



**WOMEN EMPOWERMENT IN INDIA: A COMPARATIVE
STUDY OF MUSLIM PERSONAL LAWS AND
CONSTITUTIONAL LAWS**

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Chapter 6

CONCLUSION

The question of whether Muslim women have rights or need saving? my work tried to find the answer for it. I have examined the works of both traditional and reformist scholars who have interpreted the Quran and hadith to find the answer. The popular assumption that “Eve was created from Adam’s lowest rib” has been considered one of the bases of man’s superiority over woman. It is based on the Hadith of the Prophet. Riffat Hassan argues that the myth is embedded in the Yahwist’s account of creation in Genesis 2: 18-24 and it has no basis in the Quran.¹ The creation of humanity is completely egalitarian in the Quran. She further says the Quran uses common terms for humanity in the verses related to human creation and there is no mention of *Hawwa* (Eve) in the Quran.² The word “Adam” is used as a symbol for self-conscious humanity. She observes that the word “Adam” is a Hebrew word (from “*adamah*” means “the soil”) and it is used as a collective noun which refers to the “the Human” rather than to a male person.³ She infers that, the Quran doesn’t talk about a particular human being rather to human beings in a particular way. Therefore, in the Quran, the description of human beings clearly shows that it uses both feminine and masculine terms to define the creation of humanity from a single source.⁴ She openly rejects the view that *Hawwa* was created from Adam’s rib. She says that the hadith is weak with regard to its prescribed aspect (i.e. with reference to its “*Isnad*” or list of transmitters) and its content “*matn*” is against the Qur’anic explanations about human creation.⁵

Asma Lamrabet Moroccan feminist scholar says the hadith was one among a collection of recommendations in reference to the relations between men and women in seventh-century Arabia.⁶ This hadith has no basis in the Quran and the main purpose was to encourage men to treat women well. She further says Prophet didn’t

¹ Riffat Hassan, ‘Challenging the Stereotypes of Fundamentalism’: *The Muslim World*, 2001, 55–70.

² Hassan.

³ Hassan.

⁴ Hassan.

⁵ Hassan.

⁶ Lamrabet.

talk about Adam's rib but was used as a metaphor in the symbolic linguistic style to command men to show compassion towards women.⁷

With regard to Inheritance Rights of women, Amina Wadud provides a different view on the Islamic concept of Inheritance. She argues that the mathematical formula of two to one has been the overview of the Quranic discussion regarding inheritance. The Quranic verse 4:11-12 which makes the share of the male equivalent to the portion of two female (siblings) enumerates a variety of proportional divisions between males and females.⁸ The conservatives believe that a man has unilateral power to divorce his wife without giving any reason. They believe that 'is the husband's right to divorce his wife by pronouncing that the marriage is dissolved. The Quran provides both women and men the right to divorce but choices and the procedures to exercise it are different for both men and women. There are three forms of divorce that women can exercise. One of the procedures of divorce is by mutual consent (*Mubaraa*). The second procedure of the divorce is "khul" which is recognized by the Quran and by the hadith and also accepted by the jurist of Islamic Law. The third option for a wife to divorce her husband is *Talaq al-tafwid* (delegated divorce). Muslim women have also been given right to education, however, they have been denied to seek education by men in order to strength their authority over women.

In Islam, knowledge for Muslim men as well as women has been strongly advocated in both religious and social domains. In Islam, Men have not been given any importance over women in acquiring knowledge. The Quran explicitly directs both men and women to acquire knowledge. Under Muslim Law a Muslim husband is permitted to have four wives at a time but with conditions. She provides in-depth understanding of the verse that talk about the polygamy. "*If you fear that you will not deal justly with the orphans, marry women of your choice, two, three or four. But if you fear that you will not be able to do justly (with them), then only one, to prevent you from doing justice.*" This verse talks about the treatment of orphans. She argues that some male guardians, who were responsible for managing the wealth of orphaned female children, were unable to abstain from unjust management of that wealth. Therefore, to prevent mismanagement it was suggested a marriage to the female

⁷ Lamrabet, 39.

⁸ Mohammad, 'The Evolution of Sharia Divorce Law: Its Interpretation and Effect on a Woman's Right to Divorce'.

orphans. The Qur'an limited this number to four, and consequently, the economic responsibility of maintaining the wife would balance the access to the wealth of the orphaned female through the responsibility of management.⁹ However, most supporters of polygamy discuss it within the context of just treatment of orphans. This verse is explicitly concerned with justice: dealing justly, managing funds justly, justice to the orphans, and justice to the wives, etc. Justice has been the focus of most modern commentaries concerned with polygamy.

My work also deals with the human rights of women as provided by the International community and by the constitution of India. Human rights are the rights of every individual or the rights of every human being. They are the rights which every human being must have by virtue of him or her being a human being. The Protection of Human Rights Act, 1993, defines 'human rights' as They are conceived of as rights inherent in individuals as rational, free-willing creatures, not conferred by mere positive law, and not capable of being abridged or abrogated by positive law . As already discussed in detail about the measures taken by the International Community for Protection of the Human Rights of Women, the first positive manifestation of the assertion of human rights was evident on 10th December, 1948 when the United Nations Organization adopted the Universal Declaration of the Rights of Man. The international community has shown its concern for the human rights of women in a number of meetings and conferences. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is described as an international bill of rights for women. It forbids all forms of discrimination on grounds of gender as it violates the fundamental freedoms and human rights. The Government of India also approved the CEDAW 1979 and restated that discrimination against women infringes the principles of equality of rights. The Convention defines what amounts to 'discrimination against women' and also declares that the states should take appropriate measure to eliminate it.¹⁰ The framers of the Constitution of India were much inspired by the Universal Declaration of Human Rights. This is evident from the fact that they have incorporated the same spirit in the Preamble of the Constitution itself. There are also

⁹ Wadud, 83.

¹⁰ 'Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979', United Nations Human Rights office of the High Commissioner, accessed 16 November 2020, <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>.

other provisions in the Constitution that seek to protect human rights. The constitution of India provides right to life, which is recognized as a fundamental right under the Indian Constitution.¹¹ The constitution also states that discrimination among citizens on the grounds of religion, race, caste or sex is prohibited.¹² It also grants equal opportunity to all in matters of public employment.¹³ My work mainly deals with Muslim law so it is important to discuss about the Muslim law in detail and its application among Muslims

There has been a sudden increase in the tensions between the Islamic world and the West, particularly as some states have pursued the so-called ‘War on Terror’. This has led to the controversies over Islam as a religion in general and Islamic law (Sharia) in particular. The disconnection between the “West and” “Rest” particularly for Muslim women and alienation of their culture has been one of the major issues after war on terror. Islamic law has been viewed as synonymous with violent punishment, gender inequality, and the application of a rigid, pre modern, and bigoted religious code. There has been a debate on ‘Islam and the West’. Samuel Huntington’s 1993 article ‘The Clash of Civilizations?’ has provided a base for it. However, these two terms even in the modern world, represent distinct civilizations which are dominant in different parts of the world. These two civilizations are considered self-sufficient and mutually exclusive, and one of them, at least, is unchanging and static in its fundamental principles.¹⁴ Human rights law, as codified in a series of international instruments since 1945, and Islamic jurisprudence is considered not as separate and discordant systems. They are considered as two among many components of a highly complex contemporary legal universe which influence and react to each other but also deeply affected by the phenomenon of the modern sovereign state.¹⁵ To answer these complex questions that have arisen in the Islamic legal principles, it is important to discuss how these doctrines developed during the colonialism and post-colonial era. There are certain questions that definitely need to ponder and their possible solutions. What is the source and authenticity of these laws? Who speaks for these laws? Who

¹¹ M.P. Jain, *The Indian Constitutional Law*, 5th ed. (Nagpur: Wadhwa and Company, 2005).

¹² Jain.

¹³ Jain.

¹⁴ Benjamin Glahn Anver M Emon, Mark S Ellis, ‘Common Ground’ to “Clearing Ground”: A Model for Engagement in the 21st Century’, in *Islamic Law and International Human Rights Law Searching for Common Ground?*, ed. Benjamin Glahn Anver M Emon, Mark S Ellis (Oxford, United Kingdom: Oxford University Press, 2012), 15, 16.

¹⁵ Anver M Emon, Mark S Ellis.

is the ultimate authority to implement these laws? Does Islamic law really discriminate women? Is there any compatibility between Islamic law and human rights provided by the international community and states? Does Muslim law as applied in India need reforms? My work has tried to address all these questions. In my thesis I have used the terms Islamic law and Muslim law in totally different context. Islamic Law has been used to imply the true legal rules that have been interpreted by the jurists of Islam. Muslim Law has been used to denote the laws which include the legal rules interpreted by the jurists, orientalist, judiciary, and legislative body.

With the start of colonialism, (the violent expansion of European powers into the heart of Muslim civilization) the local institutions of Islamic learning were dismantled in order make room for the establishment and smooth function of institutions established by colonial administration. By the second half of the 19th century, there have been legal reforms by the colonial state in the Muslim majority countries and they effectively incorporated European legal codes.¹⁶ In India also, Britshers started legal reforms and incorporated British legal principles and same was perpetuated with Muslim law as well. After independence, these states did not return to a rule of law system that involved the full scope and extent Islamic legal doctrines. Islamic law contains broad legal principles (eg criminal law, contracts, torts, judicial administration, bailments, religious rituals, etc), but it has been significantly limited in its scope and application in the modern Muslim state and in the countries where Muslim law exists.

India is primarily a Hindu majority country. Muslims constitute the largest minority (14 per cent), while Christians and Sikhs each account for about 2 per cent of the population. Buddhists, Jains and Parsis are small in number.¹⁷ Under the Indian Constitution, the state has separated itself from religion. In 1976, the word “secular” was added to the preamble of the Constitution. The Indian Constitution emphasizes that no particular religion in the state will receive any state patronage whatsoever and no citizen in the state will have any special treatment or will be discriminated against simply on the basis that he or she professes a particular form of religion. It is based

¹⁶ Anver M Emon, Mark S Ellis.

¹⁷ Partha S. Ghosh, *The Politics of Personal Law in South Asia: Identity, Nationalism and the Uniform Civil, The Politics of Personal Law in South Asia*, second (New York: Routledge, 2018), <https://doi.org/10.4324/9780429506826>.

on the philosophy of “*Sarva Dharma Sambhav*” (peaceful coexistence of all religions).¹⁸ But the Constitution itself safeguards the different religions and religious groups by including religious rights as fundamental rights. Under Article 25 of the Constitution, “all persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion subject to public order, morality, and health”. Article 26 gives to every religious denomination a fundamental right to manage its own affairs in matters of religion. This cannot be abolished in any way as form the basic structure of the constitution. In the context of the Indian Constitution, religion has been defined as having “its basis in a system of beliefs and directives which are regarded by those who profess that religion to be conducive to their spiritual well-being.”¹⁹ In a number of cases the Supreme Court has also observed that “religion was not merely a matter of faith and belief, but also included rituals, ceremonies, and religious practices according to the tenets of a religion”.²⁰ There are many personal, regional and customary laws in India but there has been a discourse only about Muslim personal law. Muslim personal law in India is mostly uncodified. Muslim Personal Law in India is not entirely Islamic law in the conventional sense of the term. It consists of three parts – opinions of Muslim jurists (which are not codified), decisions given by British and Indian judges, most of whom were non-Muslim. Third, it includes these laws, the *Shariat Act*, 1937; Dissolution of Muslim Marriage Act, 1939; Muslim Women (Protection of Rights on Divorce) Act, 1986; Waqf Acts, etc.²¹ The state has tried to include certain legislations in the Muslim law. The state has tried to enforce in the name of Sharia and has tried to be secular that has resulted in coercive political power and not genuine Islamic law. There are also not officially recognized *Shari’ah* courts. The state courts generally administer the law according to the Indo-Muslim judicial precedents.²² The Shah Bano controversy reveals the dichotomy between the personal laws and secular law. The enactment of The Muslim Women (Protection of Rights on Divorce) ACT, in 1986 demonstrated the alliance between the state and fundamentalist in the enunciation of gender and

¹⁸ Ruma Pal, ‘Religious Minorities and the Law’, in *Religion and Personal Law in Secular India A Call to Judgment*, ed. Gerald James Larson (Bloomington, USA: Indiana University Press, 2001), 24.

¹⁹ Pal.

²⁰ Pal.

²¹ Faizan Mustafa, ‘Supreme Court Has Already Declared Triple Talaq Invalid’, accessed 10 February 2020, <https://scroll.in/article/836745/faizan-mustafa-supreme-court-has-already-declared-triple-talaq-invalid-it-may-just-reiterate-that>.

²² Ghosh, *The Politics of Personal Law in South Asia: Identity, Nationalism and the Uniform Civil*.

community identity.²³ But the relationship between these is much more complex than the strengthening of power and authority. The *ulema* seek to maintain their authority over the definition of group interest holding the Muslim personal law as signifier of Muslim identity. The state usually enters into an alliance with *ulema* to maintain the unity of pluralistic nation. But recently this rhetoric has changed due to majoritarian policies of the government at the helm; the government of BJP. The politicization around the issue ‘triple talaq’ has unearthed the possible political vendetta by the government.

Article 44 of Indian Constitution states that, “the state shall endeavor to secure a Uniform Civil Code for the citizens throughout the territory of India”. The said article of Indian constitution is part of the ‘directive principles’, which are non-justiciable in nature, but they do lay down the roadmap for lawmaking. Initially, UCC did not generate much debate, however over the last decade or so, the issue has been aggressively forwarded by the majoritarian political parties. The idea of UCC seems quite secular on surface, however delving a little deep into the controversy, makes one realize that the issue is not as simple as merely a mark towards secularism.

Islam unlike other religions claims itself to be a *Din*; a complete way of life. A Muslim is supposed to be a Muslim outside the mosque as well, his social and other relations are supposed to maintained in accordance with the principles of Islamic Law. The matters of marriage, divorce, succession, inheritance are usually decided in accordance with *Shariah*. Even the criminal matters are supposed to be adjudicated through sharia. Since India is not a Muslim majority state, the question of Sharia being the primary source of law stands ruled out.

However, the anxiety that Indian Muslims have with UCC is, the nature of the family laws. If personal laws are deemed null and void, is it possible of framers of the UCC bill to include Islamic principles of family law into it? If not, what are the other safeguards of protecting the divinely ordained laws (As Muslims think them to be)?

Uniform Civil Code, that successive governments resisted to enforce, has definitely a lots of promises to fulfill and lots of them to break. It certainly has the potential the realize the dream of constitution framers, of India being a secular state in the western

²³ Vrinda Narain, *Gender and Community Muslim Women’s Right in India* (Canada: University of Toronto Press, 2001).

sense of the term, But it also has the potential to once for all divulge India into the abyss of majoritarianism, which constitution makers vehemently opposed. The social fabric of India and the constitutional guarantee for freedom of religion shall be raised to ground.

Uniform Civil Code may seem politically motivated, but that does not wash Muslim Law of India of its serious lacunae, when it comes to dispensation of justice. Personal Laws, time again have proved to be contradictory, arbitrary and unjust. Muslim legal code cannot remain static, it has to progress as the society progresses on. The concepts of *Ijtihaad* and *Ijma* need to be utilized to their logical end. The need of the hour is to evolve a mechanism, where by reformation emerges from within.