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ISLAMIC LAW AND WOMEN: INDIAN CONTEXT- A MINORITY WITHIN MINORITY *

INTRODUCTION

Muslim women are triply disadvantaged: as members of a minority, as women, and most of all as poor women. Muslim women continue to struggle articulately for their rights and are still subject to an archaic family law codified nearly 70-years ago which has remained unreformed and continues to disadvantage women legally. India being a land of diversity where people of all religion thrive and constitutional rights are guaranteed to all the citizens irrespective of caste, creed, religion and sex still while on the same land Muslim women is not only treated differently from male counterparts but they also experience difference in enjoyment of rights as compared to a Hindu or a Christian women due to the application of personal law which is presumed to contain provisions which are in conflict with certain rights guaranteed under the constitution of India, such as right to equality, against discrimination etc. Muslim women in India are often caught between loyalties to their religious or ethnic communities and a desire for greater freedom and equality as women within those communities. It becomes difficult for such women to reconcile both these needs because of the pressure of the community to maintain the precepts of the personal law wherein a woman is treated as a second class member.

Under the current law and custom, Muslim women are unable to divorce except for cause unlike Muslim men who may divorce unilaterally and without cause. After divorce, Muslim women have no legal right to maintenance except for a period of three months after the marriage. And finally, Muslim men have a legal right to marry up to four wives without the consent of their wives while Muslim women have no such right to polyandry, despite the fact that there are more males in India than there are females. These laws indicate the subordinate position of Muslim women in relation to Muslim men and also show the difference in rights enjoyed by a Muslim female and a Hindu or Christian female who is being given right to divorce her husband on more grounds than

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given to the husband similarly polygamy is also prohibited thus the first research question deals with the analysis that the Muslim women is given lesser rights in India as compared to other women because of the application of personal law in matters of divorce, marriage, maintenance etc. In the second question it is attempted to establish that the Shariat law is not unjust from its inception and is not discriminatory and it is the misinterpretation of law which has evolved the custom of mistreating women. The third question deals with the scope whether the unjust part of the personal law can be reformed by suggesting that it is being applied differently in different country thus it is not as rigid as it is made to appear and also with the change in social circumstances it has undergone change. The last question provides for suggestions in order to eliminate these inequalities and injustices encoded in the law, a few solutions have been advanced.

PERSONAL LAW AS MUSLIM IDENTITY

It is relevant to state here how and by what process the personal law of Muslim community started to be regarded the symbol of Muslim identity in order to establish that the unjust part of the personal law is in no stretch of imagination a part of Muslim identity and is merely a customary distorted practice started in and before the British period. The idea of Muslims as different from other Indians and the role of law in creating that identity has its genesis in the Mughal period wherein the law was bifurcated into public and private spheres governed by two distinct traditions of law, Islamic law and religious law, this was incorporated in the laws made during the British period and Indians were governed by secular public law and religious private/personal law.[1] From here the notion that Muslims are a separate identity with different ethnicity started to develop. This difference was further legally recognized when the codification process started, since there were complexities of the law that could be applied the customs prevalent and the original sources of Muslim law were over simplified by the British judges to be applied conveniently in the courts thus ignoring the real customary practices prevalent.[2] During the Independence movement with separate electorates along the communal lines in the Government of India Act of 1909, Muslims became a legally-recognized minority.[3] The creation of a national minority had some perverse impacts and the accretion of the Indian-Muslim identity as something apart from the Hindu and even "Indian" identity and the development of Muslims into a minority occurred and were constructed by and through discourses of difference engaged in by the British, the Hindus and the

[1] Archana Parashar, *Women And Family Law Reform In India: Uniform Civil Code And Gender Equality*, (1992 Sage Publications), p.60

[2] Cyra Akila Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, And Muslim Personal Law Reform In India,* 17 Columbia Journal of Gender and Law 46, pp.10-15 (2008), Sep.20, 2015 http://ssrn.com/abstract=969020

[3] Ayesha Jalal, *Exploding Communalism: The Politics of Muslim Identity in South Asia* in Sugata Bose & Ayesha Jalal (eds.), Nationalism, Democracy & Development: State And Politics In India, (1997) Oxford University Press, Delhi, pp.90-95

Muslims.[4] In 1920s the *Shariat Act* was passed finally ending the process of codifying Muslim or, in the incorrect terminology of the British, "Mohammedan" law, while this may not have been a particularly salutary legal achievement, it was a further realization of the separation between Muslims and Hindus along "national" lines that had begun earlier. All this ended with the partition of India and strongly established the differences in the name of religion.[5]

MUSLIM PERSONAL LAW- UNJUST OR MISINTERPRETED

In an article, Muslim Personal Law was characterized in the following manner:

> *Muslim personal laws require a Muslim wife to be monogamous, while a husband can have up to four wives. They also allow husbands but not wives to divorce unilaterally without fault, institutionalize dower arrangements that arguably amount to selling women into marriage, grant male heirs twice the share of female heirs, and do not allow mothers to be guardians of minor children.*[6]

The above process of codification clearly points out that there is a considerable gap between the customary practices and the black letter of the law. In the next few paragraphs it is explained what Mohammedan law talks about polygamy, divorce and maintenance unjustly towards woman.

I. POLYGAMY

Polygamy is held up as the ultimate evidence of Islamic law's injustice towards women and as such, it deserves consideration. While some Muslim countries have either regulated or banned polygamy, India continues to allow plural marriages for Muslim men. A Muslim male husband can take as many as four wives at a time to marriage. Now the question is that how far bigamy is supported by the personal. Since polygamy up to 4 wives is allowed under the Mohammedan Law as is evident from above statements, therefore no remedy is available to a Muslim women against polygamy by her husband, however, a condition is imposed upon a Muslim male that he can marry as many as four wives subject to the condition that all the wives be treated justly and equitably. Quoting a text from the Holy Quran which seem to support polygamy is-

> *And if you fear that you will not be fair in dealing with the orphans, then marry as many of women as may be agreeable to you, two or three, or four; and if you fear that you will not deal justly, then marry only one or what your right hand possesses. That is the nearest way for you to avoid injustice.*[7]

Thus from the above verse it is evident that there are few **conditions**[8] imposed upon a Muslim male before he can take up 2nd 3rd or 4th wife which are as follows:-

1. There is no religious injunction directing muslim to marry more than one wife.

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4 *Id.*
5 *Supra* n.2, p.16
6 Catherine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects and Personal Laws*, 4(2) International Journal of Constitutional Law, p.192 (2006).
7 Arabic text and English translation by late Maulawi Sher Ali, in chapter Al-Nisa
8 Commentaries on Mohhammedan law, S.I. Jafri and B.M. Seth,pp.96,97

2. To marry a second wife is left to his choice.
3. Permission is granted to him to contract a second or subsequent marriage only in a case where he comes across a destitute female orphan who requires care and compassionate treatment for making her life livable.
4. The bar to second marriage is removed in such cases only if a muslim is able to do justice to her and all his wives, not otherwise.

Here, it is worth mentioning the views stated by Fyzee that there is some contradiction in interpreting the term ***'just and equal'*** as according to one view it is permitted to have more than one wives with the condition that he should be just between them and since capacity to be perfectly just does not exist between them therefore either polygamy is completely prohibited as it is impossible to satisfy the condition of justness or it allows only limited polygamy because one who will be unjust will be guilty of fraud and betrays trust imposed by Allah. However, another view is that on referring to Quran it is clear that polygamy is allowed and interpreting condition of just and equitability so strictly would be against the spirit of Quran as it would mean that it suffers from discrepancy which is impossible as regards *Surah 23* pointed out by The Holy Book itself, moreover polygamy is required under certain peculiar situation thus what is required is something less than perfect just behavior, i.e. dealing which excludes injustice but falls short of perfect justice. It is admitted here that the second view appears to be more acceptable. Whatever be the interpretation the most obvious conclusion is that the law does not give unfettered right of polygamy to a muslim male and is restricted to few compelling circumstances only.

It should be noted here that polygamy as a practice is not widespread among Muslim communities in India. In fact, the incidence of polygamy among Muslims is approximately 6%. Even so, the right to plural marriage is possibly the most objectionable of formal legal rights accorded to Muslim men at the expense of Muslim women. Given that it has been restricted if not formally abolished in other Muslim Countries, the time has come for such anachronistic rights to be changed in India.[9]

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II. UNILATERAL DIVORCE

Under the Mohammedan law a Muslim husband is empowered to pronounce *Talak*[10] on his wife unilaterally without her consent and at his own free will with or without any cause and as rightly said by **Anderson,** *"it is the Islamic law of divorce not polygamy which is the major cause of suffering to Muslim*

[9] *Supra* n.2, p.38

[10] "Talak" is defined as "the exercise of the right of pronouncing unilateral divorce on the wife by the husband, arbitrarily without any cause, at any time during the subsistence of valid marriage including the period of iddat, is known as Talak."(Nishi Purohit, The Principles of Mohammedan Law, 2nd edition, Orient Publishing Company, 1998, p.183)

women…the Muslim wife indeed has always lived, so far as the law is concerned, under the ever present shadow of divorce"

Although according to Hadis, *"with Allah, the most detestable of all things is divorce"*

The tradition of arbitrary *talaq* at the sweet will of the husband was prevalent since the pre-islamic days, although the power of divorce was recognized by Prophet to avoid a greater evil he made various provisions for the protection of women against such arbitrary and capricious practice of their husbands which are as follows:-

(a)- Fixing of dower

(b)- Revocable *Talaq*

(c)-Restraint on remarriage between the parties

A. NOT AT THE WHIMS AND CAPRICE OF THE HUSBAND-

Justice Iyer pointed out in the case of ***A.Yusuf* v. *Sowramma***[11]**,** *It is a popular fallacy that a muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. The holy Quaran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them"(Quaran, IV:34)….commentators on the Quaran have rightly observed and this tallies with the law now administered in some muslim countries like Iraq- that the husband must satisfy the court about the reason for divorce."*

However in the following cases different view has been taken:

Sarabai* v. *Rabiabai[12] it has been held that here may not be a particular cause for divorce, and mere whim is sufficient. And in the case of ***Asha Bibi v. Kadir Ibrahim***[13] it has been held that although an arbitrary or unreasonable exercise of divorce of marriage is strongly condemned in the Quaran and is treated as spiritual offence, it does not affect the legal validity of a divorce duly affected by husband.

But in the case of ***Saiyid Rashid Ahmad v. Anisa Khatoon***[14] the true concept of *Talaq* was pointed out by CJ. Baharul Islam that-

- *Talaq* must be for reasonable cause,
- Must be preceded by attempts at reconciliation,
- It 'may be effected' if the said efforts fail.

Thus it ended the controversy that for effecting *Talaq* "whim of the husband is sufficient".

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11 AIR 1971 Ker 261
12 ILR 30 Bom Dissented
13 ILR 33 Mad 22 Dissented
14 AIR 1932 PC 25

B. CAUSES FOR DISTORTIONS IN INDIA[15]-

It is rightly said that no other matrimonial law has been as much distorted in this part of the world as its law on divorce, the reasons being-

- Judicial ignorance or irreverence
- Author's of Muslim law like McNaughten and Mulla who decreed every Muslim husband's birth right to divorce his wife at whim.[16]
- The ill educated maulvees of the village mosque who misguided their followers by transmitting to them their own faulty understanding of the law

Following decisions of the British India further distorted the law-

In ***Ahmed Kasim v. Khatoon Bibi***[17]**,** it was held that any Mohammedan may divorce his wife at his mere whim or caprice

In ***Sarabai v. Rabiabat***[18], it was observed that an arbitrary divorce by a muslim husband was 'good in law', though 'bad in theology'.

The Privy Council in ***Rashid Ahmed v. Anisa Khatoon***[19] took the view that a muslim husband can effect divorce whenever he desires.

III. MAINTENANCE

Muslim Women (Protection of Rights on Divorce) Act, 1986

Upon divorce, a Muslim woman has the right to maintenance for a period of three months that is her *iddat* period and the time that elapsed from the end of the *iddat* until she received notice of divorce, if any. After that time, the responsibility to maintain her devolves back to her family. As such, the objective of maintenance is not to compel the ex-husband to provide for the divorced wife as in the case of alimony. Rather, because Islam considers marriage a union that can be dissolved rather than an eternal bond, a woman is never considered a part of her husband's family to the exclusion of her own paternal family. Neither is she a better half but a fully cognizable legal personality with independent rights who is capable of remarriage. In fact, remarriage is encouraged in Islam, which is the underlying rationale behind the short period of alimony provided after divorce. The passing of three months ensures that the wife is not pregnant. If she is, the husband

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[15] Furgan Ahmad, Triple Talaq: an Analytical Study with Emphasis on Socio-legal Aspects, (1994 Regency Publication, New Delhi)

[16] McNaughten declared, "*there is no excuse or any particular cause for divorce, mere whim is sufficient."* And Mulla announces, "*any Mohammedan of sound mind, who has attained puberty, may divorce his wife whenever he so desires without assigning any cause."*

[17] (1932) ILR 59 Cal 833

[18] (1906) 8 BOMLR 35

[19] AIR 1932 PC 25.

is liable, of course, for the child's maintenance until it reaches majority and all children from the marriage, in turn, "belong" to their paternal family.

Until the Shah Bano case and the passage of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (MWA 1986), divorced Muslim women who were inadequately supported and rendered destitute could sue under Section 125 of the Indian Criminal Procedure Code for long-term maintenance beyond the iddat period.[20] Section 125 applied to all women regardless of religious affiliation, however, for Muslim women, the passage of the MWA 1986 which provided support to those who had contracted for insufficient *Mahr* in event of divorce, closed that avenue of legal recourse cutting off maintenance after three months.

MUSLIM PERSONAL LAW- AMENABLE TO REFORM?

The Sharia law is not a law which has come by way of a dictate from man to man, instead it is command from Allah, whether expressed in revelation of Mohammed, the Prophet, in the shape of Holy Quran or in the practices of the Prophet himself and thus it is the source of all laws as well the only law and according to traditionalist these rules are something immutable, unchangeable and eternal. However, it has been seen in the recent time that these rules have been modified by adapting it to the changing needs of the society.[21] Thus the family law presently followed by the Muslim world may be divided into 3 different groups- countries where classical family law remained unchanged and uncodified, where Islamic law has been completely abandoned and replaced by the statutory law applicable on all citizens, where family law has been refined by various legislative techniques.[22]

In a number of countries reforms have been brought about wherein triple talaq has either being abolished or made ineffective or impracticable- eg in Egypt, Iraq, Jordan, Morocco, North Yemen, Sudan, Syria, Pakistan, Bangladesh.[23]

I. POSITION IN INDIA

However in India where the State has enacted law, it is has been in response to conservative Muslim pressure and at the expense of women, Armed with verses from the Qur'an and sayings of the Prophet, they seek to challenge the allegations made by progressive Muslims and Hindu nationalists alike. The first argument from conservatives is that the law is immutable.[24] The argument that law is immutable can be dismissed for the reason that the British codification does not reflect all the law or even the most important parts of the law. In May 1993, a *fatwa* was issued

[20] *Supra* n.2, pp.36-37
[21] S.J. Hussain, Marriage Breakdown and Divorce Law Reforms in Contemporary Society, (1983 Concept Publishing Company, Delhi).
[22] *Supra* n.13
[23] *Id.,* pp.118-122
[24] *Supra* n.2, p.34

know as the *Fatwa of the Jamaat Ahl-e-Hadees,* which invalidated the triple *Talaq* given in one sitting which was supported by very few groups and *Jamaat Ulema* published a statement upholding the validity of triple *Talaq*.[25]

Thus looking at the position in various countries all over the world it may be stated that the Sharia Law is amenable to change and can be modified to suit the needs of the society but is not accepted in the Indian society due to various reasons one being such interference by courts, as was mistakenly done in Shah Bano case where court tried to interpret the Quaranic text[26], may be against the constitutional rights of religion guaranteed under it to profess, propagate and practice their own religion and therefore, it cannot bring reform through legislation in India as against other Muslim countries.

However it may also be pertinent to mention here that the reform of personal law is said to violate constitutional provisions when the cultural identities of muslims depends solely or partly on their religious law, and neither polygamy nor unilateral right to divorce can be identified with muslim culture and thus reform of Islamic law in India will not be unconstitutional.[27]

SUGGESSTIONS[28]-

Muslim women's formal rights in the area of family law clearly have not kept pace with women from other Indian communities or other nations because the area of the family law in question has not been revised by the State since its enactment more than 70 years ago. For several years, the call for reform has been growing. The following three suggestions may be of certain help-

I. AN OPT-IN UNIFORM CIVIL CODE-

Article 44 of the Indian Constitution directs the State *to endeavor to secure for the citizens a uniform civil code throughout the territory of India.* Over the years, the Uniform Civil Code has met sustained resistance from conservative Muslims. The opt-in solution has called for the promulgation of a UCC that women can then choose as the law governing their marriage. This solution allows women choice while not threatening the traditional religious personal law regime. Women are given the choice of the secular and more favorable law in the event that they are faced with inequitable personal law remedies without any threat of invalidation of personal law as a whole.

A. SEVERAL PROBLEMS-

i. The Assumption of a Robust Secularism- Secularism is an essential prerequisite in establishing the trust of minority communities in the State. Without such a trust in the neutrality

[25]Sanober Keshwaar, The Triple Talaq-Unjust, Untenable, Un-Islamic in Indira Jaising(ed.), Justice for Women, (1996 The Other India Press), pp.82-85

[26] *Ijtehad*- The act of interpreting the Quran to determine the law. The power of *ijtehad* is not given to the courts and only to eminent scholars and *maulvies* can interpret the Holy Quran

[27] *Supra* n.13

[28]*Supra* n.2

of the government, minorities, particularly Muslims who have been discriminated against for decades, are unlikely to acquiesce to a relinquishing of their laws.

For instance, in the *Hindutva* cases, the Indian Supreme Court held that references by the Hindu Right to ideologies of Hindu nationalism or *Hindutva* were not violations of Section 123(3) of the Representation of the People Act, 1951 (RPA 1951) which bars appeals to religion and communalism in attempts to gain votes. Rather, *Hindutva* was construed by the Courts as a general reference to Indian culture and a "way of life".

Relying on two cases, *Sastri Yagnapurushadji and Others v. Muldas Bhudardas Vaishya and Another* and *Comm'r of Wealth Tax, Madras and Others v. Late R. Sridharan by L.R.s* the Court concluded that it could give no definition to Hinduism, Hindu or *Hindutva*. It concluded that the *Hindutva* is a synonym for Indianisation and "the development of a uniform culture by obliterating differences between all the cultures co-existing in the country", by equating Indian culture and Indian identity with Hinduism. The Court went on to state that speech promoting *Hindutva* was acceptable in the promotion of *secularism* and that it was a matter of fact whether or not there was a violation of the RPA 1951. Under these circumstances, liberal calls for uniformity and secularism take on a sinister tone. It strains reason to assume that a political system in which such ideologies have substantial purchase, in which parties espousing these ideologies are elected to state and central government, could pass a secular code that acts neutrally.

ii. ***The Assumption of Political Will to Better Women's Status-*** The enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 shows the extent to which women's rights are susceptible to political pressure and manipulation. The Act overturning the Shah Bano judgment was passed by a political fearful Congress government under pressure from Muslim conservatives is an example of how communal politics can serve up gender justice on a platter if it suits. The Supreme Court of India ruled in her favor granting her continued maintenance. In reaction, fundamentalists, both Hindu and Muslim, mobilized a discourse of identity that threatened to unseat Congress (I), the leading party and to tear Indian society apart along communal lines. Muslims, the Congress-led Indian Parliament passed the MWA 1986 that reversed the Court's decision and foreclosed the right of Muslim women to sue for continued maintenance beyond the iddat period.

iii. The maintenance of a private sphere in which unjust religious laws can operate, and the other has to do with the possibility of "free choice". An optional code, particularly one that requires Muslim women to opt-in by entirely abandoning Muslim laws preserves a public/private dichotomy.

iv. Muslim women may be unable or unwilling to jeopardize their religious affiliations particularly in a society in which they are discriminated against. An assumption of free choice in a traditional society is unwarranted.

Therefore, formal rights enacted by a State without political will to challenge gender inequality may not amount to real gains for women.

II. STRICT APPLICATION OF PERSONAL LAW-

The argument from conservatives is that the law is misapplied. The following can be stated the misconceptions-

1. If the giving of *Mahr* is practiced according to Muslim law, it is a security for women in a society that provides no social safety net.
2. A bride's family can stipulate a high *Mahr* to deter unilateral divorce and abandonment. If the law were enforced, therefore, Muslim women would be financially more secure and less likely to be divorced without their consent.
3. The triple *Talak*, which is the most unfavorable form recognized in Islam, is incorrectly practiced by Muslim men. The way in which men have used it—in one sitting—is disapproved of because it contravenes the rules set out in the Qur'an.
4. Maintenance for three months may be adequate if a divorced wife has contracted for an adequate *Mahr* that she may leave with or has prospects of remarriage or self-support.

A. PROBLEMS-

The way in which such laws are interpreted create an environment of unjustness for women such as in the case of Shah Bano who, at an age of 73, did not have many prospects of remarriage nor is it likely that there was much of her paternal family left to support her.

III. COMBINATION OF THE TWO- BEST OF THE TWO WORLD'S-

Internal Reform, Legal Assistance and External Reform-

i. Internal Change: Muslim Personal Law Reform
ii. Practical Assistance: Both Economic Empowerment and Teaching Women to Use the Law
iii. A Parallel Code: Drafting a Model UCC and Advocating its Passage

The State cannot continue to uphold religious laws that conflict with the fundamental rights and justify the subordination of women on this basis. Further, male leaders of the religious community also cannot continue to use and control women as a symbol of identity by politicizing their rights. For these reason, an effort needs to be made to move towards a system that can afford women

their rights while respecting their religious communities. As either a step towards a civil code or as an end in itself, Muslim Personal Law reform is long overdue.

CONCLUSION

It is clear from the above discussion that a Muslim woman is doubly disadvantaged in India. Such position of Muslim women is only due to the misinterpretation of the Sharia law and not because the personal law is unjust in its entirety and the provisions of the law are amenable to reform suiting the needs of the changing society and has been incorporated by a number of Muslim countries. According to the study and my personal opinion among the suggestions given the last one which is the combination of the two is the best solution to bring reforms as either UCC alone or strict application of personal law have their own shortcoming and are not feasible in the present scenario. The best approach in the interim is for radical reform of Muslim Personal Law coupled with the drafting of an aspirational code that is then advocated vigorously. However, all these reforms will be of no use unless the perception of the society is changed towards a woman. An effort needs to be made to move towards a system that can afford women their rights while respecting their religious communities. Whatever be the means it may be concluded that Muslim Personal Law reform is long overdue and presently Muslim women is a minority within minority in India.

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