

MUSLIM PERSONAL LAW AND THE CONSTITUTION OF INDIA: WOMEN'S RIGHTS PERSPECTIVES

¹Md. Mofidul Islam

ABSTRACT--*The right of Muslim women granted by personal law in India is one of the most controversial issues within the framework of human rights. While Indian Constitution formal guarantees to protect the religious rights of members of Muslim communities, whereas the equality rights of Muslim woman have been neglected due to the continuance of personal law system which is discriminatory on the basis of religion and gender. Although Indian government has enacted several laws to protect their rights, granted by the Shariat (Islamic law), towards the provisions of marriage, divorce, and maintenance, but at the level of the society or the community, these provisions have violated due to socio-cultural reasons and the patriarchal legal system which is against the spirit of Indian Constitution. This led to gross violation of their rights granted by Muslim Personal Law towards the provisions of marriage, divorce, and maintenance as well as under the Constitution of India. This paper examines the question of whether the rights granted to Muslim women by personal law based on the Shariat (Islamic law) with regard to marriage, divorce, and maintenance really benefit Muslim women in the society, addressing the issues of gender discrimination and its constitutional validity.*

Keywords-- Muslim Personal Law, Constitutional validity, women's rights, Muslim societies.

I. INTRODUCTION

The Muslim is the largest religious minority community in India. The Indian Constitution provides a comprehensive framework for the protection and promotion of the rights of religious minorities. Although the religious rights of Muslim minority community were protected by secular law, but equality rights of Muslim women were neglected. In this context, Vrinda Narain argues that "Located at the intersection of community and nation, public law and private law, Muslim women are simultaneously included and excluded from the enjoyment of equal rights by the continuance of the personal law system." Muslim Personal Law in India based on the Shariat (Islamic law) and religion. The Shariat (Islamic law) has sources its authority from the Quran (the Holy Book); Hadith or Sunnah (Tradition) of the Prophet Muhammad; Ijma (consensus of opinion of Jurists); and Qiyas (analogical reasoning). The Quran has granted women almost equal rights with their male counterpart, these rights of women are also supported and supplemented by the authentic Hadith of the Prophet Muhammad. The British government and after independence, Indian government has passed several laws from time to time to protect Muslim women's rights granted by the Shariat (Islamic law), but at the level of the society or the community, these laws do not help much in seeking justice guaranteed to them in the Quran and Hadith due to socio-cultural reasons and patriarchal system of personal law which are discriminatory on the basis of religion and gender. In this regards,

¹ Mofidul Islam is a research scholar, Dept. of Political Science, Shri Krishna University, Chhatarpur (M.P.) Email: mofidulislam42@gmail.com

Ansari asserts that “Muslim women in India are a heterogeneous group having their own vertical and horizontal divisions by virtue of the economic and socio-cultural class, region and sect that they belong to, and traditional school of Islamic jurisprudence and customary laws that they are governed by”. In a male-dominated society, Muslim women in India are mostly uneducated and unaware about their rights granted by the Shariat, live with fear and threat to their male counterparts, and follow traditional customary laws. Hence, this paper attempts to analyze the actual enjoyment of Muslim women’s rights granted by personal law based on the Shariat (Islamic law) towards the provision of marriage, divorce, and maintenance addressing the issues of gender discrimination and its Constitutional validity.

II. MUSLIM PERSONAL LAW IN INDIA: A BRIEF BACKGROUND

Before we analyze issues of gender discrimination based on Muslim Personal Law, it is necessary to discuss a brief reference to condition prevailing at time of introduction of the Shariat (Islamic law) in India. The Shariat (Islamic law) introduced for the first time in India by Muslim sultanate of Afghan and Turkish rulers who were Hanafi and based on the Ulemas as religious and legal arbitrators in the royal courts. The Mughal emperors appointed the Qazi who administered the Hanafi law, the law of the land. This continued until British rule was established, while the influence of English common law and the principles of equity became increasingly apparent. The Muslim Personal Law (Shariat) Application Act, 1937 was enacted by the British government, applied to Muslim in British India as a matter of policy, forgot the original draft of Shariat (Islamic law), based on the Quran, and tried to translate various important religious texts into English, and forged the laws somewhat based on these holy texts. In this regards, Razia Patel also stated: “To oppose any reforms in these laws, the fundamentalist political Muslim groups like the Muslim league and others called these as “Shariat-based” and hence “divine”, and fanned the passions of common Muslim masses to gain support against any changes.” But the British government, at first time, enacted a progressive law for Muslim women in India was the Dissolution of Muslim Marriage Act, 1939, gives Muslim women a right to judicial divorce. After Independence, the framers of the Indian Constitution have maintained Muslim Personal Law as it existed at the time of its introduction. In 1954, the Government of India adopted a uniform law for all communities, the Special Marriage Act, which effectively provided people a choice of coming out of personal laws. The major changes occurred after the famous Shah Bano case which resulted in the adoption of the law i.e. the Muslim Women (Protection of Rights on Divorce) Act, 1986 passed by the Indian government to protect the maintenance rights of divorced Muslim women only during the period of iddat (three months and ten days) or under section 125 of the code of criminal procedure, 1973. Recently, other major changes in Muslim Personal Law happened after Shayara Bano Case which led to the enactment of Muslim Women (Protection of Rights on Marriage) Act, 2019 also called as the Triple Talaq Act which banned the instance triple talaq or other forms of divorce by their husbands.

2.1. Muslim Women’s rights as enshrined in Personal law and contemporary societies: The ground reality

British government and India after gaining independence, enacted several laws based on the Shariat (Islamic law) to protect the rights of Muslim women with regards to marriage, divorce, maintenance and inheritance. But now the questions arise, the rights granted by Muslim Personal law based on the Shariat (Islamic law) really benefit

the Muslim women in the society. In Islam, the Quran is the principal authority for all the rules and regulations; it took care of the rights of women in relation to marriage, divorce and maintenance with their male counterparts, the rights granted by the Quran are supported and supplemented by Hadiths or sunnah (Traditions) of the Prophet Muhammad. However, what Islam gave her, the society of male domination took away. The most of the women deprived of their rights granted by the Shariat related to marriage, divorce and maintenance in Muslim societies for socio-cultural reasons and the patriarchal legal system which is discriminatory on the basis of religion and gender. As per Islamic law, Muslim marriage is called Nikah is not a sacrament as like Hindu marriage, but purely a civil contract. So, a Muslim woman has freedom of choice in marriage. She can choose her future husband, without coercion from her father or other relatives. Her free consent is necessary for the validity of marriage contract. There can be no marriage without her free consent. But, in a male-dominated society, Muslim women do not enjoy her marital rights in their own conditions.

In this regard, Engineer argues that:

Except in case of educated upper class girls, women are not consulted before marriage. The father considers it his right to marry her off according to his choice alone. She can hardly stipulate any conditions.

Naseem Ahmad further asserts that:

“Most marriage that currently take place in Muslim societies are arranged unions, during which force and intimidation are quite often employed to obtain the girl’s consent. Moreover, her freedom to sign the marriage contract has been considerably curtailed. The majority Muslim marriages nowadays are contracted through agents (guardians, especially on the part of the women), very often a male member of the family (father, brother, or uncle), who formalises and signs the contract on her behalf. In doing so, her opportunity and right to negotiate marriage and divorce terms are deliberately denied.

In Muslim marriage, Fixation of dower or mahr is considered an important aspect for the validity of marriage contract which is women’s exclusive rights and access to and control over it. Muslim marriage will not take place without mahr. Dower or mahr may be prompt mahr which is given at the time of marriage in the form of jewelry or in kind and the rest is deferred mahr is given at the time of divorce or upon the death of her husband and can also be demanded by wife at any time. But the most of the Muslim women deprived of their Quranic rights in the society.

On the question of mahr rights of Muslim women, Saukath Azim observed:

The amount of mahr is usually decided by the parents or elders of either side, on the basis of the socio-economic background of the family. In most of the cases the women or the bride are unaware of the amount of mahr decided in their marriage. The minimum amount of mahr has not been fixed. Many Muslim on the occasion of marriage ceremony just announce in front of the gathering and do not give any amount either in cash or in kind. In practice, it remains only a paper transaction. In most cases the dower fixed is ridiculously low.

Similarly, on the question of marital rights, Orakzai argues that:

Muslim males have a right to marry up to four wives and right to marry non-Muslims from Ahl-al Kitab (people of the book i.e. Jews and Christians), while Muslim women are not allowed to marry non-Muslims. Similarly, men can divorce women at their will, without citing any reason while women have only limited divorce rights based on specific and limited grounds and then only through a judicial order.

Thus, a sociologist says:

A Muslim man can have up to four wives, with no legal protection to the women against the exercise of this privilege. The law does not admit polygamy as a cause for seeking divorce by a Muslim woman. Of course, the corresponding rights of a women to have more than one husband in any circumstances is inconceivable, much less is granted under law... A man can divorce at will just by uttering the words 'I divorce you' three times, anywhere, at any time without any witness. He is also not required by law to give any maintenance to the wife beyond the periods of *Iddat*, which is three months and a few days after divorce. If a man divorces his wife, he is obliged to pay mahr, a sum of money agreed upon at the times of marriage. This provision is also taken as a security for Muslim women against easy divorce. But as long as the right to have four wives continues to be enjoyed by a man, he need not divorce his wife if he does not wish to pay mahr he can simply discard her, or ill-treat her, while taking another wife...so as to every stage. Muslim law is fettered with inequalities, with the women in every case being less equal.

2.2. Muslim Personal Law and its constitutional validity: Gender discrimination concerns in India

In sharp contrast to Muslim Personal Law, Article 14 of the Indian Constitution guarantees to all citizens 'equality before law' or 'equal protection of the laws' and Article 15 of the Constitution prohibits the discrimination on grounds of religion, race, caste, sex or place of birth. The Constitution also protects the fundamental rights to freedom of religion guaranteed by Articles 25 to 28 as well as Article 29 and 30 protects the interest of minorities and provides certain rights to the minorities. In recognition of the conflict between the principle of equality and the discrimination sanctioned by personal law, Article 44 of the Constitution directs the State to enact a Uniform Civil Code (UCC). As a consequence, the religious rights of members of the Muslim community have been protected, whereas the equality rights of Muslim women have been neglected due to the continuance of Muslim Personal Law in India. The question that arises regarding Muslim women is whether Muslim personal law is constitutionally valid, which distinguishes Muslim women and Muslim men by gender, and between Muslim women and other Indian women on the basis of religion. There are some provisions in the Muslim Personal Law in India which are discriminatory on the basis of religion and gender or against the spirit of Indian Constitution. According to Islamic law, a man is allowed no more than four wives, provided that he treats them with equality and justice. If he cannot support more than one wife or is afraid that he will not be just between them, he should remain monogamous. Thus, under Muslim Personal Law a man can have four wives at one time, but a woman is not permitted to have more than one husband at one time. If she contracted a second marriage during the lifetime of her husband, she can be punished for bigamy under section 494 of the Indian Penal Code, 1862. This section applies to all communities whether male or female but in the case of Muslims it applies only to females. So the practice of polygamy by Muslim communities in India is not only against the provisions of Quranic injunction but also against the provisions of Indian Constitution. In India, there is still no direct legislative reform of the Muslim Personal Law on the practice of polygamy. Moreover, most Muslims do not register their marriage in accordance with the Special Marriage Act of 1954, which provides for a monogamous union. Muslims solemnly formalize their marriage in a classical religious form by Maulvis or Qazis, mentioning the details of the bride and groom in a *nikahnama* (marriage agreement). These *Nikahnamas* are not registered in the court. However, they are valid under the Muslim Personal Law in India. As per Islamic law, there is no age limit for marriage, the age of puberty is considered as the age of marriage. Thus the provisions of Child Marriage Act, 2006 are further diluted due to the

continuance of Personal Law system in India which against the spirit of Indian Constitution. So, Child marriages still continue to be widespread among Muslim communities in India. Moreover, Islamic law gives Muslim male unlimited rights of divorce without any reasons whereas Muslim female have limited rights of judicial divorce under the Dissolution of Muslim Marriage Act, 1939. On the question of divorce law, Engineer argues that:

She can hardly exercise her right to 'khula'. The Hanafi school almost deprives her of this right. There is no question of ever stipulating the condition for 'talaq-i-tafwid' (delegated right to divorce). On the other hand she becomes victim of triple divorce in many cases. The triple divorce was strictly prohibited by the Holy Prophet and naturally the Quran does not mention it as it is highly unjust to women. The Prophet strictly forbade this form of divorce. It is, therefore, referred to as 'talaq-i-bida' (innovated form of divorce) or even as 'sinful form of divorce'. Yet, it is most widely practiced in India and elsewhere.

Although triple talaq declared invalid and unconstitutional by Shayara Bano case, 2017 which led to the enactment of Muslim Women (Protection of Rights on Marriage) Act, 2019 popularly called as the Triple Talaq Act. But there arise serious question regarding the issue of maintenance and custody of children. Section 5 of the Act ensures only "subsistence allowance" and not "maintenance". Maintenance means the amount of money necessary to continue life in accordance with the position of a person in society, while subsistence allowance is the bare minimum amount required to meet the expenses of day-to-day living. However, the provision is "without prejudice to the generality of the provisions contained in any other law ", which means that the woman is still entitled to initiate the proceeding for maintenance in accordance with Section 125 of the Code of Criminal Procedure, 1973. Hence, it is not clear what is the meaning of this section in the form of a subsistence allowance. Moreover, section 4 of the Act mention Punishment for pronouncing talaq which may extend to three years. Now question arise if the husband is imprisoned, how he can pay maintenance allowance to wives and children. Before passing of the Triple Talaq Act, 2019, the maintenance rights of Muslim women were governing by the Muslim Women (Protection of Rights on Divorce) Act, 1986 who have been divorced by, or have obtained divorce from, their husbands. They can get maintenance only during the period of Iddat or under section 125 of CrPC, 1973. But condition is that a divorced Muslim women cannot get maintenance from her husband under the Criminal Procedure Code, 1973 like other 'divorced women' who are governed by other personal laws such as Hindu, parsi and Christian she claim maintenance from her husband till she remarries. But in case of Muslim women ,only when a divorce Muslim women and her former husband agree to be governed by the provisions of section 125 to 128 of the code of the Criminal Procedure, 1973 relating to maintenance they can get maintenance. Now, the question arise, are Muslim Personal Law unconstitutional and cannot be codified, argues Razia Patel Muslim Personal Law have been based on religious texts, but these texts have selectively reinvented and discursively created, so, it is man-made law. Thus, she stated:

There are many elements included in this personal law ,which are not based on the shariat, and which are applied as a matter of "justice, equity and good conscience"and yet others were abolished-for instance, the judge need not necessary be a Muslim; apostasy and adultery are not punishable by death; the giving and taking of interest by a Muslim is not illegal; the hand of a thief is not cut off; Muslims and non-Muslim can lawfully marry without changing their religion and their children are legitimate and have rights of inheritance under the Special Marriage Act, 1954; and the existing *nikah* between two Muslims can be turned into a civil marriage by registration under the Special Marriage Act, 1954.

III. CONCLUSION AND SUGGESTIONS

To conclude, the paper has discussed issues concerning the rights of Muslim women under Muslim Personal Law in India and its Constitutional validity. Muslim Personal Law based on the Quran, Hadith or Sunnah (Traditions) of the Prophet Muhammad, Ijma and Qiyas. The Quran explicitly ensure gender justice and takes care of all the essential rights of Muslim women, no doubt about it. But the condition is that Muslim women read the Quran, but do not understand the meaning and essence of the Quran. So, they are completely dependent on religious leaders in how to fulfill their rights and obligations in society. The theologian and Jurists do not rethink about Muslim women's right issue. But in a real change, Muslim Personal Law in India is not based original Quranic injunction and authentic Hadith of the Prophet Muhammad, but it is based on Ijma (consensus of opinion of Jurists); and Qiyas (analogical reasoning) which was later developed. The history of Muslim personal law in India is rooted in the colonial past of India and is largely preserved by the Constitution during independence. Consequently, Muslim personal law, as it exists today, is largely based on customs favoring the native patriarchy. Although Article 44 of the Indian Constitution directs the State to enact Uniform Civil Code (UCC), but till today, there is no implementation of UCC in India. I do not directly propose to implement Uniform Civil Code in India. The Apex Court for the first time declared Triple Talaq as unconstitutional and the BJP government take as a step towards establishing uniform civil code (Enshrined in Article 44 of directive principle of state policy) which led to the Muslim Women (Protection of Rights on Marriage) Act, 2019, but criminalizing it goes against the fundamental rights to the freedom of religion i.e. Article 25 to 28 of the Constitution of India. Divorce is a civil matter and makes Triple Talaq a criminal offence; this is unjust to Muslim communities in India. Solution must come through coexistence rather than coercion. Muslim women in India are not only poor but also educational backwards. The government should initiative to take empowerment of Muslim women through Education because education is the backbone for awareness of their rights granted by personal law in India. To solve the problems of Muslim women's rights granted by personal law, the attitude of the male dominant society should be changed. It is important for the Government to understand the feeling of common Muslim masses vis-à-vis Muslim women who being governed by Shariat in matters of personal laws. These should be resolved by developing a fair and equitable legal framework based on the principles of the Quran.

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