

EMPOWERING INDIAN MUSLIM WOMEN IN THE ERA OF GLOBALIZATION

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Abstract-

Liberalization, Globalisation and privatization are three wheels of International forum. India being signatory of many International Treaties and Conventions is moving fast. In the race there is specie called women who needs to be balanced between providing equality and safety. Women have become equal participants in many respects at all levels of society. The future would see more women venturing into areas traditionally dominated by men. Various social reformers have tried to uplift the social conditions of women through legislations and judiciary has played a vital role for her empowerment. Because of globalization, women have moved away from their traditional roles of homemaker and child rearing to social and business solutions. But the society has become more unsafe to women with this shift. The threat is beyond the jurisdiction of law.

And talking about the rights of Indian Muslim Women we are a way backward as there is a conflict between her rights and personal law. We are a nation which proudly professes to be the world's largest democracy, guaranteeing the protection of equal rights to all our citizens while boldly holding the flag aloft of being a secular nation. However, underneath all the rosy claims, lies the cruel underbelly of discriminatory and tyrannical personal laws which tear apart the foundation of equality upon which our great nation was built? The most heinous form of tyranny to which Muslim women have been subjected to since time immemorial is the outrageous practice of triple talaq or more commonly known as "instant divorce. Then there are her rights on adoption, guardianship, maintenance, etc where there is outright discrimination. The list is never ending looking at the point of her empowerment and protection of rights. The reason for selecting these two problems for this article is that each problem represents a different level of complexity in Islamic jurisprudence. This means that different approaches may be adopted to resolve them. Yet, they are not jurisprudentially or practically unrelated. The authors here shall examine the status of Muslim women in India and the protection afforded to her in the light of Globalisation and make pertinent suggestions.

1. Introduction

Women Empowerment becomes an important concern in the contemporary age of globalization. : Women Empowerment can be considered a change in the context of a woman's life that enables her increased capacity to lead a fulfilling human life, characterized by external qualities such as health, mobility, education and awareness, status in family, participation in decision making and level of material security, as well as

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internal qualities such as self-awareness and self confidence. Evaluation of awareness among women is one of the most prominent features. Therefore, at all the forums including United Nation Organization, women rights and issues regarding women empowerment are being discussed. All the countries have been forced to draw out their women from parochial culture and trying to utilize as a skilled human resource.

Government of India has initiated various policies and legislations for women empowerment considering as development of capacities, powers and skills to make a person more confident, more self-reliant and able to take self decisions from the time of independence but unable to reach towards the proper destination. Illiteracy, communication gap, male dominant society, less political participation in decision making process, traditional norms, culture, social negligence, unorganized economic participations are some of the problems of women empowerment. Thus, women's quest for equality with men in matters of education, employment, inheritance, marriage, politics, cultural affairs and self dignity, civil rights and recently in the field of religion also to serve as cleric is a universal phenomenon. Education is playing vital role in women empowerment. The developed countries of the world are more advanced in empowering women than the rest of the world. Without proper education, guidance, environment no country could be achieved the full potential development of the women society as well as empowerment.

The *Quran* is the foundation of Islamic Law. The *sunnah* (the hadith and example of the Prophet) is used as a secondary source for further clarification and guidance. Where the *Quran* and *sunnah* leave a question unanswered or unresolved, Muslim scholars resort to *itihad* (the science of interpretation and rule making). Under established principles of *Utihad*, if the *Qur'an* and *sunnah* are silent on a matter, it is permissible (among other things) to resort to local custom, so long as that custom is consistent with the *Qur'an* and *sunnah*. In the legal arena, this meant that it was permissible to supplement religiously-based law with customary law.¹ These supplements espoused patriarchal values of one form or another. In the end, *Utihad*, and in fact the judiciary as a whole became predominantly the domain of men. Thus, the woman's voice was ultimately reduced to a whisper in this arena.

2. Women Empowerment

In this contemporary age of globalization, the slogan of women empowerment is getting its peak, while United States of America and its closing states have also a claim of delivering women empowerment within their folds. In September 2012, United States and 12 other countries took joint step regarding announcing "Equal Futures" for women and girls. It was the background of last year's speech of President Barak Obama in UN General Assembly, in which he challenged member countries to "break down economic and political barriers that stand in the way of women and girls." The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights,²

¹ Azizah al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women 's Rights', American University International Law Review, vol. 12, issue 1, 1997, p. 6.

² Part III of the Indian Constitution.

Fundamental Duties and Directive Principles³. The Constitution not only grants equality to woman, but also empowers the state to adopt measures of positive discrimination in favor of woman.

3. Empowering Muslim Women in India

The concept of empowerment flows from the power. It is vesting where it does not exist or exist inadequately.⁴ Empowerment is used to transform social relations, social institutions, laws and public policies.⁵ The position and status of women all over the world has risen incredibly in the 20th century. We find that it has been very low in 18th and 19th centuries in India and elsewhere when they were treated like 'objects' that can be bought and sold. For a long time women in India remained within the four walls of their household. Their dependence on men folk was total. A long struggle going back over a century has brought women the property rights, an equality in civil rights before the law in matters of marriage and employment. In addition to the above rights, in India, the customs of *purdha* system, female infanticide, child marriage, sati system, dowry system and the state of permanent widowhood were either totally removed or checked to an appreciable extent after independence through legislative measures.

When these legislations apply to all women the position of Muslim women is still low. Today, the issues of women rights in Muslim personal Law is highly controversial. Specially, Muslim women rights relating to triple *talaq* divorce, inheritance, maintenance has got much attention now a days. However, Indian Constitution has guaranteed equality and freedom from discrimination based on gender or religion, but still there are various practices which are based on heartless conservative culture. As we know a large part of Muslim Personal Law is still uncodified and most of the legal decision pronounced by the courts based on the norms mentioned in Quran and hadith. The central debate on interpretation of Muslim personal laws has both positive as well as negative aspects. Some authors has supported that, Muslim personal laws has given various rights to Muslim women such as choice in marriage, inheritance etc. whereas, some are of the opinion that, there are various practices which is against the spirit of Indian Constitution.

Restraints on women's liberties have been usually introduced and fortified by men. In relatively secular societies, where women's rights are governed and protected by constitutional decrees, debates on women's liberties still exist, though on a different plane. In such societies insular administrations occasionally attempt to override women's rights by bringing alterations to the constitutional system. According to William Montgomery Watt, Islam improved the status of women by "instituting right of property ownership, inheritance, education and divorce"⁶

³ Part IV of the Indian Constitution.

⁴ Dhruva Hazarika, 'Women Empowerment in India: A Brief Discussion', *International Journal of Educational Planning & Administration*, vol. 1, (2011), p. 200.

⁵ Abdul Waheed, et. al., 'Empowerment of Muslim Women in India: A Sociological Analysis', *Bangladesh e-Journal of Sociology*, vol. 11, July 2014, p. 41.

⁶ Yvonne Yazbeck, *Islam, Gender and Social Change*, Oxford University Press, New York, 1998, p. 11.

4. Initiating to empower Muslim Women in India through Judicial Decisions

Freezing Culture and Silencing Internal Dissent is the mode adopted by Muslim women to claim their rights. During the early period of Islam, Muslim women were held in high esteem and they occupied exalted positions and in the days of Holy Prophet Mohammad, a Muslim woman was given in the society a position of equality with the opposite gender. Equal treatments were meted out to the women. The ladies of the family of the Prophet were noted for their learning, their virtue, courage and their strength of character.⁷ Few women have approached the Supreme Court for asserting their rights related to Muslim family law. Hence, opportunities for courts to give judgments protecting Muslim women's rights have been limited. Fewer women have obtained judgments in their favour, which also lay down a law or interpret legal provisions. Some of these judgments have sparked protests from patriarchal forces within the community.

1. Maintenance of Muslim Women

As regards maintenance of Muslim women, maintenance signifies food, raiment and lodging.⁸ Beyond the dower, the husband's financial obligation towards his wife is that of maintenance. Once it is due the maintenance of the wife is deemed debt of the husband from the date of withholding it.⁹ It is generally agreed that wife is entitled to maintenance during the continuance of marriage. After divorce, she is entitled to maintenance during the *iddat* period but not during the *iddat* following the death of her husband. Islamic law grants maintenance to Muslim wife from her husband not only during the subsistence of marriage but also reasonably after a dissolution of marriage.¹⁰

In India, Muslim men and women choose their personal law then general law. However, post divorced maintenance has been subjected to heated discussion. Section 125 of Cr.P.C. states that is any person neglects or refuses to maintain his wife¹¹, who is unable to maintain herself, upon proof, order for such allowance to be paid. Moreover, section 127(3)(b) states that where an order has been made under section 125 in favour of the divorced wife the court shall cancel such order if satisfied that she has received, before or after divorce, the whole of the sum which is either under the personal or customary law applicable to parties, was payable on such divorce. Muslims understood this to mean that they were exempted from the operation of Section 125 once dower has been paid.

The famous explosive case *M. Ahmed Khan v. Shah Bano*¹², in which the lady was from Indore whose husband divorce her by giving irrevocable triple *talaq* after 40 years

⁷ S.A.Kader, 'Muslim Law of Marriage and Succession in India', p. 80-81.

⁸ Fyzee & Asaf A. A. 'Outlines of Muhammad Law', 4th Ed., Oxford University Press, Oxford, p. 211.

⁹ Mansoor & Taslima, 'Maintenance of Muslim Women: A Legal Connotation', *The Dhaka University Studies*, Part F, vol IX, June 1998, p.63.

¹⁰ The Holy Quran, 2:228 and 2:241.

¹¹ U/S 125(b) of Cr.P.C. 'A wife includes divorced wife and has not remarried'.

¹² AIR 1985 SC 945.

of marriage, citing provisions in Muslim law that he was liable to pay maintenance only for *iddat* period and that he had already paid amount of dower, and hence refused to pay her lifelong alimony. She filed a criminal suit and going against Muslim Personnel Law. The Supreme Court upheld the decision of the lower court which had directed her husband to pay a maintenance amount under the alimony provision of Indian law applicable to all communities. The Provision for maintenance of wives, whether married or divorced, who are unable to maintain themselves is a social welfare measure applicable to all people irrespective of caste, creed, community or nationality.¹³

In *Javed v. State of Haryana*, a Bench of three judges observed that practice of polygamy is injurious to public morals and can be superseded by the State just as practice of 'sati' It was further observed that conduct rules providing for monogamy irrespective of religion are valid and could not be struck down on the ground of violation of personal law of Muslims.

In *Bai Tahira's v. Ali Husain*,¹⁴ the supreme Court did not turn to the Holy *Quran* but confined itself to Section 125 considering it as a secular provision and came to the conclusion that the claim of maintenance by the divorcee was indefeasible be the husband Hindu, Muslim or others, so long as the spouse had not remarried and had no means to maintain herself.

For Muslim men and women, For believing men and women, For devout men and women, For true men and women, For men and women who are Patient and constant, for men And women who humble themselves, For men and women who give In charity, for men and women Who fast For men and women who Guard their chastity, and For men and women who Engage much in Allah s remembrance For them has Allah prepared Forgiveness and great reward. However, in post-Islamic period, it is seen that the degradation and degeneration set in, in the status of women. In male-dominated world, Muslim women were pushed to the whims and fancies of the men- folk and this is reflected primarily in the case of dissolution of marriage, i.e., divorce, which is known as *Talaq* in Arabic meaning. The doctrine of *talaq-ul-bidet* (triple *talaq* is one form of *talaq*) was evolved as a convenient divorce to dissolve the marriage at the will and whims of the Muslim husband. The Muslim Personal Law Board opined that the Supreme Court was wrong in interpreting the Holy *Quran*. Because of the extreme pressure from the religious leaders the decision could not be enforced. This led to passing of Muslim Women (Protection of Rights on Divorce) Act, 1986.

In *Ali v. Sufaira*¹⁵ it was held that u/s 3 (1) (a) of the Act, 'a divorced Muslim women is not only entitled to maintenance for the period of *iddat* from her former husband, but also to a reasonable and fair provision for the future'. But there was inconsistency in the decisions of various High Courts as to amount and period of maintenance. It was in *Daneil Latifi v. UOI*,¹⁶ which confirmed that 'reasonable and fair' provision meant life

¹³ Mohammad Shabbir, 'Muslim Pesonal Law and Judiciary' Ed. 1, Law Book Co, Allahabad, 1988, p. 27.

¹⁴ AIR 1979, SC 362.

¹⁵ 1988

¹⁶ 1997 SCC 740.

long post divorced maintenance to be paid by the husband during the period of *iddat*. If any of the relatives is unable to maintenance then Magistrate may direct the Wakf Board to pay the maintenance. Moreover, 1986 Act has met with severe criticisms from the women's organizations and human rights groups since the time of enactment.¹⁷

2. Divorce and Muslim Women

Firm union of the husband and wife is a necessary condition for a happy family life. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially no marriage is contracted to be dissolved but in unfortunate circumstances the matrimonial contract is broken. One of the ways of such dissolution is by way of divorce. Under Muslim law the divorce may take place by the act of the parties themselves or by a decree of the court of law. However in whatever manner the divorce is effected it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage.

The Prophet declared that among the things which have been permitted by law, divorce is the worst. Divorce being an evil, it must be avoided as far as possible. But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. The basis of divorce in Islamic law is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are several modes of divorce under the Muslim law, which will be discussed hereafter. While men can divorce their spouses easily, women face legal and financial obstacles. For example, in many cases the woman must repay her dowry and marriage expenses. In general she also has to forfeit child custody, if the child is older than seven years. Even if she gets child custody, she has to give it to the father, when the child reaches the age of seven.

Before 1939, a Muslim wife had no right to seek divorce except on the ground of false charges of adultery, insanity or impotency of the husband. But the Dissolution of Muslim Marriages Act 1939 lays down several other grounds on the basis of which a Muslim wife may get her divorce decree passed by the order of the court. There are two categories of divorce under the Muslim law extra judicial divorce, and judicial divorce. The category of extra judicial divorce can be further subdivided into three types, namely, by husband *talaaq ila* and *zihar* by wife *talaaq-i-tafweez*, *lian* by mutual agreement. The second category is the right of the wife to give divorce under the Dissolution of Muslim Marriages Act 1939.

Talaaq-i-tafweez or delegated divorce is recognized among both, the Shias and the Sunnis. The Muslim husband is free to delegate his power of pronouncing divorce to his wife or any other person. He may delegate the power absolutely or conditionally,

¹⁷ Uma & Soumya, 'Muslim Women Right to Maintenance in India', Law and our Rights', *The Daily Star*, January 30, 2005.

temporarily or permanently. A permanent delegation of power is revocable but a temporary delegation of power is not. This delegation must be made distinctly in favour of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. The power of *talaaq* may be delegated to his wife and as Faizee observes, "this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India".

Originally, *khul'* was meant to be an equitable solution. According to Prophetic precedent, a woman who does not like her husband through no fault of his own has the option of leaving him, so long as she returns to him the mahr (usually translated as dowry) he gave her. *Khula* is the right of a woman in Islam to seek a divorce or separation from her husband. A Muslim woman may petition a *qadi*, or in non-Islamic areas an Islamic community panel, to grant her divorce if the husband refuses. The waiting period (*iddat*) of a woman who seeks a divorce is one menstrual cycle or one month if she is post-menopausal, i.e. ceased menstruating. This is to ensure she is not pregnant. If the woman is pregnant, then the waiting period is until she gives birth. Women's right to initiate divorce is very limited compared with that of men. According to Sharia law, there are two reasons for a wife to be divorced: when she can prove that the husband did not have intercourse with her for more than two months or if the husband does not provide her with what she needs for living such as food and shelter.

But all the right to divorce is only in books and has been futile in reality. In this regard Dissolution of Muslim Marriages Act 1939 was passed to protect the Muslim Women's rights. Section 2 of the Act states, a woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution of her marriage on any one or more of the following grounds, namely, that the whereabouts of the husband have not been known for a period of four years, that the husband has neglected or has failed to provide for her maintenance for a period of two years, that the husband has been sentenced to imprisonment for a period of seven years or upwards, that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years, that the husband was impotent at the time of the marriage and continues to be so, If the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease That she, having been given in marriage by her father or other guardian before she attained the age of fifteen years and the husband has been treating her cruelly.

The weirdest form of divorce is the triple *talaaq* which has become hot topic in recent times. In *A.S.Parveen Akthar v. The Union of India*, the court stated that under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 in so far as it seeks to recognise and validate *Talaaq-ul-Biddat* or *Talaaq-i-Badai* form of divorce as void and unconstitutional. The petitioner in the present case has averred that *Talaaq-ul-biddat* is not a mode recognized in the *Quran*, and that the Holy Book provides for reconsideration and reconciliation before recognizing divorce as irrevocable. The petitioner has referred to Chapter IV verse 35 of *Quran* which says, "Any if you fear a breach between the two, appoint an arbiter from his people and an arbiter from her people. If they desire

agreement, God will affect harmony between them." Hence, the Apex court declared *Talaaq-ul-Biddat* or *Talaaq-i-Badai* form of divorce, as void and unconstitutional, are mainly that it does not provide for reconsideration and is not preceded by attempts at reconciliation.

In the case of Mohammed *Haneefa vs. Pathummal Beevi*,¹⁸ wherein the learned Judge after referring to the unbridled power of a Muslim husband to divorce his wife, asked: - "Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity."

In *Mohd. Ahmed Khan vs. Shah Bano Begum & Ors*,¹⁹ the husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs.3000/- as deferred *mahr* and a further sum to cover arrears of maintenance and maintenance for the *iddat* period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. Though the main contention here was of maintenance, the dissolution of marriage was by pronouncement of triple talaq.

Shamim Ara v. State of U.P. & another,²⁰ in which Shamim Ara & Abrar Ahmed married in 1968 according to Shariat law. Four sons were born to them. In 1979, Shamim approached the Family Court at Allahabad for maintenance for herself and her two minor sons, and said that her husband had treated her with cruelty and deserted her and her children. While the proceedings were pending in court, Abrar stated in court that he had divorced Shamim orally by triple talaq in July 1987, and that therefore she was not entitled to any maintenance. The Supreme Court decided that no legally valid divorce had taken place, either in 1987 as the particulars of the alleged talaq were not stated, and the witnesses before whom the talaq was allegedly pronounced did not testify in court. The Supreme Court also stated that making a reference to talaq in court documents is not a valid form of divorce recognized under Muslim law. Hence the court directed Abrar to Judgments on Muslim Law & Women's Rights 21 continue paying maintenance to Shamim until the obligation comes to an end in accordance with law.

Irony remains that though the Court in innumerable instances has recognized triple *talaqs* discriminatory nature but since it is a sensitive issue courts shy away. Thus how can this form of *talaq* be in line with the Right to Equality? Even commercial contracts cannot be broken in this manner; are human relationships so fragile and cheap? In this 21st century everything is so advanced that in a recent case a man divorced his wife through Skype then why even today are we ardently following practices which act as a sword hanging on the neck of Muslim women only. Women have been discriminated on the ground of personal law, a tool used to bargain for their wants from politicians. When neither the Prophet nor the *Quran* distinguishes between men and women why the fate of Muslim women should be sealed by the hands of Muslim men alone is a question that

¹⁸ 1972 Ker LT 512.

¹⁹ (1985) 2 SCC 556.

²⁰ AIR 2002 SC 3551.

needs to be answered. Such an injustice further emphasis on the dire need of Article 44 to become a reality in the form of uniform civil code.

5. Uniform Civil Code- Will it mean protection of Rights of Muslim Women

Uniform Civil Code is a common set of laws applicable to all citizens irrespective of their religion. That means religious ordinances governing marriage, divorce, adoption and inheritance will be subservient to what the Constitution-framed law holds is fair and just. For one, the sheer range of India's diverse religions and communities. The Constitution also enjoins all religions and faiths to be respected equally and adherents be free to carry out the articles of their faith. So in a sense, forcing such a code in matters like marriage and divorce might contradict this extremely basic principle.

6. Conclusion

For Empowerment of Women in every society must change their attitude, behavior in positive trend and essential to create congenial environment towards the women and to recognize their rightful place in the decision-making process. Women should have greater autonomy in decision-making, greater ability to plan their lives and free them from shackles imposed by prevailing customs, beliefs and practices. Their small steps towards attaining the rights afforded them in the *Quran* or in the Indian Constitution have resulted in reverses for them and the community, both undermining their efforts and strengthening the determination of the Muslim right wing to resist changes in their legal status.²¹ The Muslim women (Protection of Rights on Divorce) Act, 1986 in spite of some shortcomings is by and large in consonance with Muslim law of maintenance and secures maintenance rights of Muslim married women to a great extent. In the matter of maintenance and divorce the steps of judiciary has been very harsh and has been touching the line of judicial distortion. But they are very much hesitant to cross the limits set by the apex judiciary. The recent case²² of Bombay High Court is the clear example of the hesitant tendency of the High Court to cross the limits set by Apex judiciary.

²¹ Lynn Welchman, 'Women and Muslim Family Laws in Arab States- A Comparative Overview of Textual Development and Advocacy', ISIM Series on Contemporary Muslim Societies, Amsterdam University Press, USA, p. 93.

²² Sheikh Mohd v. Naseem Gegum I (2007) DMC 226 Bombay High Court.