

ANALYSIS OF MUSLIM PERSONAL LAW IN INDIA WITH REFERENCE TO WOMEN'S RIGHTS

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Abstract

India being a pluralist society is governed by various personal laws, for instances Hindus are governed by Hindu law, Muslims are governed by Muslim law and so on. Muslim personal law is mostly uncodified and based on Quran and Hadith. However, women under Muslim personal laws have been given certain rights like inheritance, acceptance of marriage, etc, which is also being approved by Quran and Hadith. But in relation to divorce, adoption, maintenance, etc, the law is not adequate to protect the women and discriminates women from men. Though, the Constitution of India has guaranteed equality and protection from discrimination based on sex, this discrimination has led to contravention of Human rights of women. This research paper, through its doctrinal research, attempts to study and analyse various violation of rights of Muslim women, interpret various enactments and examine the role of judiciary in protecting the rights of Muslim women

Keywords: Women's Right, Muslim Personal Law, Gender Discrimination

INTRODUCTION

Islam has granted women numerous rights, including property rights, maintenance and mehr that no other religion has granted. Some rights that were granted several centuries ago were not even granted to women in the modern legal system. Men and women are equal in Islam, the inequality is created by society and not by religion. Religious scholars interpreting the Quran deprived women of their basic rights granted by Islam. Islam grants full protection of women's rights. Women are allowed to play an efficient and useful role in Islamic society. Sharia law enables them to set up their own organization for the uplift of society. Although such an organization did not exist in the time of the Holy Prophet (peace be upon him), women in those days used to come together and present their problems to the Holy Prophet (peace be upon him) and the Prophet listened to them. Now the situation is different, Muslim women face various difficulties all over the world. Therefore, they can set up their own organizations to solve the problems related to women and children and they can do a lot for upliftment. The Holy Quran came to correct the discrepancies in the thinking and behavior of ancient civilizations and religions regarding women.

The Quran has stated "O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, his mate" ¹

The Holy Qur'an also emphasizes the similarity of creation for men and women and thus the similarity of responsibility and retribution. None of them ranks higher than the other except by good works. Women are not considered dependent on men in the Holy Qur'an, but as independent human beings. As for good or bad deeds, God makes no distinction

between men and women. What is lawful applies to both men and women, and what is improper applies to both men and women. Women are no longer seen as the devil's companions or simply objects of sensual pleasure. Unless their feminine nature prevents them from doing so, women should take their responsibilities in everything as men do.² Women have the right to a life of dignity, to education, to owning and managing property, to marriage, to child care, to an inheritance, to work and to social respect. In Islam there is no monasticism, there is no break with social life, there is no difference between mother and father, neither in obedience nor in reverence:

"We have enjoined on man kindness to his parents: In pain did his mother bear him, and in pain did she give him birth. The carrying of the (child) to his weaning is (a period of) thirty months. At length, when he reaches the age of full strength and attains forty years, he says, "O my Lord! Grant me that I may be grateful for Thy favour which You have bestowed upon me, and upon both my parents",³ "Thy Lord has decreed that you worship none but Him, and that ye be kind to parents, "Say not to them a word of contempt, nor repel them, but address them in terms of honour"⁴

OBJECTIVE

Through this doctrinal research the researcher aims

- To study contraventions of rights of Muslim Women in India.
- To analyse various violation of Muslim Women in Muslim marriages and divorce
- To examine the role of Judiciary in protecting the rights of Muslim women.
- To study various legislations passed to protect rights of women in India.

This research paper, through its doctrinal research, attempts to study and analyse various violation of rights of Muslim women, interpret various enactments and examine the role of judiciary in protecting the rights of Muslim women. The researcher has made an attempt to study and analyse the issues faced under the heads of marriage and divorce under Muslim Law.

FINDINGS

In India, all women are protected by a uniform law without any discrimination, with the exception of Muslim personal law. Within this theme, the legal protections of Muslim women in India are examined under several specific headings.

1) Constitution Law

In India in , both those in favor of and those opposed to reform in personal law relied on the provisions of the Constitution of India itself⁵. The Constituent Assembly debated at length the scope of religious liberty as opposed to personal rights was dealt with. Some members of the Constituent Assembly suggested that personal laws should enjoy immunity from state regulations because of the sanctity of religion involved⁶. However, a majority of the members of the assembly rejected the argument, arguing that personal laws should not be protected from government regulation for reasons of religion⁷. Thus,

in their approach to personal laws, the members of the Constituent Assembly were clearly aware that they did not intend to immunize personal laws from government regulation because of the religious sacredness ascribed to them.

The rule of gender equality is enshrined in the Constitution of India in its preamble, fundamental rights, fundamental duties and directive principles of state policy. The Constitution of India not only guarantees equality for women, but also empowers the State to take measures to positively favor women. M. Divya. (2017) analyzes the constitutional protections of Muslim women in her article entitled "A Study on the Rights and Privileges of Women in India".⁸The Constitution of India not only guarantees equal rights for women, but also empowers the state to take actions that provoke positive thoughts about women and their rights. It is also a tool to eliminate the problems of women in India in this way and to neutralize discrimination in favor of women and to eradicate socio-economic, educational and political disadvantages they face. Fundamental rights ensure, among other things, equality before the law, and equal protection before the law, prohibit discrimination against citizens on the grounds of religion, race, caste, sex or place of birth, and guarantee equal opportunities for all citizens in matters of employment.

- Article 14 of the Constitution of India deals with equality before the law and states that the state shall not deny anyone equality before the law or the equal protection of the laws within the territory of India.
- Prohibition of discrimination based on religion, race, caste, sex or place of birth.
- Article 15(3) of the Constitution deals with affirmative discrimination and provides that the state has the power to make special arrangements for women.
- Article 16(2) deals with non-discrimination on the basis of sex or excluded from employment or office in the State."
- Article 23(1) – Human trafficking and forced labor are prohibited. The state guarantees men and women right to livelihood -Article 39(a). The state guarantees equal pay for equal work for both men and women (Article 39(d)).
- The State has a duty to ensure that the health and strength of female workers are not abused and that they are not forced by economic necessity to engage in occupations beyond their strength (Article 39(e)).
- The state will take measures to ensure fair and decent working conditions and benefits of maternity relief. Article 42.
- It is the duty of every citizen of India to refrain from practices detrimental to the dignity of women (Article 51-A (e)).

Apart from this women are also given guaranteed position panchayats, municipalities, etc as states below

- One-third of the total number of seats to be filled by direct election in each panchayat is reserved for women. Article 243-D (3)
- One-third of the total number of presidential positions in the panchayats at each level are reserved for women, Article 243-D (4).
- One-third of the total number of posts to be filled through direct elections in each municipality are reserved for women. Article 243-T (3).
- The positions of presidents of municipalities are reserved for women in the manner provided for by state legislation in Article 243-T (4).

This is just a brief analysis of the protection of women under the Constitution of India. It could be a topic in its own right to examine the social, economic, political and religious protections afforded to women under the Constitution of India. It protects women from any form of discrimination. And it also tries to emancipate the position of women in all areas of life.

2) Indian Penal Code, 1860 and other Special Legislations

In order to fulfill its constitutional mandate, the state has enacted various legislative measures aimed at ensuring equal rights, combating social discrimination and various forms of violence and atrocities, and providing support services, particularly to women. While women can be victims of any crime, be it "murder," "robbery," "fraud," or any other crime, crimes against women are referred to as "crimes against women." These are generally divided into two categories. The first category of offenses is defined in the Indian Penal Code (IPC) and the second category of crimes against women is defined by specific laws.

• Offence against women under IPC

Apart from offences against body⁹ which is applicable to all human being, there are separate and special chapters to protect married women under the title Of Offences Relating to Marriage¹⁰ and Of Cruelty by Husband or Relatives of Husband¹¹

Naming some offences which are specifically related to women are Molestation under Sec. 354 IPC, Kidnapping and Abduction for different purposes dealt under Sec. 363-373, Rape defined under Sec. 376 IPC, Homicide for Dowry, Dowry Deaths or their attempts under Sec. 302 and 304-B, Torture, both mental and physical Sec. 498-A IPC

• **Various Special legislations that contain several rights and safeguards for women:**

1. Protection of Women from Domestic Violence Act – this legislation intends to provide protection to victims of domestic violence, serve justice, create awareness, harsh punishment and deal with all matters of dv to protect women
2. Immoral Traffic (Prevention) Act, 1956 – This law aims to eradicate the act of prostitution in women and girls, to rescue the women and girls and to provide them such assistance to make them decent members of the society
3. Indecent Representation of Women (Prohibition) Act, 1986 – the object of the act is to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures, etc
4. Maternity Benefit Act, 1961 - to provide for maternity benefit to women workers in certain establishments; (2) to regulate the employment of women workers in such establishments for certain period before and after child birth.
5. Dissolution of Muslim Marriages Act, 1939 - An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie¹²
6. Muslim Women (Protection of Rights on Divorce) Act, 1986 - This special law related to Muslim women intends to protect Muslim women who have been divorced or have obtained divorce with their husband and for matters connected with divorce.
7. Family Courts Act, 1984 – This legislation intends to establish Family Courts for speedy settlement, conciliation with regards to disputes in marriage, family, etc.

Apart from the above mentioned enactments, there are other special laws too, which protects women to name the few National Commission for Women Act, 1990, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Indian Succession Act, 1925, Special Marriage Act (1954), Indian Evidence Act, 1872, Evidence Act, 1872, Foreign Marriage Act (1969), Indian Divorce Act, 1869, The Muslim Women (Protection of Rights on Marriage) Act, 2019, Minimum Wages Act, 1948, etc.

3) Muslim law and legal protection of Muslim women

In Islam, men and women are equal in the sight of God and must perform the same duties of worship, prayer, faith, alms-giving, fasting and pilgrimage to Mecca. Compared to previous Arab cultures, Islam has generally enhanced the status of women by forbidding the killing of female children and by acknowledging women's full personality. Islamic law has also emphasized the contractual nature of marriage, requiring that a dowry be paid to the woman rather than to her family, and guarantees women the right to inheritance and to own and manage property. Women were also given the right to live in the marital home and to receive financial protection during marriage and after death and divorce. The crucial premise of gender equality is taken from a verse of the Holy Qur'an in which Allah Almighty declares that He created man and woman from a single source and origin: "O

Mankind, Be dutiful to your Lord who created you from a single soul and from it created its mate (of same kind) and from them twain has spread a multitude of men and women"¹³

However there has been discrimination on the grounds of gender under various aspects of Muslim Law. The researcher intends to study the Muslim Law under two specific head: marriage and Divorce in the paper.

- **Marriage**

Marriage under Muslim law has been considered as a pure contract, with the object of procreation of the children¹⁴. Quran has described man and woman with implication of closeness and equality as it can be seen from the Quranic verse, "They are your apparels and you are their apparels"¹⁵

Islam has granted Muslim women various rights. And on many occasion has treated both men and women equally as in the stated in the Quran¹⁶ "And they (women) have rights similar to those against them in a just manner". The spouses are equally dependent; they are created for each other to live in harmony and coexistence. As the Holy Quran says in the Surah Az-Zumar verses 6 "HE created you from a single soul". The relationship between a man and a woman is based on love and goodwill. Without each other they are incomplete and bring each other peace and harmony. Marriage in Islam requires a contract between two equal partners, with the woman being the subject and not the object of the marriage contract. In summary, a contract is a written legal document between two adults that involves an offer from one partner and the acceptance of one partner by the other in the presence of two witnesses. The terms of the marriage are usually contained in a deed called the Nikah Namah. The Nikah Namah contains conditions such as the amount of the dowry, the manner of its payment, issues of custody of the children, and any other conditions that the spouses wish to set¹⁷. The Muslim woman is free to choose her own marriage, her consent being essential for the validity of the marriage contract. The adult daughter is asked for approval to the marriage, and her permission is her silence, and if she refuses, no compulsion is imposed on her. Islamic law recognizes women as free and responsible members of society and grants them a privileged position. The Muslim woman retains her distinctive individuality even after marriage and never takes her husband's surname

However, women are discriminated against in marriage as there is a provision on polygamy where a man can be married more than once. Strict observance of Sharia is often abused by men and is often the cause of serious marital discord, leading to violations of women's rights. Consent to marriage is one of the important aspects of the nikah. Although mandatory in Islam, women's consent is rarely seriously considered in a largely traditional and patriarchal society and cultural background. Consent to marriage is seen as a kind of ritual rather than a decision-making exercise. Mahr is also a major factor of nikah and non-payment mahr at the time of marriage, and women's financial dependence often makes women unequal partners in the marriage contract. In addition, the criteria by which the mahr amount is to be determined is not taken into account and the minimum amount for the mahr is determined.

- **Divorce**

It is a unique aspect of Muslim law that the husband has the unilateral power to get away from his wife without reason, without any reason, literally at his whim, even in jest or under the influence of alcohol, and without recourse to the court or other judicial authority to divorce administrative or family violence when no one is present (although Shia law requires two witnesses) and even in their absence by simply saying the Talak. Quran says "O prophet, when men divorce women, put away of their (legal) period and reckon the period and keep your duty to Allah, your lord"¹⁸. In these Qur'anic verses it is said that when a woman divorces, she should divorce her with kindness and not with anger and pain. In Islam, marriage is considered a civil contract. To avoid the civil consequences of an unhappy marriage, divorce is permissible. The Holy Quran says so explicitly. The holy Quran explicitly says "either retain them with humanity or dismiss them with kindness"¹⁹ the husband's right to divorce (talaq) in Muslim law has been the subject of much criticism in the Shah Bano case. According to Muslim law, marriage is a civil contract and, like other contracts, can be terminated by mutual consent of the parties, but the man has certain superiority over the woman in Sharia and can, under certain formalities, divorce her even against her will. The wife cannot divorce her husband voluntarily and against his will unless she is granted that power by a contract with him before or after marriage. She can obtain a court divorce on specific grounds without relinquishing her dowry or her right to inheritance and maintenance for a period of time, under the Muslim Marriage Act, which applies to all Muslim women. Through Khula, she can persuade her husband to break her off from the marriage. Women in India are guaranteed right to come out of the marriage judicially through the Dissolution of Muslim Marriage Act 1939:

The Dissolution of Muslim Marriage Act 1939 offers the Muslim married woman protection from the rigidity of Muslim personal law²⁰. The wife's right to divorce, which she was denied, was restored to her under that law for certain reasons set out therein. It is an achievement in regarding marriage relief for a Muslim wife. The grounds on which a married Muslim woman can seek divorce is provided in The Dissolution of Muslim Marriage Act 1939 under section 2.

The grounds are as under:

- i. Whereabouts of the husband not known for four years period
- ii. Non maintenance for two continuous years
- iii. Imprisonment of the Husband for a period of seven years or upwards;
- iv. Non-performance of marital obligations for a period of three years;"
- v. Impotency of the Husband
- vi. Insanity or leprosy or virulent venereal disease of the Husband
- vii. Repudiation of marriage by Women
- viii. That the husband treats her with cruelty
- ix. On any other ground which is recognised as valid for the dissolution of marriages under Muslim law

Under Sec.5 of the Act nothing shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

Khula and Mubarat are two forms of divorce by mutual consent²¹. Khula means redemption and Mubarat means mutual separation, are two forms of divorces by the wife with the consent of her husband²².

The Muslim Personal Law (Shariat) Application Act 1937 also recognized the rights of the wife to obtain divorce on two other grounds, i.e. (i)Ila (& (ii) Zihar.

Islam recognizes the right of both spouses to end their marriage. Islam gives women the right to dissolve marriage by "khula". If the husband dissolves the marriage by divorcing his wife, he cannot recover any of the marital gift he gave her if the wife wants to end the marriage, she can return the marriage gifts to her husband. The divorced wife is entitled to maintenance from her ex-husband until the Iddat is observed.

Now the question is who will support her when she has no one to support her and she is of legal age. A prominent case that has caused much controversy not only among legal luminaries but also among people from all walks of life and of different religions is that of Mohammed Ahmed

Khan v. Shah Bano. Such cases should be viewed from a humanitarian perspective and such divorced wives, especially the elderly, should be treated as destitute women. Muslim women are lagging behind in education therefore they are largely unaware of their rights and are unaware of their rights under Sharia law and the rights enshrined in the Constitution of India.

4) Judiciary and Muslim Women's Rights

The judiciary has taken steps to the status of women in Muslim personal law. Many of the cases give the impression that our judiciary's role has been healthy and satisfactory. In many cases, the Supreme Court has examined personal laws against the touchstone of fundamental rights and made them compatible with fundamental rights. While the Court has found in some cases that the validity of personal laws cannot be challenged on the grounds that they violate fundamental rights, this is because the parties to the personal law are inaccessible to fundamental rights.

It is interesting to note that there were important judgments that benefited Muslim women, albeit not in the 'milestone' category, but of great importance in protecting women's rights. Some are the following:

In the case of Shah Bano, the question at issue in the present case was to what extent is the Muslim husband obliged under section 125 of the Cr. P.C 1973 to support his ex-wife? In the present case, the court went into the details of various authorities and the translation of verses from the Holy Qur'an to support the view that a Muslim woman who has divorced her husband has every right to maintenance even after the divorce. In addition, the court confirmed that the alimony arrangement pursuant to Sec.125 of the Cr. PC does not depend on the religion of the spouses. It is a secular law that applies to everyone, regardless of religion. Thus, the ruling sparked an unprecedented debate and controversy over a Muslim woman's right to claim maintenance from her husband after

divorce. Ultimately, this led to the passage of the 1986 Muslim Women (Protection of Rights in Divorce) Act.²³ In the case of Danial Latif, the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act 1986 was challenged on the grounds that it violated Articles 14, 15 and 21 of the Indian Constitution. The court found that "it is not the intention of the legislature to make unconstitutional laws," but that, per se, this is not a basis for maintaining a law as constitutional. By its unconvincing interpretation, the court gave the law a seal of constitutional validity.²⁴ In case of Bai Tahira the issue was regarding the Mahr amount. The Supreme Court ruled in this case that paying a small additional amount to a divorced Muslim woman was not a substitute for alimony²⁵

In the case of Rashida Khatun issue was Can an assurance to marriage be equated to confer legal marriage status? The parties to the proceedings are Mohammedans who belong to the Islamic faith and are subject to their personal rights. In the present marriage validity case, it was argued that rituals or functions were not required in a Muslim marriage and that Muslim marriage was a civil contract, the contracting party consenting to the marriage of the applicant and subsequently cohabitation with her it was enough to prove her status as a wife. Therefore, the court ruled that there was no acceptance of the marriage offer, only a guarantee to marry in the future and that mere coexistence with such a guarantee therefore did not constitute a fact of marriage.²⁶ In Shamim Ara case, the court ruled that talaq is effective only if expressly stated. Furthermore, the court ruled that a mere statement in the written declaration of divorce, which has been issued a number of times in the past, cannot in itself be considered an effective talaq on the date of service. Therefore, the judgment tries to establish some norms and parameters within which the husband can pronounce a talaq. However, the concept and right of the unilateral triple talaq has been attacked²⁷

In Shayara Bano' Case²⁸, the Court held the instantaneous Triple Talaq as unconstitutional by 3:2 majority and ruled that the practice violates the Fundamental rights guaranteed by Part III of the Constitution on 17th August 2017. According the majority Triple Talaq is not an essential component of Islam and hence is not protected by the exception in the Article 25. After the decision of the Court the Muslim Women (Protection of Rights on Marriage) Act, 2019 was enacted to curtail and penalize the act of Triple Talaq, by the Parliament of India.

CONCLUSION

Islam has granted Muslim women with enormous rights, but unfortunately these rights are not been enjoyed by women due to many factors, which needs to be examined by detail research on lack of knowledge in Muslim women. Muslim law is based on the Quran and Hadith, and in India Muslims laws are too based on the principles of Sharia. Time and again, with the intention to bring Muslim women at par with the women of other religions and to curb certain practice which is the cause of harassment and sufferings some part of the Muslim laws are being codified in India. As we have seen Muslim women are not only protected by the laws enacted by codifying Muslim laws but also by the general laws like IPC. Apart from this the court has played a vital role for the protection of Muslim Women's rights as can be seen from Shah Bano to Shayara Bano, the court has intended

to protect the women from harassment that they have been suffering through some practices.

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