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## Marriage and divorce in Muslim personal law and Indian constitution

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### Abstract

Rights of women in Personal Law particularly with respect to marriage and divorce have been controversial in India. Although, Indian Constitution recognizes human rights of equality, right to life, religion, right against the discrimination on the basis of gender etc, but the right of equality of Muslim women is neglected. Muslim women are discriminated on basis of gender. Indian government has enforced only Shariat, leaving customs and usages, in respect of marriage and divorce, but these provisions do not help the Muslim women due to patriarchal legal system. Therefore rights available to Muslim women in Muslim Personal Law about marriage and divorce as well as the rights available under Indian Constitution are violated. The Muslim women, therefore, are continued to suffer for reasons of polygamy, oral unilateral divorce prevalent in the Muslim community.

This research paper attempts to highlights as to how the Muslim personal law with respect to the prevalent polygamy and oral unilateral divorce system adversely effects and discriminate the Muslim women on the ground of religion and gender, and suggests the remedies to eradicate such discrimination with them, so that they may enjoy their prestigious life equally with their counterparts in the society.

**Keywords:** Marriage, Muslim personal law, Indian constitution

### Introduction

There are many minority communities of different religions living in India, but Muslims are the largest. Muslims are secured by secular law, however equality rights of Muslim women are neglected. "The Muslim Personal Law (Shariat) Application Act, 1937" was enacted to put an end the unholy, oppressive, and discriminatory customs and usages in the Muslim community and to enforce the 'Shariat' as personal law of Muslims including their marriages and divorce. Subject to the other provisions of the Constitution this Act is still applicable to the Muslim of India [1]. Explaining the meanings of 'Shariat', Fyzee said, "We have the Qur'an which the very word of God. Supplementary to it we have Hadith which are the Traditions of the Prophet- the records of his actions and his sayings- from which we must derive help and inspiration in arriving at legal decisions, if there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or Shariat as the Muslim doctors understand it [2]. Thus the 'Shariat' has source of its authority from the 'Quran,' 'Hadith'; 'Ijma;' and 'Qiyas'. Holy Quran permitted polygamy under exceptional circumstances while it permits monogamy as a norm. Muslim men treating it a license to have a four wives at a time. Muslims often misuse these provisions and leave their wives in inhuman conditions. The second problem before the Muslim women is oral unilateral divorce. In Shariat, The Muslim husband has monopoly in the matter of divorce. The Muslim husband has right of Talia, Iliya and Zohar, while Talia-i-tarweed, Chula and Mubarak is not possible without his consent, whereas the Muslim wife has only one option i.e., Lian, that too by the court process. Therefore the "Dissolutions of Muslim Marriage Act, 1939" was enacted by which the Muslim wife is entitled to obtain a decree for dissolution of her marriage on grounds mentioned in the Act [3]. The Muslim women, therefore, is continued to suffer by polygamy and oral unilateral divorce. Our Constitution has also granted right of equality [4]; prohibits the discrimination on the ground of religion and sex [5]; right of life and personal liberty [6]; and freedom of conscience and the right freely to profess, practice and propagate his religion [7].

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These rights are available to the Muslim women also, being citizen as well as a resident of India. "The Muslim Women (Protection of Rights on Marriage Act, 2019)" has now been enacted and enforced from 19 September, 2018 in order to effect the decision of Supreme Court in *Shayara Bano Versus Union of India and others* <sup>[8]</sup> setting aside the talaq-i-biddat (triple talaq).

The Quran has granted women almost equal rights with their male counterpart, these rights of women are also supported and supplemented by the Hadith. Government has enacted several laws to protect Muslim women's rights granted by the Muslim personal law, the Constitution has also granted several human rights, the Supreme Court and High Courts in India has also pronounced some pro-women judgments, but they do not help much to them in seeking justice, due to patriarchal system of personal law as well as due to male dominated society. Moreover Muslim women in India are mostly uneducated and unaware about their rights. Even educated Muslim women are not able to understand provisions of Quran and Hadith. They have to follow the verdicts of their religious leaders and they have to live with fear and threat to their male counterparts and follow traditional and customary laws, in absence of proper and specific codified law with regards to all matters of Muslim marriage and divorce. Constitution also directs the State to secure for the citizens a uniform civil code throughout the territory of India <sup>[9]</sup>. Common Civil Code may solve all the personal problems of all citizens irrespective of their religion. However this object has not yet been achieved.

### Poligamy in Muslim personal law

Marriage is an institution. It is essential unit in the society. Under Muslim law, the marriage is a matrimonial relation to regularize the sexual relation between male and female as its object of procreation of children, promotion of love and mutual support. The essentials of marriage are: Parties must have capacity to marry; Proposal and its acceptance at one meeting; requirement of consideration (Mehr); no legal impediment; sufficient witnesses and free consent of the parties. Saving some exceptions, practically the consent of the bride has always been influenced by the parent or other relatives. Holy Quran allows men to marry two or three or four women, but ask them to have a single wife if they fear that they cannot treat all of them equally <sup>[10]</sup>. However it also declares that men are not able to do justice between wives <sup>[11]</sup>, God has not made for any man two hearts in his body <sup>[12]</sup>, marry those among you who are single <sup>[13]</sup>. Thus Holy Quran permitted polygamy under exceptional circumstances while it permits monogamy as a norm. However the conditional permission to have more than one wife has been used by Muslim men as a license, and they presume four wives at one time. They are able to perform their indefinite marriages by giving atlas to earlier wives. Muslim wife has no right to have more than one husband. This practice is absolutely discriminatory against the women on the basis of equal protection of laws guaranteed under the Constitution <sup>[14]</sup>.

Indian society is complex of different religions. It is junction of Hindu, Sikh, Budh, Jain, Muslim, Parsi and Christian etc having their separate personal laws. Excepting the Muslims, polygamy has been completely abolished and made punishable. Whoever marries having living husband or wife shall be punished with imprisonment up to seven years and shall also be liable to fine <sup>[15]</sup>. However these provisions are

not applicable to Muslim men, but Muslim wives are subject to these provisions and they are not allowed to have more than one husband at a time.

The complexity of modern society and fast changing socio economic conditions, the emergence of single family structure, the rapid development of industrialization, urbanization, education, employment and laws giving equal status and rights to men and women, the Muslim women are compelled to face the consequences of polygamy, in that they are harassed and live in inhuman conditions and lose their dignity.

It is unfortunate that Quranic permission for polygamy is deemed as law and its conditions, restrictions, morals and advisories for the marriage are deemed unenforceable. Thus Indian Muslims are simply misusing the mandates of Holy Quran, while most of the Muslim countries have codified the Muslim marriages. For examples - *Turkey* has declared polygamy illegal in 1926 while *Tunisia* has prohibited plurality of wives and made punishable. *Algeria* allows polygamy under certain conditions that the court shall determine the facts that previous wives have given consent to their husband's new marriage and the husband is able meet the legal condition of equal justice. *Morocco* a marriage contract disallowing man to take another wife is binding. In the absence of this condition in the marriage contract, the designated court may satisfy itself on the proof that husband has capacity to maintain multiple wives, and permit him after hearing the first wife in camera. In this proceeding the court, on the first wife's plea, may grant divorce and maintenance which is to be paid within seven days, failing which the husband's application for marriage shall deemed to have been withdrawn. *Somalia* has permitted another marriage on certain conditions that his wife is certified sterile by penal of doctors, or suffers from incurable disease, or imprisoned for two years, or is absent from matrimonial home for a year. In *Indonesia* wife's consent for marriage, proof of financial capacity, and guarantee for the equal treatment is required for second marriage. In *Syria* the legal justification and financial capacity shall be judged by court before permission to have more than one wife. In *Iraq* apart from these two conditions, the court shall also examine that the husband shall be just to all wives. In *Middle-Eastern countries*, though, protection to women against the inherent harshness of polygamy is feeble or non-existent. In *Egypt* the husband has to inform, whether he is already wedded while registering his marriage. On information the first has option of divorce within a year of information. In *Bahrain* the husband is required to inform his wife of his new marriage, while in *Jordan*, violation of such clause in the marriage contract entitles the wife to seek divorce. Therefore, like other Muslim countries, the codification of the Muslim marriage in India is also essential and it may be allowed in certain specified conditions. In absence of the proper legislation as well as without proper permission of the competent authority, the polygamy should not be permitted.

### Divorce in Muslim law (Talaq)

Talaq means to release from matrimonial relationship. Holy Quran exalts the husband, to be wise and considerate towards her, and treat her in such manner as will neither injure nor exhaust her <sup>[16]</sup>. It is in these circumstances, that postulate, that the husband and wife in a difficult relationship, are allowed a period of four months, to

determine whether an adjustment is possible. If the couple is against reconciliation, Quran ordains that it is unfair to keep the wife tied to her husband indefinitely and it suggests that in such a situation, divorce is the only fair and equitable course<sup>[17]</sup>. Quran says that in case of possibility of ending the marital relationship between them, appoint one arbitrator on the side of husband and the other arbitrator on the side of wife. If they would like to continue in relationship, the God shall get them (husband and wife) agreed<sup>[18]</sup>. However Prophet Muhammad had declared divorce to be the most disliked of lawful things in the sight of God.

In Shariat, the Muslim husband has right – Talaq, ILA, & Zihar, while Muslim wife has right – Talia-e-tarweed and lain. Khula and Mubarat is allowed by mutual consent. Talaq is divided as Talia-e-amazon, which is regarded best atlas and Talia-e-hasan which stands as reasonable talaq. Moreover Talaq-e-biddat (triple talaq) is also prevalent, which is regarded as worst talaq. Talaq-i-tafweez is also a delegated talaq by the husband to his wife. It shows that the Muslim husband has monopoly in the matter of divorce, while Muslim wife has only one option i.e. lian. If the husband charges his wife for unproved adultery, then only the wife can take recourse of – lian - and seek the remedy in the court for decree of talaq. In these circumstances the “Dissolutions of Muslim Marriage Act, 1939” was enacted by which the Muslim wife is entitled to obtain a decree for dissolution of her marriage on any one or more grounds, including the grounds of Muslim Law, mentioned in the Act<sup>[19]</sup>.

Talaq, namely, divorce at the instance of the husband, is of three kinds – ‘talaq-e-ahsan’, ‘talaq-e-hasan’ and ‘talaq-e-biddat’. Out of them, ‘talaq-e-ahsan’, and ‘talaq-e-hasan’ are both approved by the ‘Quran’ and ‘hadith’. ‘Talaq-e-ahsan’, is considered as the ‘most reasonable’ form of divorce. Holy Quran says “the divorced woman should keep themselves in waiting for three courses<sup>[20]</sup>.” ‘Talaq-e-hasan’ is considered as ‘reasonable.’ This consists of three pronouncements made during successive tuhrs. It is also based on Quranic injunctions that “Divorce may be pronounced twice, then keep them in good fellowship or let (them) go kindness<sup>[21]</sup>.” “So if he (the husband) divorces her (third time) she shall not be lawful to him afterward until she marries another person<sup>[22]</sup>.” ‘Talaq-e-biddat’ is not mentioned in the Quran. The practice of ‘talaq-e-biddat’ can be traced to the second century, after the advent of Islam. It is recognized only by the Hanafi sect of Sunni Muslims. Even Hanfi describe it, “as a sinful form of divorce”. It is instant form of talaq and become irrevocable forthwith without having opportunity for reconciliation.

In *Shayara Bano versus Union of India and others*<sup>[23]</sup> the constitutional bench of the Supreme Court has considered the constitutionality of ‘talaq-e-biddat’ and set-aside it by the majority of 3:2. Justice Kurian Joseph said in his judgment that on the pure question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness and Constitutional democracy of India cannot conceive of a legislation which is arbitrary. He does not agree that triple talaq is an integral part of the religious practice. He held that what is bad in the Holy Quran cannot be good in Shariat, and in that sense, what is bad in theology is bad in law as well. Justice RF Nariman and Justice UU Lalit in their judgment held that Act 1937 is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression “laws

in force” in Article 13 (3) (b). It would be hit by Article 13 (1) if found to be inconsistent with the provision of Part III of the Constitution, to the extent of such inconsistency. They further said that Triple Talaq is only a form of Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanfi School which tolerates it. Therefore Triple Talaq forms no part of Article 25 (1) of Constitution. They held that arbitrariness in the sense of manifest arbitrariness would apply to negate legislation as well under Article 14 and therefore, Triple Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it, as such it is violative of the fundamental right contained under Article 14 of the Constitution of India.

To affect the judgment of Supreme Court in Shayara Bano case, parliament has now enacted Muslim Women (Protection of Rights on Marriage) Act, 2019, effective from 19 September, 2018 throughout the India. It defines ‘Talaq’ as Talaq-i-biddat or any other form of Talaq which instantaneous and irrevocable (hereinafter “Unapproved Talaq”)<sup>[24]</sup>. The unapproved Talaq may be declared in any form- spoken, written, and electronic or in any other manner<sup>[25]</sup>. It makes the pronouncement of unapproved talaq punishable with imprisonment up to three years and fine<sup>[26]</sup>. Thus Talaq-i-biddat has been declared illegal as well as punishable offence.

The status of Muslim women would not be likely to be changed, by declaring the Talaq-i-biddat illegal. Instead of forthwith, the marital tie can still be broken within maximum period of four months at the will of the husband, without the consent of wife, through Talaq-e-ahsan or Talaq-e-hasan or other types of divorces available to the husband. Thus Muslim husband still has unlimited option to get rid of her wife and re-marriage with another women, while Muslim wife cannot break the marital tie at her own will. She has only option to seek the doors of the Court to get the divorce from her husband. This practice is discriminatory and it is procedural discrimination. Therefore the rights of the Muslim husband is also to be codified in terms of Dissolutions of Muslim Marriage Act, 1939, so that the equality in the matter of divorce may be established between husband and wife as well as to abolish the supremacy of husband in the matter of divorce.

#### **Remarriage with his divorced wife (Nikah Halala)**

When Muslim husband divorced his wife and wants to remarry with his divorced wife, then he has to follow the procedure of ‘Halala’. The former wife, after divorce, has to follow Iddat; thereafter she has to marry another Muslim man. This marriage is not only formality, but she has to go on sexual intercourse too. After this, if that husband gives divorce her independently, and then she has to follow Iddat again. It is only after completion of this Iddat, wife can remarry to her former husband.

Though the object of this procedure is to punish the husband for the act done by him, but it is only wife, who undergo the process of the heinous act under the duress of her husband and other family members. Thus Muslim women face again the consequences of the act done by her husband. In selection of the second husband too, the divorced wife is not free. She has to marry and go to the process of intercourse again with that man, who is pointed by her first husband or his family members. In that case too, she is compelled to



live with that second husband against her will, till he does not divorce her, and if he does not divorce, then forever. In this process the life of the Muslim women become absolutely ruined and deemed hateful in the society. Therefore the custom or process of 'Halala' in the Muslim community is absolutely unreasonable and against the dignity of Muslim women. It is required to be abolished.

### Registration of marriage and divorce

Registration of marriage and divorce is not compulsory in India. Registration of all marriages is only compulsory under Special Marriage Act, 1954, irrespective of the religion. Since February, 2006, the Supreme Court directed the State Governments and Union Territories thrice to frame Rules for compulsory registration of all marriages irrespective of the religion and personal law of the parties [27]. Consequently, the Law Commission of India has submitted Report No. 211 titled "Law on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform" to then Union Minister for Law and Justice, Government of India on 17 October, 2008. It has recommended that family matters are in the concurrent jurisdiction of the Centre and State [28]. Therefore, the Parliamentary legislation on compulsory registration of marriages titled, "Marriage and Divorce Registration Act" is therefore not only possible but also highly desirable. This will bring country-wide uniformity in the substantive law relating to marriage registration. Rules may be made by the State Governments to take care of the local social variations. However, it is unfortunate that no such legislation has yet been made.

Non-registration of marriage and divorce adversely affects particularly women. Registration of marriage is itself a proof that of marriage between the parties have been performed. Moreover registration plays important role for maintenance and guardianship of children and the age of the parties at the time of their marriage etc. As such the registration of each marriage and divorce is absolutely essential.

### Muslim personal law and Indian constitution

The Muslim Personal Law (Shariat) Application Act, 1937 provides that 'Shariat' shall be applicable as Muslim personal law in all questions of marriage and dissolution of marriage [29]. Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspect of law, ethics and etiquette. The primary source is the Quran. Yet in matter not directly covered by the divine book, rules were developed looking to the Hadis and upon driving a consensus [30]. Quran is the first source of law. Sources other than the Quran are only to supplement what is stated in it and to supply what is not provided for. There cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Quran [31]. It is pre-Constitutional law and is enforced in India subject to the other provisions of the Constitution [32]. Therefore all the 'laws in force' in India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of fundamental rights, shall, to the extent of such inconsistency, be void [33]. Further it says that State shall not deny to any person equality before law or the equal protection of law [34], which includes that the provisions should not be arbitrary, artificial or evasive; it shall not discriminate against any citizen on the ground of only of religion, race, caste, sex, place of birth or any of

them [35]; no person shall be deprived of his life or personal liberty [36], which includes human dignity, livelihood, better standard of living, social esteem and self-worth etc.; it also provides that states all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion [37]. Therefore constitutionality of any provision of law, including Shariat, may be challenged under Article 32, 136 or 226 of the Constitution of India.

In *Shayara Bano versus Union of India and others* [38], Justice Kurian Joseph said in his judgment that on the pure question of law that a legislation, be it plenary or subordinate, can be challenged on the ground of arbitrariness and Constitutional democracy of India cannot conceive of a legislation which is arbitrary. Justice RF Nariman and Justice UU Lalit in his judgment held that Muslim Personal Law (Shariat) Application Act 1937 is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression "laws in force" in Article 13 (3) (b) and would be hit by Article 13 (1) if found to be inconsistent with the provision of Part III of the Constitution, to the extent of such inconsistency. They said that 'talaq-e-biddat' is manifestly arbitrary and therefore violative of the fundamental right contained under Article 14 of the Constitution of India. The constitutional bench of the Supreme Court has considered the constitutionality of 'talaq-e-biddat' and set-aside it by the majority of 3:2.

### Conclusion and Suggestions

India recognizes a plural legal system, wherein different religious communities are permitted to be governed by different personal laws. However the laws of each religious community must meet the test of Constitutional validity. Muslim men can practice polygamy, while the Muslim women, as well as men and women of other religions, are prohibited polygamy under section 494 IPC. Polygamy disrupts the peace of women and affects her mental health. It is cruel to the women and affects the right to peaceful life with human dignity. Polygamy is not an essential practice in Quran, as such it is doubtful that it is protected under Article 25. Muslim men are able to perform their indefinite marriages under the license of four wives, by giving Talaq to earlier wives. This practice is absolutely discriminatory against the women on the basis of equal protection of laws guaranteed under the Constitution [39]. The position of Muslim women remained unchanged, even if the Supreme Court has set-aside the Talaq-i-biddat. Instead of forthwith, the marital tie can still be broken within maximum period of four months at the will of the husband, by applying other methods of Talaqs.

Thus Muslim husband still has unlimited option to get rid of her wife and re-marriage with another women, while Muslim wife cannot break the marital tie at her own will. She has only option to seek the doors of the Court to get the divorce from her husband. This practice is also discriminatory. The State is under obligation to protect its citizens according to the Constitution. As such State should take responsibility to protect the rights of the Muslim women who are also equal citizen and are entitled to all such benefits, which the women of other religion avail by right. Almost all Muslim countries have regulated the marriage including polygamy by enacting laws according to the circumstances of their countries. Therefore in order to

empower then Muslim women that they could be able to enjoy their life prestigiously and with the dignity at par with their counterparts, the codification of the Muslim personal law with respect to marriage and divorce in India is also to be properly codified specifying and including the essential principles of Holy Quran and Hadith in the current Indian circumstances of 21<sup>st</sup> century. By codification the polygamy may be permitted in certain circumstances; and procedure of unified divorce to be codified in terms of Dissolutions of Muslim Marriage Act, 1939, including the husband and wife both in the same enactment; the process of marriage with his divorced wife to be permitted, but the procedure of 'Halala' is to be abolished.

Registration of all the marriages and divorces is to be made compulsory throughout India in terms of the Law Commission's Report No. 211 titled "Law on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform" submitted to Union Minister for Law and Justice, Government of India on 17 October, 2008.

In the last it is suggested that Government of India should take pain to ensure for enacting the Common Civil Code for its all citizens of India so that proper equality may be established in the personal matters of all the citizens, irrespective of their religion and faith. For this the Government is required to take steps to form a conciseness amongst the public, particularly amongst the progressive elements of Muslim society. It is also necessary that political interests should not come in the way and all political parties and progressive persons of all the communities including Muslims are required to come forward and co-operate the Government to achieve this Constitutional goal.

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