

MUSLIM WOMEN, RELIGIOUS PERSONAL LAW AND DISCRIMINATION WITHIN

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Issues of Muslim women, especially with respect to their position in personal law, have, in India, acquired a great deal of importance due to several reasons. This can partly be attributed to coming in power of political outfit generally considered antithetical to rights of Muslims in general and Muslim identity in specific. Secondly, due to rising literacy rates among Muslim Women, they have become more aware of their rights and consequently they have called for revision of Muslim personal laws, considered obsolete in post-modern period and medievalist in approach. However, Muslim women, despite the political support for change, often find themselves caught between loyalties to their religious or ethnic communities and a desire for greater freedom and equality as women within those communities¹. Thus, Muslim women in India are triply disadvantaged, firstly as members of such minority, secondly as women, and thirdly, most of all as poor women.²

Though the recent debate has centred around discriminatory provisions regarding divorce, there are several other provisions of Muslim personal law are unequal towards women and the same can be mentioned hereinafter. *Firstly*, equal inheritance rights are denied to women. As per general rule, if there are male and female heirs of same degree, the share of male heir is always double to that of female heir. Widows are entitled to one-fourth of the property of deceased husband in case there are no children. Rule is applicable regardless of the number of wives a deceased had. Therefore, if a man had more than one wife then, one-fourth of share will be divided among them³. The reasons advanced for denying equal right to inheritance are often naive, for example, *as for the right to inherit, she inherits as daughter, as wife and as mother. Thus she inherits in three capacities. Of course she gets half that of her brother but then neither she has to pay dower (on the contrary she receives) nor has she to maintain herself. She is maintained by her father while unmarried and by her husband after marriage.*

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¹ Cyra Akula Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, And Muslim Personal Law Reform In India*, 17 Columbia Journal of Gender and Law 45, 45-110 (2008)

² Ibid.

³ Vrinda Narain, *Women's Rights and the Accommodation of "Difference": Muslim Women in India*, 8 Review of Law and Women Studies 51, 43-73 (1998)

*She is not obliged to give anything of her wealth, whatever she possesses, to her husband who is obliged to maintain her even if she is rich and he is poor.*⁴ Such arguments presume that women are dependent on father, husband and children and thus, have the effect of denying the woman of her independent identity.

Secondly, under Muslim Law, a mother cannot be the legal guardian of her children. She can only claim physical custody, the period of which is prescribed by personal laws and is non-extendable. The father is considered a legal guardian and upon his death guardianship passes to father's executor, paternal grandfather or the paternal grandfather's executors.⁵ Further, a mother's right to custody of her minor children is not absolute, and she may be deprived of it if she is deemed unsuitable and unable to contribute to the physical, moral and intellectual development of the child. Sometimes guardianship rights are used by husband as a threat to induce compliance and wife yield to his demands.⁶

Thirdly, Muslim women's right of monogamous marriage has not been protected. The instances of polygamy among both Hindus and Muslims are nearly equal but it the formal acknowledgement of right of Muslim men to enter into Polygamous marriage, which is degenerating.⁷ Polygamy, though, is a criminal offence in India but Muslim men are exempt from provision of this act, even in view of the fact that many Islamic countries have either controlled or prohibited polygamy.⁸ Further, Muslim personal laws are also not equal with regards to whom women can marry. While men are permitted to marry women from other religion who are *kitabia* but marriage between Muslim women and Non-Muslim man is void.

Fourthly, divorce laws are discriminatory against Muslim women. While men have a unilateral right to divorce, women's rights to divorce are limited and subject to several constraints. Islamic law allows several kinds of action by which divorce can be obtained. First, *talaq* is divorce that is initiated by the husband at will, without any cause. It can be revocable or irrevocable, done through written or oral pronouncement, and does not require the wife's presence or consent. A revocable *talaq* becomes irrevocable upon the passing of the *iddat*. Second, a wife can initiate or obtain divorce through *khula*, or mutual consent, in

⁴ Asghar Ali Engineer, *Status of Muslim Women*, 29 Economic and Political Weekly 298, 297-300 (Feb 5, 1994)

⁵ Supra note 5

⁶ Nayar Honorwar, *Behind the veil*, 6 Journal of Law and Religion 385, 355-387 (1988)

⁷ Faizan Mustafa, *Three is Crowd*, (March 17, 2015 12:00 am),

<http://indianexpress.com/article/opinion/columns/three-is-a-crowd/>

⁸ Around 20 countries including Turkey, Turkmenistan, Israel have illegalised polygamous marriage for Muslim men.

which she agrees to give the husband consideration for dissolution of the marriage. Finally, where both parties seek dissolution, the *mubara'at* form of divorce can be used.⁹ In addition, Dissolution of Muslim marriage Act 1939, lists various ground on which Muslim women can obtain divorce.¹⁰ Out of the above, it is the *talaq al biddat*, or *triple talaq* as it is called, in which the word *talaq* is pronounced thrice in single sitting, is under controversy. It is this form of *talaq*, far greater than polygamy, which causes severe prejudice to the status of Muslim women¹¹.

ARABIA AND ADVENT OF ISLAM

In order to correctly understand orthodox position of women in Islam, it is necessary to analyze the societal position of women in Pre-Islamic Society in Arabia becomes necessary and impact of development of Islam. In Pre-Islamic Arabia, primitive society having nomad culture threatened by poverty and starvation, women were considered more a burden. With women being considered weak and most of the necessary functions of nomadic society being accomplished by males, female subjugation was a way of life. Status of women in early Arabic society can also be understood from the types of marriage contracted. There were two main forms, first *sadiqa* based on female kinship and second *ba'l* based on male kinship. Initially both in practice it was the domination of *ba'l* form of marriage over *sadiqa*, which significantly contributed to female deprivation.¹² Further, there was no limit, except financial, on number of marriages which could be contracted by males. The dower, though was given in marriage but it was generally paid to the father of the bride, thus, rendering a marriage to be a

⁹ Supra note 5, 73

¹⁰ Section 2 of the Dissolution of Muslim marriage Act 1939, mentions the following grounds,

- i. his whereabouts have not been known for a period of four years;
- ii. he has failed to provide maintenance for her for a period of two years (for which she may sue him even if she is able to maintain herself);
- iii. he has been imprisoned or sentenced to be imprisoned for more than seven years;
- iv. he has failed to perform his marital obligations for a period of three years;
- v. he was impotent at the time of marriage and continues to be so;
- vi. he has been insane for a period of two years, or suffers from leprosy or a virulent venereal disease;
- vii. the wife was given in marriage by her father or guardian before the age of fifteen and repudiates the marriage before the age of eighteen;
- viii. he treats her with cruelty, that is, either physical or mental, associates with women of ill-repute, attempts to force her to lead an immoral life, disposes of her property and refuses to allow her to exercise her legal rights over it, obstructs her ability to perform her religion, or has more than one wife and does not treat her equitably; and
- ix. she has any other grounds which are recognized as valid for dissolution under Muslim law.

¹¹ Vrinda Narain, *Women's Rights and the Accommodation of "Difference": Muslim Women in India*, 8 Review of Law and Women Studies 53, 43-73 (1998).

¹² John.L.Esposito, *Womens's Rights in Islam*, 14 Islamic Studies 102, 99-114(1975)

sales contract between husband and bride's father. This also limited the divorced women with limited means of support after divorce. In short, Pre-Islamic Arabic society was characterised by rampant female infanticide, practice of easily obtainable divorce by husband and absence legal rights secured to women. In such a situation her position was at best marginalised¹³.

It was in backdrop of this society that Islam introduced major reforms in the society along with recognition of female rights as well. Significant changes were introduced in personal laws which provided significant benefit to women. Firstly, Islam restricted the number of wives which could be taken by man to four with an emphasis on monogamy, particularly evident from conditions which were imposed. Husband was obligated under Islam to treat all his wives without any discrimination and was also required to provide them with separate quarters and adequate maintenance.¹⁴ Also marriage was given status of contract between husband and wife, with both male and female having equal rights to contract marriage.¹⁵ Role of father to give his daughter was thus made marginal. Secondly, Islam recognised the right of women to manage her own property and her personal income for her personal benefit to exclusion of everyone including husband and children.¹⁶ Rights of women concerning inheritance were also recognised though her share was restricted to half of males. It was however, in the area of divorce that fewer rights were given to females as compared to males. *Talaq* was held to be undesirable practice and in cases where it became necessary women was entitled to *mehr* if not paid earlier. In fact, Islam was the first religion to accept woman as a legal entity and accord her rights in matters of marriage, divorce, property, inheritance, custody of children and maintenance etc¹⁷ and considered to be equal in status and worth with respect to man.¹⁸ Thus, from material as well as spiritual point of view Islam recognised position of women to be same as that of men¹⁹. In short, Islam rather than being a religion was a social movement which strived for the change in underlying malpractices prevalent in the society. It was in the course of time that these practices were cast in stone and given status and hence held to be immutable.

¹³ Nayer Honarvar, *Behind the veil: Women's Rights in Islamic Societies*, 6 Journal of Law and Religion 366, 355-387(1988)

¹⁴ Rashda Sharif, *Women in Islam*, 21 European Judaism: A Journal for the new Europe 29, 28-33 (1987)

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Shashi Shukla, *Political Participation of Muslim Women*, 57 The Indian Journal of Political Science 8, 1-13(1996)

¹⁸ Supra note 16, 32.

¹⁹ Saneya Saleh, *Women In Islam: Their Status In Religious And Traditional Culture*, 2 International Journal of the Society of Family 36, 35-42 (1972)

CASE OF MUSLIM IDENTITY

The call for social change in Muslim personal laws, as mentioned earlier, has been met with considerable resistance. This situation is perplexing in view of the reformative zeal adopted by Islam in its initial formative years. Several reasons have been quoted for this position. However, among them the obsession with religious identity is most pertinent in case of India and often changes in personal law have been frowned upon on ground that it is integral part of social-religious identity.²⁰ The concept of socio-religious identity is, however, of British creation. It was the colonial politics of British India which began, in a more systematic manner, manipulation of group identities.²¹ The attempt to divide population along communal lines carried out in order to prevent united anti-imperialist struggle. Also, meaningful reforms in personal laws were avoided so as to avoid public backlash and to prevent diffusing of identities, for a unitary system of personal laws would have blurred the differences among communities. In 1772, for example, Warren Hastings and William Jones, had decided to apply “the laws of Koran with respect to Mohammedans and that of the Shashtra with respect to Hindus.”²² But it was Minto-Morley reforms of 1909 which institutionalized the unsaid policy of British administration to harness the fault lines in religions to their own benefit by granting Muslims separate electorates in representative bodies at all levels of the electoral system. It was a momentous step which gave Muslims the status of an all-India political category but one effectively consigned to being a perpetual minority in any scheme of constitutional reforms.²³ From then communal discourse became too entrenched in Indian Politics. The late 1930s saw the further development of the idea of a Muslim nation which ultimately led to the unfortunate partition.²⁴

The persistence with the minority identity continued even after the Independence as Muslims who preferred to stay in India, closed their ranks in order to secure safety in what they perceived as *Hindu Rashtra*, even after adoption of Constitution which was secular in nature. This insecurity found its expression in uproar of the community against the judgement of

²⁰ Supra 13, 65

²¹ Asgar Ali Engineer, *Remaking Indian Muslim Identity*, 26 *Economic and Political Weekly* 1036, 1036-1038 (1991)

²² Ali Riaz, *Nations, Nation-State and Politics of Muslim Identity in South Asia*, 22 *Comparative Studies of South Asia, Africa and the Middle East* 54, 53-58 (2002)

²³ Cyra Akula Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, And Muslim Personal Law Reform In India*, 17 *Columbia Journal of Gender and Law* 56, 45-110 (2008)

²⁴ Id. 57

Supreme Court in case of *Shah Bano*²⁵. In this case Supreme Court ruled that Shah Bano, who divorced by her husband after 43 years of marriage, was entitled to maintenance from her husband. The court further ruled that a Muslim woman, unable to support herself, was entitled to take recourse to Section 125 of the Criminal Procedure Code which applied to all communities regardless of their separate personal laws. In case of a conflict between certain provisions of the Criminal Procedure Code and the Muslim Personal Law, the former would prevail over personal law was further emphasised in *Daniel Latifi*²⁶ case. Judgement evoked considerable passion and in view of protests, Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed by the government. This act limited the duty of husband to provide for the maintenance of divorced wife. Under the act husband was only liable for maintenance during iddat period. However, what is often ignored is the fact that Shah Bano judgement was not the first to grant maintenance rights to divorced Muslim women. Two important judgments by Justice Krishna Iyer in the *Tahira Bai v. Ali Hussain Fiduli Chothia*²⁷ and *Fazlunbi v. Khader Ali*²⁸ cases in the 1970s granted maintenance to Muslim women under Section 125 of Criminal Procedure Code. In contrast to *Shah Bano* case none of judgement evoked sharp response. Some writers have attributed it to deteriorating Communal harmony in India during the period and to phraseology in which judgement was framed. *Shah Bano* judgement was critical of the Muslim Personal law, in comparison; judgements delivered by Krishna Iyer J, were couched in framework of Social Justice.²⁹ However, the first reason seems to be misguided in view of fact that in year 1980 when the *Fazlunbi v. Khader Ali*³⁰ judgement was delivered, there were Moradabad riots disturbing the communal harmony, even then judgement evoked no response. Therefore, second reason which puts phraseology of judgement at fault seems more plausible.

Muslim leadership and especially clergy have also used the tool of religion as an identity for the preservation of political power for such power rests on the premise that group in some important respects different from another group. In such a scenario incentive for the group to evolve is non-existent. On the other hand if the group evolves to the point where the distinction between itself and other groups is no longer significant then it would render

²⁵ Mohd. Ahmed Khan v. Shah Bano Begum 1985 SCR (3) 844

²⁶ Daniel Latifi v. Union of India AIR 2001 SC 3598

²⁷ AIR 1979 SC 362

²⁸ AIR 1980 SC 1730

²⁹ See for example Zoya Hasan, *Minority Identity, Muslim women bill campaign and the political process*, 24 Economic and Political weekly, 44-50 (1989)

³⁰ AIR 1980 SC 1730

group, claim for power meaningless³¹. Therefore, a section of the Muslim leadership has consistently tried to politicise religion as a means of safeguarding the community's separate and distinct identity, justified on the ground of Article 25, 26 and 29³² of Constitution of India. This has been achieved by demanding obedience and loyalty to personal laws over reforms which may bring members of group closer to majority. In pre-independence era the political movements among Muslims in the 1920s used religious and cultural symbols, relevant to all strata of the community, with a view to foster the unity among the followers of the religion and to enhance their bargaining position in the constitutional discussions.³³ In the post- independence period this symbolism has come to rest entirely on laws pertaining to family and women. Invariably women are the victims of cultural distinction, because community identity is defined almost entirely in terms of family laws which tend to subordinate women.³⁴

CONCLUSION: THE WAY FORWARD

After the *Shah Bano* controversy, subsequent enactment of Muslim Women's Protection on Divorce Act also highlighted the ambivalent attitude of government towards the protection of rights of all. State abdicated its duty off securing the fundamental rights mentioned in Article 14³⁵ and Article 15³⁶. The State under pretext of securing the policy of secularism bowed to the demands of Muslim elite and failed to interfere with personal laws when such laws were in explicit conflict with the constitutional guarantees. Consequently, the state, unwittingly, created a model of differentiated citizenship, wherein it had differing obligations and duties to citizens based on gender and religious identity. In a country like India where, being a woman itself creates societal hurdles, Muslim women were made to suffer both as women and as a member of Islamic community. The obvious reason being that Muslims, and not

³¹ Shalina.A. Chibber, *Charting a new path towards gender equality in India: From Religious personal law to Uniform Civil Code*, 83 Indiana Law Journal 705, 695-717 (2008)

³² Article 25, 26 and 29 of Constitution of India contain provisions regarding the minority rights.

³³ Zoya Hasan, *Minority Identity, Muslim women bill campaign and the political process*, 24 Economic and Political weekly 45, 44-50 (1989)

³⁴ The subordination of women in personal law is not limited to Muslim laws only. For example: under Christian law, a man may obtain a divorce when his wife has committed adultery, while a Christian woman seeking divorce is required to prove at least two offenses by her husband.

³⁵ Article 14 of Constitution of India guarantees to every person equality before law and equal protection law without any discrimination

³⁶ Article 15 prohibits discrimination on grounds of race, religion, gender, caste, place of birth etc.

women, are formidable voting bloc³⁷ and any changes in personal law would have resulted in electoral reverses.

As measure to ameliorate the status of women, especially those of minority community, it is often suggested to implement the Uniform Civil Code, as directed under Article 44 of Indian Constitution, which would be a common personal law code having provisions with regard to inheritance, divorce, marriage, guardianship and maintenance. Supreme Court too has from time to time called for implementation of civil code. In *Lily Thomas v. Union of India*³⁸ AIR 2000 SC 1650, Supreme Court held, “*The desirability of uniform civil code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change.*” Supreme Court, in the same vein had earlier, in the case of *Sarla Mudgal (Smt), President, Kalyani & Others v. Union of India & Others*³⁹, directed the government to implement the directive of Article 44 and to file affidavit indicating the steps taken in the matter. The demand for Uniform Civil code has also become louder due the fact that present government is favorably disposed towards its implementation.

However, few caveats have to be kept in mind regarding Uniform Civil code. Implementation of the code is along drawn process, requiring consultations with the parties concerned. Also minorities have valid reason to worry that code might not be neutral or secular instead it would be the reflection of Hindu values and ignoring their cultural system. In such a scenario it becomes important to assuage concerns of the minority groups. Any forceful attempt to implement code would inflate societal tensions and in such a scenario women may prefer to remain within the fold of religious practices and customs than becoming the part of mainstream society. Uniform Civil code would then not only fail in its purpose of women amelioration but also become politically unfeasible. Instead as a short term measure, the personal laws of the minorities could be codified and updated by incorporating values relevant in modern society and by removing the practices which are discriminatory. This would help to begin the debate within the communities over the personal laws. It would further serve dual purpose; firstly, it will loosen the stranglehold of religious elites over adjudication of the personal laws, while opening up more formal means of dispute settlement such as through courts. Secondly, it would help in creating a fertile ground for further

³⁷ Supra note 33, 705

³⁸ AIR 2000 SC 1650

³⁹ AIR 1995 SC 1531

dialogue on Uniform Civil Code for its ultimate implementation; in the meantime codified personal laws would continue to protect the women in minority communities.

Additionally any change in Muslim personal laws would require the Muslim leadership to stop viewing the religion and minority identity as a tool for consolidation of power advancing group politics. Refusal to change would itself threaten the basis of group based identity for failure to respect the identity of women would render Muslim women to feel disassociated with the very concept of Muslim identity, which use to advance discriminatory practices among them. This can be seen from the fact that in recent Uttar Pradesh election it was alleged that Muslim women voted for a particular party often considered opposed to Islamic ideology.