

## **Women's Rights to Marriage and Divorce as Enshrined in Islamic Law: Discrimination concerns and issues in Muslim Societies**

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**Abstract:** Women's rights towards the provisions of marriage and divorce as enshrined in Islamic law have been the subject to all kinds of controversies, misinterpretation and especially misinformation. In fact, the Quran, the principle authority for all rule and regulations, put women almost equal rights to marriage and divorce with their male counterparts and the rights granted to Muslim women by the Quran are supported and complemented by the 'authentic' Hadith of the Prophet Muhammad. Although the Shariat (Islamic law) contains many positive provisions that protect their rights, these provisions have worsened for socio-cultural reasons and the patriarchal system of personal law in the contemporary Muslim societies. This paper analyzes the rights of Muslim women towards the provisions of marriage and divorce as enshrined in Islamic law, and also examines the discrimination concerns and issues against their rights towards the provision of marriage and divorce in Muslim societies.

**Keywords:** Women's Rights, Islamic Law, Marriage, divorce, discrimination, Muslim Societies.

## 1.0. Introduction:

Before Islam, women enjoy no marital rights and women were treated as heritable property, to be inherited by the heirs of a husband. Female children were buried alive, divorce was only in the hands of the husbands, and the practice of polygamy i.e. there was no restriction on number of the wives as a man could have, inheritance was only for the strong and oppression was widespread.<sup>1</sup> In this dark era, Muslim women gained marital rights parallel in the world due to Islamic reforms through the Quran and Hadith of the Prophet Muhammad between 610 and 632 A.D. The Quran, the main authority for all norms and rules of marriage and divorce, gives women almost equal marital rights with their male counterparts, and the rights granted by the Quran to Muslim women are uplift and supplemented by the authentic hadith of the Prophet Muhammad. Islam is the first religion in the world that recognized women as a legal entity and gave her essential marital rights enjoyed by men. In fact, Muslim women have more marital rights than women in any other society until the liberation of women in the Western world.<sup>2</sup> However, from the beginning of the Islamic era (610A.D. and onwards), the male-dominated Arab society has resisted the ideals of sexual equality enshrined in the Quran and hadith. By the time the Shariat (Islamic law) began to be codified in the eighth century A.D. all sorts of pre-Islamic (Arab) and non-Islamic influences (from the Hellenic and Sassanid culture) had affected the thinking of the Muslim jurist. Conservatives and traditionalists supported the status quo of male domination of pre-Islamic Arab society and sought to justify their position.<sup>3</sup> This was followed by a period of adherence to a particular master thus leading to development of Madhabs (schools of jurisprudence) strictly followed by the adherents.<sup>4</sup>

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<sup>1</sup> Engineer, A.A. (1992). *The Rights of Women in Islam*. London: C.Hurst & Co. Publishers, pp.20-32

<sup>2</sup> Syed, M. A. (2004). *The Position of Women in Islam: A Progressive View*. Albany: State University of New York Press, p.2

<sup>3</sup> Ibid, p.2

<sup>4</sup> Orakzai B.Saira. (2014). The Rights of Women in Islam: The Question of 'Public' and 'Private' Spheres for Women's Rights and Empowerment in Muslim Societies. *Journal of Human Rights in the Commonwealth*, 2(1), p.43

In this context, Fayzee (1971)<sup>5</sup> also added to argue that:

In the course of time four schools of Sunnite law came into existence in Arabia proper, Hanafi, Maliki, Shafi and Hanbali. Further to the east, another school, based upon the teaching of Imam Jafar al Sadiq arose and was known as the Ithna Ashariya... The Hanafi School is followed by majority Muslims in central Asia, Turkey, Egypt and India. The Maliki was adopted in North Africa. The school founded by Imam Shafi was followed in Egypt and Sudan, south India and south-east Asia. The followers of Imam Ahmad ibn Hanbal were confirmed to centre of Arabia, the Ithna Ashari school spread over Iraq and Persia, and later infiltrated in India. A smaller school, founded by the Fatimid caliphs in Egypt was driven off from there, took refuge in the Yemen, and is now found preserved by Bohoras in Western India

So, Razia Patel (2009)<sup>6</sup> argues that:

Islamic Jurisprudence then is better described as an ethical code rather than a Uniform legal system. Various countries have difference influences, and have modified these laws in their own way. All Islamic countries also do not have uniform legal systems though claiming to be Islamic, and the local traditions and influences have been incorporated resulted in diversity.

Thus, Muslim women are not a homogeneous group with their own vertical and horizontal divisions by virtue of the economic, social and cultural class, the region and sect to which they belong, the customary laws to which they are governed and the traditional school of Islamic jurisprudence.<sup>7</sup> So, it is often said that the various schools only differ in insignificant details, but these details may affect the rights of women quite dramatically in Muslim societies. Hence, this paper analyzes the rights of Muslim women towards the provisions of marriage and divorce as enshrined in Islamic law and also examines the discrimination concerns and issues against their rights towards the provisions of marriage and divorce in Muslim societies.

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<sup>5</sup> Fayzee, A.A.A.(1971).*The Reforms of Muslim Personal Law in India*. Pune: Indian Secular Society, p.8-9

<sup>6</sup> Patel, R. (2009). Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice. *Economic and Political Weekly*, 44(44), p.45.

<sup>7</sup> Iqbal A. A. (1991). "Muslim Women's Rights: Goals and Strategy of Reform." *Economic and Political Weekly*, 26(17), p., 1095.

### **1.1. Rights of Women towards the provision of Marriage as Enshrined in Islamic Law:**

Marriage, according to the Islamic worldview, is an important part of building healthy and protective relationships, families and societies. In order for an Islamic marriage to be valid, it has to meet certain criteria, which ensures the health, security and wellbeing of the couple, their families and their communities. In Muslim communities around the world, marriage takes on many local customs and cultural forms. Islam allows this cultural diversity as long as the practices do not cause harm – specifically, as long as they do not contradict the principles of Islamic law that seek to protect human beings.

#### **1.1.1. Marriage requirements:**

Marriage in Islam requires a contract between two equal partners. For a Muslim marriage to be valid, the following conditions should be met:(1) proposal or offer (ijab) on the part of the one;(2) acceptance (qabul) by the other;(3) present of sufficient witnesses (i.e., in Sunni law, two; in Shia law witnesses are not necessary); and (4) expression of both the proposal and the acceptance at the same meeting. A proposal made at one meeting and acceptances at another meeting do not constitute a valid marriage in Islam.<sup>8</sup>

#### **1.1.2. The Right to Marry Whom She Likes, and to End an Unsuccessful Marriage:<sup>9</sup>**

The Muslim woman has the freedom of her marital choice. She is free to choose, look at and get to know her prospective husband without coercion from the father or other relatives. In the event of force or pressure, she has the right to appeal to the court to redress the wrong. Her consent is essential for the validity of the marriage contract.<sup>10</sup> She has the rights to repudiate the marriage if the marriage proves an unsuccessful. The Prophet is

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<sup>8</sup> Fyzee, A.A. (2008). *Outlines of Muhammadan Law (Fifth edition)*. New Delhi: Oxford University Press, p.71

<sup>9</sup> Jawad, H.A. (1998). *The Rights of Women in Islam: An Authentic Approach*. Great Britain: Macmillan Press Ltd, p.7

<sup>10</sup> Ibid, p.34

reported to have made the following statements: ‘A previously married woman shall not be married till she gives her consent, nor should a virgin be married till her consent is sought’

#### **1.1.2. Rights to Dower (Mahr in Islamic terms):<sup>11</sup>**

According to Mulla(2017)<sup>12</sup>, “mahr or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.” The dower (or Mahr, in Islamic terms) belongs to the wife; it is her exclusive right and it should be given away, neither to her family nor to her relatives.<sup>13</sup> The amount of dower (mahr) is usually split into two parts one is “prompt” which is payable on demand and the rest is “deferred” which is payable on divorce or death of husband.<sup>14</sup> The Quran says ‘Give women their dowry as a free gift; but if they choose to make over to you a part of it, you may regard it as lawfully yours’.

#### **1.1.4. Rights to Repudiation of Marriage by Option of Puberty:<sup>15</sup>**

Islamic law gives power to a minor to repudiate or continue his or her marriage, if she so likes, after attaining the age of majority. Such a right is commonly called “the option of puberty”.<sup>16</sup> Sir AAA Fyzee (2008)<sup>17</sup> defines the option of puberty in these words, “if a Muslim minor has been married during minority by a guardians, the minor has the rights to on attaining majority to repudiate such marriage.” The option of puberty can be exercised only when the minor is given in a marriage (a) by father or grand- father, or (b) by any other guardian.<sup>18</sup>

#### **1.1.5. The Rights to enter into a pre-marriage agreement (Kabin-nama):<sup>19</sup>**

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<sup>11</sup> See Syed, M. A. (2004), op.cit, p.93

<sup>12</sup> Mulla, F.D.S.(2017). *Principles of Mahomedan Law (22<sup>th</sup> Ed.)*.Haryana: Lexis Nexis, p.382

<sup>13</sup> See Jawad, H.A. (1998). op.cit., p.35

<sup>14</sup> See Mulla, F.D.S.(2017). op.cit, p.385

<sup>15</sup> See Fyzee, A.A. (2008). Op.cit. 73

<sup>16</sup> Ahmad, Aqil. (2016). *Mohammedan Law*. Allahabad: Central Law Agency, p.119

<sup>17</sup> Ibid, p. 73

<sup>18</sup> Ibid, p.73

<sup>19</sup> Agnes, Flavia. (1999). *Law and Gender Inequality: The Politics of Women's Rights in India*. New Delhi: Oxford University Press, p.34

According to Flavia Agnes (1999)<sup>20</sup> ‘These agreements relate mainly to two aspects,(i) regulation of matrimonial life, and (ii) stipulations regarding dissolution of marriage. This can be an effective way of controlling polygamy. The women can stipulate that in the event of the husband entering into a second marriage he should provide her with a separate residence. If the husband violates the agreement, the wife is entitled to divorce without the intervention of the court.’

#### **1.1.6. The Right to Keep Her Own Identity.<sup>21</sup>**

A woman in Islam has always been entitled, by law, to keep her family name and not take her husband’s name. Therefore, she is always known by her family’s name as an indication of her individuality and her own identity. So, in Islam, there is no process of changing the names of women are they married, divorced or widowed.<sup>22</sup>

### **1.2. Women’s Rights to Divorce as Enshrined in Islamic Law:**

The Quran makes no reference about women pronouncing talaq on their husbands, but at the same time there is no indication in the Quran that the woman’s right of repudiating her husband by divorce, prevailing in pre-Islamic Arabia was removed by Islamic laws.

Muhammad Ali Syed (2004)<sup>23</sup> argued that:

The Quran prescribes mutual and peaceful reconciliation or separation on peaceful terms after the decision of the arbiter, the wife also has the right of repudiating her husband. The wife’s right to claim divorce is recognized by the Quran and by the Hadith and is accepted by the jurists of Islamic law. It can have either of the two forms, namely ‘khula’ and ‘mubaraat’. If the desire to separate comes from the wife, it is called khula or khul. If the divorce is the result of mutual aversion (and consent) it is called mubaraat.

#### **1.2.1. Khula:**

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<sup>20</sup> Ibid, p.34

<sup>21</sup> See Jawad, H.A. (1998). op.cit., p.9

<sup>22</sup> Ibid, p.9

<sup>23</sup> Syed, M. A. (2004). op.cit.,p.67

The word 'khul,' popularly known as 'khula,' 'khoola' or 'khala' literally means "to take off clothes and then to lay down one's authority over a wife."<sup>24</sup> A wife can propose a khula divorce of her husband in which she is released (from marriage) by her husband and agrees to give a consideration (iwaz or return) to her husband for her release from the marriage. This consideration is a matter of arrangement between the parties and as a consideration for this bargain the wife may return the dower (mahr) or release her husband from paying the outstanding dower.<sup>25</sup>

### **1.2.2. Mubarat:**

According to Jawad(1998)<sup>26</sup>, "divorce through mutual consent is usually called Mubaraah. This form of divorce centres around an agreement between spouses to release each other from the marital link with no exchange or payment on either side." An essential feature of Mubarat's divorce is the willingness of both sides to get rid of each other, therefore, it is not very important who takes the initiative.<sup>27</sup>

### **1.2.3. Talaq- al-Tawfid (Delegated Divorce):**

Jawad (1998) <sup>28</sup>stated that 'in this form of divorce the husband, at the time of marriage, agrees to delegate to his wife the power of pronouncing the talaq, thus allowing her to dissolve the marriage contract. It must be stressed here that once the husband consents to give his wife the right to divorce him, he is no longer in a position to reclaim it. Tawfid divorce is indeed a powerful weapon in the hands of the wife, since she can easily use it if the conditions in the marriage contract are violated by the husband.'

### **1.2.4. Divorce by judicial process:**

The final method of dissolving the marriage contract is through a judicial process, at the instigation of either the wife or husband. This can be obtained in the case of (a) Lian and (b) annulment.

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<sup>24</sup> See Fyzee, A.A. (2008). op.cit, p.129

<sup>25</sup> See Fyzee, A.A. (2008). op.cit, pp.128-129

<sup>26</sup> See Jawad, H.A. (1998). op.cit., p.82

<sup>27</sup> Sinha, K.R.D. (2006). *The Muslim Law (6<sup>th</sup> Ed.)*. Allahabad: Central Law Agency, p.97

<sup>28</sup> See Jawad, H.A. (1998). Ibid, p.82

#### **1.2.4.1. Lian:**

The wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery. She must file a regular suit for dissolution of her marriage as a mere application to the court is not the proper procedure. If the charge is proved to be false, she is entitled to a degree, but not if it is proved to be true.<sup>29</sup>

#### **1.2.4.2. Annulment (faskh):**

The annulment (or faskh) of the marriage takes place when the wife lodges a complaint against her husband on the basis of the following: impotence, failure to fulfil the marital obligations, maltreatment, insanity and any other causes which might justify the annulment of the marriage. After investigating the complaint carefully, the judge would pass a court decree freeing the woman from the marital bond.<sup>30</sup>

### **1.3. Discrimination against Women's Rights as Enshrined in Islamic Law towards the Provisions of Marriage and Divorce in Muslim Societies:**

Muslim women are discriminated based on their gender roles. They are determined by the behaviors of either male or female. There also exist social norms, which control the behaviors of either a man or woman in a social or personal relationship. According to Muslims culture, men are superior to the women, women depend on men and therefore they are supposed to be obedient and submissive to their husbands. Like any other culture Man is the head of the family and therefore assumes the role of decision-making, woman on the other hand is supposed to obey and be submissive to the man.<sup>31</sup> Man is also the 'bread-winner' and women are child bearers. Women have indeed faced discrimination compared to their male counterparts as men have continued to be seen as superior to women as men have dominated in the fields of religion, politics and in every aspect of Islam culture while women have been left with the household chores and child

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<sup>29</sup> See Mulla, F.D.S.(2017). op.cit, p.425

<sup>30</sup> See Jawad, H.A. (1998). Ibid, p.82

<sup>31</sup> Alharafeshah, I. (2016). Discrimination against Islamic Women. *Global Journal of Arts, Humanities, And Social Sciences*, 4(8), p.43



bearing.<sup>32</sup>In a male-dominated society, Muslim women do not enjoy her marital rights granted by Islamic law in their own conditions.

On the questions of consent and contract, Asghar Ali Engineer (1994)<sup>33</sup> 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

Similarly, Naseem Ahmad (2001)<sup>34</sup>also added to argue that:

Most marriage that currently takes 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 formalizes and signs the contract on her behalf. In doing so, her opportunity and right to negotiate marriage and divorce terms are deliberately denied.

Muslim women are also subject to discrimination against their rights to dower (mahr). In the marriage contract, the husband's family agrees to pay dower (mahr), which according to Islamic law belongs to the woman herself. But In practice, the portion of the dower (mahr) payable at marriage is often paid to the father of the bride and his sibling. Despite the fact that the wife is entitled by law to collect the balance of mahr upon divorce, this often proves impossible.<sup>35</sup> The amount of dower is usually determined by the parents or elders of either parties and 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 Muslims announce the occasion of the wedding ceremony in front of the gathering and do not give any amount, whether in cash or in kind. In practice, it remains

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<sup>32</sup> Hashmi, N. (2000) Gender and Discrimination: Muslim Women Living in Europe. Retrieved from <http://aei.pitt.edu/745/1/ICHashmi.pdf> Huda

<sup>33</sup> Engineer, A.A. (1994). "Status of Muslim Women." *Economic and Political Weekly*, 29(6), p.298

<sup>34</sup> Ahmad, Naseem. (2001). *Liberation of Muslim Women*. Delhi: Kalpaz Publications, p.188

<sup>35</sup> Freedman, L. P. (1991). Women and the Law in Asia and the Near East, Draft paper, Deployment Law and Policy Program, *Columbia University School of Public Health*, p.25

only a paper transaction. In most cases the dower fixed is ridiculously low.<sup>36</sup> Another area in which is subject to discriminate, Muslim men also can marry temporarily; this type of marriage is referred to as marriages of pleasure, where a man is allowed by Islamic culture to marry for some days, week or a month the spouses are given a marriage certificate which automatically expires on the agreed date.<sup>37</sup> Moreover, Muslim males have a rights 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.<sup>38</sup> According to Javaid Rehman (2007)<sup>39</sup> ‘a valid marriage can be contracted from the age of puberty, classical Sharia equating puberty with the age of majority. Certain Islamic schools also granted authority to the parent or the guardian (wali) to enforce child marriages, with the so-called ‘option of puberty’ whereby marriage is rescindable when the child attains puberty or majority. The ‘option of puberty’ is based on juristic interpretations of Islamic family laws and is neither stated in the Quran nor is it derived from the Sunna.’

Two practices which are the subject of much controversy in Islam i.e., the practice of polygamy and talaq. A Muslim man is permitted to have four wives at a time, without legal protection to the woman against the exercise of this privilege. The law does not admit polygamy as a cause for seeking divorce by a Muslim woman.

On the question of polygamous marriage, Javaid Rehman(2007)<sup>40</sup> argues that:

Polyandry is not permitted, so that Muslim women cannot have more than one husband at the same time. While there are some differences of approach within Islamic legal schools, polygamy is legitimized both by the Quran and the Sunna. This legitimacy of polygamy is reflected in modern Islamic States practices, whereby an overwhelming majority of States authorize polygamous marriages, albeit with a variety of restrictions and sanctions.

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<sup>36</sup> Azim, S. (1997). *Muslim Women: Emerging Identity*. Jaipur and New Delhi: Rawat Publications, pp.170-171

<sup>37</sup> See Alharafeshah, I. (2016). op.cit., p.44

<sup>38</sup> See Orakzai B.Saira. (2014). op.cit, p.47

<sup>39</sup> Rehman, J. (2007). The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq. *International Journal of Law, Policy and the Family*, 21(1), p.114

<sup>40</sup> See Rehman, J. (2007). *ibid*, p.114

On the practice of talaq, Freedman (1991)<sup>41</sup> argues that:

Islamic law gives the husband the unilateral right to divorce his wife for any reason (or for no reason) simply by declaring his repudiation of her three times (talaq) and his maintenance obligations after divorce are then extremely minimal. The wife, on the other hand, is generally entitled to divorce her husband only in a court of law and only upon proof of the particular grounds specified by statute. During marriage, the wife can, theoretically, sue for payment of maintenance, but in some schools of Islamic law, the husband's failure ultimately to provide that support (no matter what his reason) is not sufficient grounds for divorce and thus she is left with no avenue for escape.

Asghar Ali Engineer further added to argue that Muslim women deprived their divorce rights not only in Indian subcontinent but also elsewhere:

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.

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<sup>41</sup> See Freedman, L. P. (1991). op.cit, p.24

#### **1.4. Conclusion:**

This article highlights the rights of women provided by Islamic law regarding marriage and divorce, and addresses discrimination concerns and a number of controversial issues within the system in Muslim societies. It was found that there were some of the Quranic text limiting the rights of women with their male counterparts, which can be dealt with by emphasizing the interpretation of the Quran that is context-driven, as well as by presenting those verses from the Quran and traditions which calls for equality and respect of women both at the level of society or the community. Secondly, It was found that most women are subject to discrimination from the rights granted by the Quran and authentic Hadith of the prophet Muhammad towards the provisions of marriage and divorce, although some women scholars such as Haifaa A. Jawad, Lynn Freedman, and many others are trying to deal with issues concerning women's rights in Muslim societies. Therefore, it is very important to allow women to debate about their sphere of activity in order to dispel the feeling of discrimination and lack of respect to women within Islamic society. To conclude, the paper has discussed the discrimination concerns and a number of controversial issues regarding women's rights which pertains to question of marriage rights, talaq, polygamy, etc. The discussion clearly showed that there is an inherent difference of interpretation of text concerning the rights of women according to Islam. Moreover, located at the level of the society or the community, the Quran calls for human dignity and piety as the central principle governing the relationship between men and women in society. Giving slight authority over women in private sphere of family does not give authority and superiority to all men over all women in society. It was the social context of Arabian society which gave the present form of interpretation of women rights. The interpretation given by reformist scholars reflects the cultural context in Muslim societies of the twenty-first century, as well as their understanding of the Quran and Hadith in accordance with the new conditions. So, it is not a divine law, rather a man-made laws. Therefore, Muslim communities need to reform women's rights in accordance with the requirements of society through a proper understanding of the Quran and Hadith or Sunnah (Tradition) of the Prophet Muhammad) so that the religious as well as social values can be established in Muslim societies. Moreover, to solve the problems of the

rights of Muslim women enshrined in Islamic law, it is necessary to change the patriarchal attitude of a society dominated by men.