

INJUSTICE IN WRAP OF PERSONAL LAW

By Mr. Nitin Balu and Pranav Kumar Kaushal

From Bahra University

Abstract

Women under Muslim law are the most debated and discussed topic. The laws which regulate Muslims are personal. The struggle between Rights of women and personal law is of ancient origin. This paper discusses how the rights of women are being violated in case of maintenance and marriage. Women are considered are the mile stones of the society and no society can run without their existence. The holy Quran was considered as the guardian of rights of women which protected the dignity of the Women but after the lapse of time status of women got worse. The holy Quran is the shower of blessings upon the every single individual who has existence in this world. Every individual is equal in the eye of god and this universal concept we are hearing from ages. Judges in Courts are referred as lords and these lords did every possible effort to bring back the dignity to the women not only of Muslim faith but also of other faith.

Keywords: - Rights, Maintenance, Marriage, women, Dignity

INTRODUCTION

The position of Muslim women in Islam has long been a point of great controversy. Muslim women can be seen as the ultimate symbol of subjection to male dominance. The popular theories state that subjugation of Muslim women by their male counterparts was mainly due to their economic dependence and lack of confidence in competing with men in the society. Is this was the cause behind the deteriorating conditions of Muslim women? A woman can be confident through education, work, learning and also individual capacity to manage herself and her family. Education, therefore is the key to women's empowerment at 'Grass root' level, Qur'an also says that education can give a woman the necessary strength and power in the society. Gender issues in Muslim societies are as relevant as in any other society. Deviations apart, fundamental teachings of Quran do not accept any difference between one human baby (boy and another girl). The earning capacity of individual differs but each person should strive hard to increase his or her capacity to earn

“The Quran clearly states that men shall have what they earn and women shall have whatever they earn... Allah has knowledge of all things”

Every human being has an identity of his own and plays an important role in all spheres of life. Any population is an aggregate of individuals and, as such, is reflection of the sum total of their physical, social, economic and political traits. The origin of Islam can be traced back to 7th century Saudi Arabia. Islam is thus the youngest of the great world religions. The prophet Muhammad (570-632 A.D.) introduced Islam in 610 A.D. after experiencing what he claimed to be an angelic visitation. Muhammad dictated the Qur'an, the holy book of Islam, which Muslims believe to be the preexistent perfect words of Allah. Roughly 24% of the global population belongs to the Muslim faith – according to a [Pew Research Center estimate](#).

The Muslim law originated from the Holy book of Muslims the “Qur’an”.

In the Holy Quran¹-Sura II, Ayat 3 says:

“This is a perfect book, there is no doubt in it, and it is guidance for the righteous”

The sacred Quran represents the communications addressed by Allah to the Prophet, through His messenger Gabriel. Muslim law in India means “that the portion of Islamic Civil Law which is applied to Muslims as a personal law”². It deals with the institutions of public prayer, fasting, pilgrimage, prohibition of wine and also topics on marriage, divorce, inheritance, etc. Quran is the final authority.

¹ Abdullah Yusuf Ali, The holy Quran, (Kitab Bhawan, 14th edition), (2016)

² Aqil Ahmad, Mohammadan Law 1(ed. Prof. Iqbal Ali khan, Central law Agency, 25th Edition. 2014)

Before Islam Muslim women were treated as chattels and not human beings their position was very bad in that time but with the triumph of Islam women got equal Rights and their position uplifted. It was the Prophet of Arabia who affected a revolution in the life of women³. This can be evident from the holy Quran⁴ (Sura 4, Ayat 19)

O ye who believe! Ye are forbidden to inherit women against their will. Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them, -except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing, and Allah brings about through it a great deal of good.

IJJSR

HUMAN RIGHTS AS PER QURAN

Muslims consider Quran as the “Magna Carta”- of HR’s as its huge portion is concerned about the freedom of human beings from the oppression of traditional values, totalitarianism, tribalism and moreover the things which prohibit mankind from actualizing the Qur’anic apparition of human image in standard proclamations. According to Quran as well as women are equivalent, and women have been given equivalent opportunities with the men flock to understand their individual talent. In fact, the defensive approach towards the oppressed classes, Quran is predominantly serious about the protecting HR’s of women and ensures that women are treated with impartiality in the social order as well as in the family. Quran has strongly advocated and guaranteed all the fundamental human privileges not only to men but also to the women. These rights are so intensely entrenched in our humanness that their rejection is equal to the cancelation of the nature that makes us human’s. In order to actualise our human talent these privileges have come with us to enjoy our human rights. These rights not only present us with the opportunities which will develop our human talent, but these rights also make us understand, what God wants us to be and what we should be. Rejection of these rights is to reject the talent which God has embodied into us to utilise our human capabilities.⁵ When we analyse the Holy Book “Quran” its basic concern is the right to human life with respect. One and all have the right to life and not only right to life but also the right to respect, not because of being a male or female but because of being humans. The Holy words in the Holy Book are put forward as

³ Mir Mehrajuddin, Vol. IX, 1985, Cochin University law Review 315-349

⁴ Supra note 1

⁵ Hassan, R. (Gender equality and Justice in Islam,) (Retrieved on Faubarary11, 2013) available on <http://www.religiousconsultation.org/hassan.htm> accessed on dated 3rd June 2018 at 6:45 AM

“And indeed we have honoured every Human being and we have carried them on the land and on the sea and provided with them with At- Tayyibat(Lawful things) and have preferred them above many of those whom we have created with the marked preferment.”⁶

DISSOLUTION OF MARRIAGE

Under Muslim law, a marriage can be dissolved either by act of god i.e. death of husband or wife or by an act of parties i.e. Divorce. The Dissolution of marriage by an act of Parties can be classified into two broad categories:-

- i.) Extra Judicial Divorce
- ii.) Judicial Divorce (by wife under the dissolution of Muslim marriage act, 1939)

After the death of the wife the husband can marry immediately but in opposite case the widow cannot remarry before a specific time which is *iddat*. *Iddat* is an Arabic word and its literal meaning is counting. Counting here means counting the days of possible conception to ascertain whether a woman is pregnant or not⁷, the *iddat* of death is four months and ten days and if the wife is pregnant, until the delivery of the child. The wife can divorce the husband without his consent. But she can of course purchase her divorce her husband from her husband and can have the marriage dissolved by *tafweez* (delegation)⁸ A husband can divorce his wife by repudiating the marriage without giving any consent. Husband can give divorce to his wife by way of *Talaq* (*Talaq-ul-sunnat, talaq-ul-biddat*), *ila*, *zihar*.

DIVORCE: DIFFERENT FORMS⁹

Among the disorganization by death, factual separation and jural separation, the most important disorganization is that of divorce. Among almost all the nations of antiquity, divorce was regarded as a natural corollary or material Rights.¹⁰ Islam recognized the concept of divorce for the very first time.

⁶ Al-Quran Allsra verse 70 chapter 17.(17:70)

⁷ Dr. R.K Sinha, Muslim law,55 (Central law Agency, Sixth edition,2006)

⁸ Supra note 6

⁹ Supra note 3

¹⁰ Aqil Ahmad, Mohammdan law 165 (ed. Prof. Iqbal Ali khan, Central law Agency, 25th edition. 2014)

Divorce by Husband

Divorce by husband is known as Talaq and it is usually translated into divorce. Talaq are an Arabic word and its literal meaning is to release. It is by jurists to denote the release of women from marital tie.¹¹

The pronouncement of talaq may be either revocable or irrevocable. The revocable form of "Talaq" is considered as the approved and the irrevocable as the un-approved form. 'Talaq', namely, divorce at the instance of the husband, is also of three kinds – 'talaq-e-ahsan', 'talaq-e-hasan' and 'talaq-e-biddat'.¹²

(i). TALAQ-E-AHASAN

Talaq-e-ahsan is regarded as the most approved form of divorce, if there is room for compromise and reconciliation between the husband and wife it can be revoked. Talaq-e-ahsan' is a single pronouncement of 'talaq' by the husband, followed by a period of abstinence. The period of abstinence is described as 'iddat'. The duration of the 'iddat' is ninety days or three menstrual cycles (in case, where the wife is menstruating). Alternatively, the period of 'iddat' is of three lunar months (in case, the wife is not menstruating). The single pronouncement is to be made during the period of tuhr of the wife. Tuhr is the period of the wife's purity.

The Quran itself says in Chapter 2, verse 228:-

“And the divorced women should keep themselves in waiting for three courses”

If the couple resumes cohabitation or intimacy, within the period of 'iddat', the pronouncement of divorce is treated as having been revoked.

(ii). TALAQ-E-HASAN

This is regarded as the good mode of talaq. In Arabic Hasan means good.¹³ In this the pronouncement is to be made in the three successive Tuhrs (Period of Purity). After the first pronouncement of divorce, if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. The same procedure is mandated to be followed, after the expiry of the first month (during which marital ties have

¹¹ Dr.Lakshamikanta Das, Vol. XII(3) 2014, Indian bar Review, pg 154

¹² Shayra Bano and others v. Union of India and others (2017)

¹³ Supra note 15, pg. 171

not been resumed). 'Talaq' is pronounced again. After the second pronouncement of 'talaq', if there is resumption of cohabitation within a period of one month, the pronouncement of divorce is treated as having been revoked. It is significant to note, that the first and the second pronouncements may be revoked by the husband. If he does so, either expressly or by resuming conjugal relations, 'talaq' pronounced by the husband becomes ineffective, as if no 'talaq' had ever been expressed. If the third 'talaq' is pronounced, it becomes irrevocable.

(iii). TALAQ-UL-BIDDAT

This is also known as Talaq-ul-bain.¹⁴ It is sinful form of Divorce. In this mode of talaq three pronouncements are made during a single tuhr either in one sentence or in separate sentence. When talaq is in writing it becomes irrevocable immediately.¹⁵ The worst thing about this mode is as soon as the pronouncement is made the marriage become in effective as there remains no room for conciliation or getting back together. The only way they both can remarry is if the women marries another man and then gets divorced from him then only they both can remarry again, until then she becomes haram for husband. The talaq- ul – biddat remained as a curse to the every muslim women. This form of talaq was like a sword revolving upon the head of muslim women which can fall on them any time. The Fight between what is right in law and what is good in religion was significant one. Way back in 2002 the Supreme Court in **Shamim Ara v. State of U .P and Another**¹⁶ has held, though not in so many words, that triple talaq lacks legal sanctity. Therefore according to article 141 the judgement of the apex court will be binding on the subordinate courts and will be law of the land. **Shamim Ara** is the law that is applicable in India. The Hon'ble Supreme court in its majority judgment (3:2) in **Shayara Bano and others v. Union of India and others**¹⁷ declared the practice of Triple Talaq i.e. Talaq – ul- biddat as unconstitutional as it violated right to equality of Muslim women. Justice kurian joshp in his separate judgement in Shayara bano observed in para 22 as To freely profess, practice and propagate religion of one's choice is a Fundamental Right guaranteed under the Indian Constitution. That is subject only to the following- (1) public order, (2) health, (3) morality and (4) other provisions of Part III dealing with Fundamental Rights. Under Article 25 (2) of the Constitution of India, the State is also granted power to

¹⁴ Supra note 12, pg. 88

¹⁵ Mohammad Ali v. Fareedunnisa Begum (1970) ; Aqil Ahmad, Mohammdan law (ed. Prof. Iqbal Ali khan, Central law Agency, 25th edition. 2014)

¹⁶ (2002) 7 SCC 518

¹⁷ Shayra Bano and others v. Union of India and others (2017), (India)

make law in two contingencies notwithstanding the freedom granted under Article 25(1). Article 25 (2) states that “nothing in this Article shall affect the operation of any existing law or prevent the State from making any law- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.” Except to the above extent, the freedom of religion under the Constitution of India is absolute and on this point, I am in full agreement with the learned Chief Justice. However, on the statement that triple talaq is an integral part of the religious practice, I respectfully disagree. Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible.

While, Justice **Rohinton F. Nariman** and Justice **Uday U. Lalit** held that this form of talaq is violative of fundamental right mentioned in Article 14 not on the ground of equality and but also within the meaning of discrimination. These two judges have one limited ground to invalidate this form of talaq, which is the test of ‘manifest arbitrariness’ as ‘the marital tie can be broken capriciously and whimsically by Muslim man without any attempt at reconciliation so as to save it.’¹⁸

TALAQ- UL – BIDDAT AND NATURAL JUSTICE

Natural Law is of the 'higher law of nature' or 'natural law'. It would be right to refer the natural law as the law of god. The words ‘natural justice’ is derived from the Roman word ‘Jus Naturale’, which means principles of natural law, justice, equity, and good conscience. It is rightly said by someone that law is the means to an end and that end is justice. The principle of Natural justice is Audi Alteram Partem i.e. one should be given opportunity to present oneself in Court, in other word no one should be condemned unheard. If this maxim is understood in philosophical sense it can be said that no one should be unheard or one should get every possible opportunity to explain oneself not only in Court of law but in every aspect of life. Law of god never does injustice and it is the rule of god.

The TALAQ –UL-BIDDAT is the form of talaq in which the husband gives divorce to wife solely by articulating Talaq, Talaq and Talaq no opportunity to wife is given to explain her or to revoke the same. The talaq- ul- biddat is against the rule of law i.e. it is the rule of whim and caprice. Whenever husband feels to desert or want to get rid of her, he brings forward the

¹⁸ M.R Shamshad, triple talaq judgement: A majority verdict without the support of reasons of majority of judges, (Aug 26, 2017, 9:49 P.M) <http://www.livelaw.in/triple-talaq-judgment-majority-verdict-without-support-reasons-majority-judges/>

shield of Talaq-ul-biddat. What is bad in moral, bad according to the conscience, bad in theology and is against the law of god and opposing natural Justice can't be practiced.

TALAQ-UL – BIDDAT AND CONSTITUTIONAL LAW

On 26th day of November we adopted Constitution and its preamble an identity card to the constitution states that it is duty of the state to secure to its citizens justice, liberty, equality, and fraternity and assuring the dignity and fraternity of the individual and unity and integrity of India. Article 14 of the constitution states that the state shall not deny to any person equality before law or equal protection of laws within the territory of India, The Article 14 of the constitution is regarded as the rule of law¹⁹ i.e. Rule against arbitrariness. Equality is a dynamic concept with many aspects and dimensions. Article 14 of the constitution contains two aspects in it. The First concept is taken from the English common law and it speaks as that every single individual from President to a common man is equal before law. Whereas the second part of the Article says that equal protection shall be secured to all persons within the territorial jurisdiction of the union in the enjoyment of their rights and privileges without favor or discrimination. The parts under article 14 do not limit the scope of equality; and it also doesn't mean the same treatment to everyone. The basic philosophy beneath the words of article 14 is equals should be treated equally and unequals should be treated unequally, an infant and a teenager should not be seen in the same perspective. Same lays that article 15 of the constitution whose marginal note clearly says "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth". Not going into details of the said article, can be inferred from the Marginal note that it is non- discriminatory article and its sole purpose is to disseminate equality.

The Talaq-ul-biddat is against the principle laid down under article 14 as well as article 15 of the Indian Constitution. The said form of talaq is exclusively practiced by Muslim Male. As said above the Triple talaq is the rule of Whim and caprice, and arbitrary in nature and the Article 14 is against the rule of Arbitrariness and lays the principle of equality above the rule of whim and caprice.²⁰

¹⁹ The law will rule and is above every individual. There shall be no arbitrary exercise of power.

Article 25: Right to freedom of Religion

India is a secular country of plural religion. The word secular was added in the preamble to the constitution by the 42nd amendment act 1976. Secularism and Democracy are two important achievements of India after independence. The most celebrated judgment of Keshavanand Bharti the apex court held that the secularism is the basic Structure of the Indian constitution. In S.R Bommai v. Union of India²¹ the court held that secularism is a positive concept of equal treatment of all religions and state has no religion that means state cannot profess or propagate any particular religion. The word secularism is commonly understood in contradiction to the “religious”.²² In *LR Coelho v. State of Tamil Nadu*²³ it has been held that secularism is a matter of conclusion to be drawn from various Articles conferring Fundamental Rights. “If the secular character is not to be found in Part III”, the court ruled, “it cannot be found anywhere else in the Constitution, because every Fundamental Rights in Part III stands either for a principle or a matter of detail.”

By the virtue of Article 25 of the Constitution right to freedom religion came into existence i.e. Freedom of conscience and free profession, practice and propagation of religion. The said article says that all the persons are free to practice or profess or propagate any religion. The practice of Triple Talaq is not an exclusive part of Article 25 neither it comes in the purview of practicing religion. The said article opens with the words “Subject to public order, morality and health and to the other provisions of this part” so this is pertinent to mention here that the freedom of religion is to be exercised in consistency with public order, health and morality. The practice of triple talaq cannot be said morally right and the said practice is inconsistent with the rights guaranteed under article 14 and 15 of Constitution and violates the one if the basic rights of the Muslim women.

HUMAN RIGHTS OF WOMEN; CONSTITUTIONAL PROVISIONS

The status of women is a benchmark of social process and is a very important part of the *human development index* in the human rights jurisprudence. The Fundamental Law of the land namely Constitution of India guarantees equality for women. It would be proper to refer

²¹S.R Bommai v. Union of India , AIR 1994 S.C 1918, (India)

²² 1, D.D Basu, Shorter Constitution of India 7 (Fourteenth ed., lexisNexis) Reprint 2013

²³ Prof. Narender kumar, Constitutional of India (Ninth ed. 2015, Allahabad Law Agency) 2016

some of the most important legislations pertaining to empowerment of women. The Constitution of India not only guarantees equality to women but also empowers the State to adopt measures to positive discrimination in favour of women. The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles Article 14 of the Constitution of India guarantees equality before law. Article 15 prohibits discrimination on the grounds of sex. Article 16 states about equality of opportunity for all citizens in matters relating to employment. The 73rd and 74th amendments to the Constitution of India provided for reservation of seats (at least 1/3) in the local bodies of Panchayats and Municipalities for women. Another Constitution Amendment (84th Constitution amendment) reserving 33 per cent in parliament and State Legislature is in the pipeline. Article 15 prohibits discrimination against any citizen on the grounds of religion, race, caste, sex, etc., Article 15(c) of the Indian Constitution allows the State to make any special provision for women and children. Article 39 (a) mentions that the State will direct its policies towards securing all citizens, men and women, the right to means of livelihood, while Article 39(c) ensures equal pay for equal work. Article 42 direct the State to ensure just and human working conditions. The Constitution imposes a fundamental duty on every citizen through Article 15 (A) (e) to renounce practices derogatory to the dignity of women. Article 243-D of the Constitution contains that not less than 1/3rd of the total number of seats to be filled in direct election in every Panchayat shall be reserved for women. The 73rd and 74th Amendments to the Constitution, effected in 1992, provide for reservations of seats to women in elections in the Panchayats and Municipalities. Same provisions have been made in Article 234-T for reservation of seats to women in the direct elections to every Municipality. Thus, there is a reservation of 33% seats for women in local bodies. Article 23 provides against exploitation of women under the heading *prohibition of trafficking in Human beings and Forced labour*.

MUSLIM WOMEN AND LAW OF MAINTENANCE

Maintenance is a bare necessity of life. Everyone in life have to maintain oneself to prove his/her existence in the world. The Arabic meaning of maintenance is Nafqah, which means what a person spends over his family. Maintenance include food, clothing and shelter but due to judicial interpretation many things has been added in the list of maintenance.

Under Muslim law, a man is bound to maintain his wife irrespective of his and her means and his minor children if he is not indigent.²⁴ This duty of maintain wife of husband is only after when wife attains puberty not before that and in case of divorced Muslim women this duty is limited to the time period of iddat and not after that. The widow is therefore not entitled to maintenance during the Iddat period commencing after death of the Husband.

The duty of husband to maintain his wife and children is known as “Karcha-i-pandan”. Apart from this the husband is the husband can also come into an agreement to pay specially by the way of guzara and mewa khori.

Way back in 1996 the legislature enacted the Muslim Women (Protection of Rights on Divorce) Act which nullified the judgment and an attempt of the judiciary to lay a uniform code for the granting of maintenance to the Muslim women. Section 125 of Criminal Procedure Code is applicable to individual of every faith whether Muslim, Hindu, Parsi, Christian. Under section 125 of Cr PC, 1973 the term wife is defined as:-

“Wife includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.”

In Shah Bano Begum v. Mohammad Ahmed Khan²⁵ the five judges bench of the Supreme Court held that a Muslim husband having sufficient means must provide maintenance to his divorced wife who is unable to maintain herself. Such a wife is entitled to maintenance even if she refuses to live with the Muslim husband because if she refuses to live with the husband because he has contracted another marriage within the limit of four wives allowed by Quran. The Supreme Court rejected this contention of the husband that section 125 of the Criminal Procedure Code providing for maintenance of divorced women who is unable to maintain herself is inapplicable to Muslims. It was said that the religion professed by a spouse or the spouses has no place in the scheme of section 125 of Criminal Procedure Code, which is a measure of social justice founded on an individual's obligation to the society to prevent vagrancy and destitution. Whether the spouses are Hindus, Muslims, and Christians or Parsi, Pagans or Heathens, is wholly irrelevant to the application of section 125. It was held that Muslim divorced woman who cannot maintain herself is entitled to maintenance from her former husband till the time she gets remarried. They rejected the plea that maintenance is payable only till the period prescribed under Muslim personal law,

²⁴ Aqil Ahmad, Mohammdan law 321 (ed. Prof. Iqbal Ali Khan, Central Law Agency, 25th edition. 2014)

²⁵ Shah Bano Begum v. Mohammad Ahmed Khan AIR 1985 SC 945 (India); Aqil Ahmad, Mohammdan law (ed. Prof. Iqbal Ali Khan, Central Law Agency, 25th edition. 2014)

during which she should abstain from sexual intercourse and other luxuries. The learned judges held that the ability of the husband to maintain his divorced wife till the expiration of the Iddat period extends only in case the wife is able to maintain herself. Pointing to the Ayats of the Quran, the judges declared that these clearly impose an obligation to provide maintenance to the divorced wife.

The court also held that cancellation of maintenance of wife due to payment of dower or Mahr do not make wife ineligible for maintenance as mahr is consideration to be given at the time of marriage not at the time of divorce.

To nullify the ruling of the Supreme Court Muslim women (Protection of Rights and Divorce) Act came into existence and confined the Muslim women right to maintenance after divorce in the four walls of act. And undo the situation of women under Muslim law. The act was challenged by the Danial Latifi v. Union of India²⁶ and it was argued that the right to equality as well as right to life of the muslim women gets violated by the act. The Supreme Court rejecting the contention said the said is not unconstitutional and the act ensured that a husband would not only maintain the divorced wife during iddat, but also pay a lump sum that would be fair and reasonable for her future.

Conclusion

In 17th century Thomas fuller rightly said “Be ye ever so high, still the law is above you”. In case of triple talaq and status of Muslim women under Muslim law these words of Thomas perfectly fits. Whether the practice is prevailing for thousand years it can't violate the basic principles of god and also of law of the land.

The messenger of god nowhere made reference about triple talaq. The messiah of god protected the rights of the Muslim women, who were treated as mere chattels before the most valuable words of the messenger. God created men and women equally and no practice can go beyond the creation of god.

Founding fathers of the constitution left no opportunity to abide them with the rule of god and on this basis made rule of law. In the most celebrated decision of the apex court on triple talaq considered what is bad in theology once good in law is also bad in law. Supreme Court is considered as Guardian of Constitution but it would be right to refer it as guardian of rights and dignity of every individual as vote bank politics blew the

²⁶ (2001) 7 SCC740

candle of Right of maintenance of Muslim women Supreme Court gave its hand to the drowning rights of Muslim women.

The holy book of Muslims, the Base of Muslim laws also speaks about the dignity of Muslim women and in Chapter II of Holy Quran it is written:

“Either retain them with humanity, or dismiss them with kindness”

