could take a second wife. Those circumstances could be when the first wife is terminally ill or medically proved to be infertile or barren and that too with the permission of the first wife and the court of law.<sup>5</sup>

Further, Quran permitted polygamy to help women in distress like widows and orphans, not to do injustice to them. Thus there is crying need for codified personal law, will become a model law for other Muslim countries who follow the Islamic law. Therefore, women in Islam can enjoy all the rights related to Talaq, marriage, property etc.

Therefore, it is fallacy on the part of those who understand that polygamy is a fundamental right of a Muslim Male. Polygamy is exception, but not a rule. The relevant Quranic provision on polygamy institution itself considers monogamous marriage as an ideal one. No doubt that there is misuse of this provision; this can be checked by providing effective machinery through legislation. Under the provision of the dissolution of Muslim Marriage Act 1939<sup>6</sup>.

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<sup>4</sup> ibid

<sup>5</sup> Asghar Ali Engineer, Abolosing Triple Talaq what next?, Economic and Political Weekly, Vol 39, no 28, page 3094.

<sup>6</sup> Khan Noor Ephroz, Women & Law Muslim Personal Law perspective, page 367, Rawat Publication, New Delhi 2003

The other major problem is that of triple divorce in one sitting. This form of divorce has indeed caused a lot of misery to a large number of Muslim women in India. What is worse, it is still in practice although it was disapproved of by the prophet himself. The Quran does not mention it at all. The Quranic divorce not only requires two arbiters, one from the wife's side and one from the husband's side, but also two reliable witness for pronouncing divorce. Thus the Quran says, and if you fear a breach between the two, appoint an arbiter from among his people and an arbiter from among her people. If both desire agreement, Allah will affect harmony between them.<sup>7</sup>

Therefore, from above discussion it is every much clear that, Quran itself has laid down the proper procedure for divorce but still people are following very informal way to pronounce the Talaq and left the Muslim women helpless.

Therefore, Islam does not allow the husband or wife to use divorce as mockery and takes extra precaution for the welfare of wives. A former Supreme Court Judge Justice Krishna Iyer remarked that "a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce. A few distortions seem to have crept in dispensing justice in British India and even in the decision of Privy Council, which decreed Muslim husband's right to divorce his wife at whim. Such misguided views have had sustenance in the opinion of illeducated moulvis who had already been serving their clientele with their faulty understanding of the Quranic law of divorce<sup>8</sup> .

### **PROPERTY RIGHTS OF INDIAN MUSLIM WOMEN**

Much like those of women of any other country, property rights of Indian Muslim women have evolved out of continuing struggle between the status quoist and the progressive forces. Indian Muslim women always used to get fewer rights in terms of right to property in comparison to male. As we know Muslims personal law have not codified their property rights of Muslim women neither the Shias nor the Sunnis<sup>9</sup> . However, Mahr is an important concept in Islamic law which is directly connected with the right to property of the Muslim women and empowerment of the women. Mahr is basically is called as a gift which becomes due from a Muslim husband to his wife on marriage as a token of respect symbolising his sincerity and love for her. The subject matter of mahr can be money or any other thing having value, depending upon the acceptance of the wife. Upon the object or property given as a mahr, the ownership lies exclusively with the women.

Further, the grant of absolute ownership of the mahr property to the Muslim wife shows the revolutionary measure adopted by Muslim personal law to vest women with the property rights to ensure them an equitable marital status. Hence, married Muslim women who had been ever

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<sup>7</sup> Asghar Ali, The Right of women in Islam, 1996, New Delhi page 159.

<sup>8</sup> Saleem Akhtar and MohsWasimali, Repudiation of marital Tie at the Instance of Muslim Wife: Misgiving and Clarification, Journal of the Indian Law institute, Page 506, Vol. 45, issue 3 & 4, 2003

<sup>9</sup> Available at <http://www.muslimpersonallaw.co.za/inheritedocs/Property Rights of India>



deprived of status of marriage have such property rights which are exclusively vested in her property rights.

### **MUSLIM PERSONAL LAW: THE RESPONSE OF THE JUDICIARY:**

The response of the judiciary on the status on women under the Muslim personal law has been ambivalent. Many of the cases give the impression that the role of our judiciary has been healthy and satisfactory. In many cases Supreme Court has tested personal laws on the touchstone of fundamental rights and to make them consistent with fundamental rights. Whereas in some of the case court held the validity of the personal laws cannot be challenged on the ground that they are in violation of fundamental rights because of the fact parties in personal law is not susceptible to fundamental rights. It is interesting to note that, there have been important judgments beneficial to Muslim women even though not in landmark category, but very significant in this concern. Some are as follow:

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

In instant case issue was that, up to what extent of Muslim husband's liability to maintain his 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 1986<sup>10</sup>.

#### **Case -DanialLatif V. Union of India (2001) 6 SCALE 537.**

In this case constitutional validity of the Muslim Women (protection of rights on Divorced) Act 1986 was challenged on the ground that it infringed article 14, 15 and 21 of the Indian constitution. The court remarked that the "legislature does not intend to enact unconstitutional laws" but that per se is no ground for upholding an Act as Constitutional, through its un convincing interpretation, Court imposed a seal of the constitutional validity of the statute.

#### **Case BaiTahira v. Ali Hussein AIR 1979 SC 362**

Supreme Court in this case upheld that, the payment of trifling amounts of mehr to a divorced Muslim woman is no substitute for the maintenance.

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<sup>10</sup> Kusum, Cases and Material on Family law, page 413 & 414. Universal Law publishing co. 3rd ed. 2013.

### **Case RashidaKhatun V. SK islam AIR 2005 Ori 56**

Issue can an assurance to marry be equated to an acceptance to marry so as to confer status of legal marriage?

The parties to the proceeding are Mohammedans belonging to the Islamic faith and are governed by their personal law. In instant case as to the validity of the marriage, it was argued that in a muslim marriage no rituals and functions are necessary and the muslim marriage being a civil contract, consent of respondent to marry the petitioner and thereafter cohabitation with her was sufficient to prove her status as his wife. Therefore, court upheld that there was no acceptance of the offer to marry, but there was only an assurance to marry in the future and therefore mere cohabitation with such of assurance does not constitute the factum of marriage.<sup>11</sup>

### **Case ShamimAra v. State of Uttar Pradesh (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, judgement 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 been 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 law.

### **REFORMS IN MUSLIM PERSONAL LAWS**

It will be recalled that in the late 50s when the former Justice V. R Krishna Iyer was law minister in Kerala, he had introduced a Bill seeking to amend the inheritance laws which discriminate against the Christian women in that state. He failed in his effort because he was opposed not only by the Christian establishment but also by Muslim leaders and other member of opposition. The reason is obvious. Any success in reforming the laws governing one religious community is bound to pave the way for similar reform in the laws applicable to other religion<sup>12</sup>.

There is a crying need for a comprehensive legislation to be drafted under the guidance. Islamic law is so progressive that it can become basis for a Uniform Civil Code. However, conservative Muslim society dragged the Quran pronouncement to its own level and introduced, through human reasoning many measures, which curbed women's rights. Despite reforms in other countries women have not got full measure of equality, which the ulma theoretically concede<sup>13</sup>

<sup>11</sup> Kusum, cases and Materials on Family law, page 413 & 414. Universal Law publishing co. 3rd ed. 2013

<sup>12</sup> Vimal Balasubrahmanyam, Women, Personal Laws and the struggle for secularism, Economic and Political Weekly, Page 1216, Vol. 20 no 30 (July 27, 1985).

<sup>13</sup> Asghar Ali Engineer, Abolishing Triple Talaq what next? Economic and Political Weekly, page 3093 Vol. 39, no (28, July 2004).



Quran is the only unanimous divine source for Muslims and it remains most progressive in respect of women's rights. Ideally it grants equality between man and woman and should be the main source of legislation about women's right. The past interpretation of the Quran was constrained by socio economic condition and should not be binding on the present and the future generation of Muslims. All great Islamic thinkers have reputedly made this point and have accepted the central role of 'iJtihad (creative interpretation) .it is the only our social conservatism, not lack of theological sanction, which prevents our ulama from exercising it<sup>14</sup> .

Further, the issue of compulsory marriage registration is a one of the other step toward reformation in Muslim personal law. In the year of 2006, the Supreme Court directed all states and union territories to notify rules for compulsory marriage registration. In July of the following year, the court was informed that some states had framed rules only for Hindu marriages. Therefore, in October 2007, the court ordered compulsory registration of marriages of couples of all religions and rules to be enacted to that effect within three months. While this was seen by the conservative sections in the Muslim community as interference in their personal laws, the liberal voices pointed to a very significant aspect: a marriage is a contract in Islam. In fact, a member of the Law Commission of India and an expert on Islamic law, Tahir Mahmood, observed that since parties to a Muslim marriage have full contractual freedom under Islamic law and can stipulate conditions of their choices that do not violate mandatory provisions of the shariat, the new nikahnama is valid. Critics of the aimplb also point out that the more liberal Islamic schools of shariat like the Shafi, Malik and Hanafi are ignored by the board<sup>15</sup>. Therefore, it is clearly documented here that, there are various step has been taken for reformation of the personal law.

## CONCLUSION AND SUGGESTIONS

As key points in the 20th century, moreover, religious and political leaders as Zoya Hasan has argued, initiated state codification of Muslim personal law in the interest of the community unity and identity the landmark acts are the Muslim Personal Law (Shariat) Application act of 1937, the Muslim Dissolution of marriage Act of 1939 and most recently, the Muslim women's (Protection of rights on Divorce) Act of 1986. This last, despite its name, prevented Muslim woman ( who had been married under Muslim personal law and subsequently divorced) from resorting to the criminal procedure code as women of other religions can do to secure minimal maintenance from their former husband.<sup>16</sup>

Hence, after the discussion of all above aspects it can be conclude that, public opinion needs to be guided into favouring such liberal judgments and certain uniform codified laws which help in an important way to nullify to some extent the inequities in the existing personal Muslim laws.

<sup>14</sup> ibid

<sup>15</sup> A Nikahnama for Muslim Women, Economic and Political Weekly, Vol. 43, No. 12/13 (Mar. 22 - Apr. 4, 2008).

<sup>16</sup> Barbard D. Metcalf, Imrana Rape, islamaand Law in India, Islamic studies, Vol. 45 No 3, 2006 available at [www.jstor.org](http://www.jstor.org)

Therefore, there is need to launch an awareness campaign against the misuse of a various Muslim women rights relating to marriage, divorce, property rights etc. polygamy etc.

It should also need to consider that amount of 'Mahr' paid is substantially high so it can discouraged the practices of talaq as well as ensure the rights of Muslim women.

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