



PERSONAL LAWS AND GENDER INEQUALITY CONCERNS IN INDIA: A STUDY ON MUSLIM PERSONAL LAW

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ABSTRACT

“Human rights are women’s rights and women’s rights are human rights”

Hillary Clinton.

India is a country with people of different communities, religion, caste, creed, etc. People are governed under their own personal laws in the personal matters such as marriage, divorce, maintenance, etc. The various provisions pose a serious threat against equality and are discriminatory in nature. Women are entitled to same rights as all other living beings. The framers of the Constitution of India were much inspired by the Universal Declaration of Human Rights (UDHR). This is evident from the fact that they have incorporated many provisions of UDHR to protect these rights. Article 14 holds Equality before Law and equal protection of law, Article 15 prohibits discrimination on the basis of religion, race, caste or sex. Moreover, Government of India acceded to Convention for the Elimination of all forms of discrimination against Women (CEDAW) in 1979.

Despite of all these efforts, inequality and discrimination against women in India is prevalent and one of the most important areas where this inequality is evident is in Mohmmaden Law. Personal laws have provided fewer rights to women. The Muslim law gave way to many problems faced by women like polygamy, triple talaq, early marriage, dowry, domestic violence etc. The Indian Judiciary also observed negative impact of Muslim Personal law on women in various of its judgements. These laws are borrowed from religious text which indicates favouritism to men. Women rights in relation to personal matters are not properly protected under these personal laws. This has resulted in violation of human rights of women.

The present paper seeks to clarify how the implementation of a Uniform Civil Code in India would help in achieving Gender Equality. The authors would also examine the provisions of Muslim law which are discriminatory against women and suggest reforms vis-a-vis protection of rights of women.

Keywords: Personal laws, Gender, Inequality, Women, Reforms.

I. INTRODUCTION:

In general, societies and families in particular, are created and developed by both man and woman. Man and Woman both are equivalent to each other. All over the world, struggle for gender equality has been one of the major concerns for women. In India, from past centuries, women were neglected and were considered as oppressed and weaker section of the society. Even in Post-Independence Era, the first and foremost task was to render a Constitution of India for the people, which would provide gender equality and to ensure that there is no such discrimination on the basis of sex. Preamble of Indian Constitution ensures equal fundamental rights to all its citizens.

The Indian Constitution guarantees that there must be Equality before law and Equal protection of different laws shall be secured to the people of India (Article 14)¹. Also, it ensures that there shall be no discrimination against any citizen on the basis of gender or sex. State is empowered to make any special provision for women and children (Article 15(3))². Directive Principles of state policy in the constitution has such provisions which express direct concern about women. Despite of all these provisions and even after seventy years of commencement of Constitution, question mark still exist with respect to the status, equality, freedom and dignity of women.

On the basis of performance, Gender inequality is the obvious or hidden disproportion among individuals. This means to make difference between girl and a boy that is a female or a male and in simple term is called as Gender bias. This Gender biasness has become one of the nation's issues. In making biasness among the gender, India has the 10th Rank out of 128 countries all over the world. For India as a whole, the female-male ratio of the population under age 6 has fallen from 94.5 girls for hundred boys in 1991 to 92.7 girls per hundred boys in 2001³. The Problem is increasing day by day more rapidly.

In country like India, every community have their own personal law. The Hindus, Christian, Parsis, Jews have their own personal law as well as Muslims, who are the biggest minority community have their own personal law and are subject to Sharia. These Personal laws deal with marriage, divorce maintenance etc and are collectively known as Family law. The status of women is being affected by personal laws and thus this lead to a struggling life of women in Indian society.

¹ Article 14 of the Constitution of India reads as under: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

² Article 15(3) of The Constitution Of India 1950:

(3) Nothing in this article shall prevent the State from making any special provision for women and children

³ Gender Inequality. Available at- <https://www.legalserviceindia.com/article/I202-Gender-Inequality.html>

The Laws through which Hindus, Christians, Jews and Parsis are governed are codified by legislature on the other hand, Muslim law is uncodified. Also, Muslim Personal law like any other Personal law is based on religious text which shows favouritism to men and a harsh approach is being seen in cases of women. Muslim women rights are suppressed due to the social status of Muslims in the country. Also, Muslim personal law subject to Judiciary has been treated as untouched manner. Therefore, there are gender equality concerns in India with respect to personal laws particularly in Muslim personal law.

II. MUSLIM PERSONAL LAW AND GENDER INEQUALITY ISSUES IN INDIA:

With the existing socio-political conditions and legal framework of the country like India, there are many unique challenges and issues posed to the subject of Muslim Personal Law. On the basis of religious identities and territorial jurisdiction, Laws are applicable in Indian legal system. Personal Laws govern people in matter of marriage, divorce, adoption, wills, joint family matters etc. The Indian Constitution empowers the State or Union Legislature to legislate on the matters of Personal laws which is mentioned in Entry 5, List III of Seventh Schedule of Indian Constitution. The Muslims are governed by two codified legislations that is – Muslim Personal Law (Shariat) Application Act, 1937 and Dissolution of Muslim marriage Act, 1939. The Shariat Act applies on Muslims in the matters of Divorce, Marriage, adoption etc. The Provisions given in this act is discriminatory against women and it creates gender inequality. These Gender Inequalities in Muslim Law are as follows:

A. Gender Discrimination vis-à-vis Muslim Marriage:

Muslim women due to lack of education most probably leads to unsuited and incompatible marriage. According to the Census 2011 data, out of all married Muslim women 13.5 per cent were married even before the age of 15 and 49 per cent were married between 14 and 19 years of age. Marriage at such an early age, in most cases, decreases the possibility of acquiring education or being financially sound⁴. In Marriage, the non payment of Dower (Mahr) does not make marriage invalid and women have to depend upon the husband for payment of Mahr. Bigamy is an offence according to section 493⁵ of Indian Penal Code. But as per Sharia, Polygamy by Muslim men is allowed whereas Polygamy by women is prohibited. Moreover, A Sunni Male can marry a Muslim woman who belong any section or Kitabia. Whereas, a woman cannot marry with a man who is non- Muslim and also she cannot marry a man who is Kitabia. Therefore, in Muslim Marriage there is a clear inequality with respect to Muslim Marriage.

⁴ Triple talaq: How it affects lives of India's 90 million Muslim women. Available at- <https://www.indiatoday.in/fyi/story/triple-talaq-muslim-women-supreme-court-sharia-law-islam-968630-2017-03-30>

⁵ Section 493 of Indian Penal Code:

493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

B. Talaq Procedure and Gender Inequality:

Talaq (Divorce) in its original sense means repudiation or rejection but under Muslim Law, it means a release from the marriage tie, immediately or eventually.⁶ Talaq is specifically applied to act of repudiation by husband. It was said that under Muslim law talaq is the mere arbitrary act of Muslim husband who may repudiate his wife at his own pleasure with or without cause.⁷ Also, at any time the talaq can be pronounced and no prior approval of wife is mandatory for the same. A talaq pronounced by drunken husband is considered as a valid divorce. The same right of talaq is not available to wife which is again creating gender inequality. This arbitrary act of husband in pronouncing talaq has led to violation of wife's fundamental right that is right to life enshrined in Article 21⁸ is being violated as right to life does not include merely to live life like an animal but to live life with dignity in the society.

Triple Talaq (Talaq-ul-biddat) is an irregular and sinful mode of talaq in which instant talaq can be given by husband by pronouncing talaq in three pronouncements. This divorce is harsh against women as it is irrevocable and husband acts arbitrarily. No iddat period is observed in this type of divorce which again causes a great problem to women. Maintenance which is necessary support which is required by women is not being provided to the women after divorce. A survey in 2017 by Bharatiya Muslim Mahila Andolan revealed that 95 per cent of divorced women received no maintenance from their husbands⁹. Thus, This is another area where inequality exist against women. Though, triple talaq is stuck down for time being, but this must be permanently abolished to ensure equality in country.

Moreover, other modes of divorce like Talaq-ul-ahsan, talaq-ul-hasan, etc are of such nature that husband has arbitrary power to pronounce unilateral divorce. Even in Khula, the wife can initiate the divorce process with the consent of husband. All these unilateral acts of divorce further inequality amongst Muslim women.

C. Muslim Inheritance and Gender Inequality:

One of the important determinants in equality concern is financial dependence of women upon men. The women get equal share but according to Islamic jurisprudence, it is very important that women should be familiar about *usul-al-fiqh* (These are Principles of Islamic jurisprudence) to become aware about the shares in the property. This essential aspect is lacking in women as very less number of women are aware about the logic of *usul-al-fiqh* due to patriarchy and lack of education and awareness of Islamic principles among women. Due to lack of education and awareness, brothers often use to cheat their sisters by unlawfully taking the share of sisters. This has created a concern in India with respect to women in the matters of property rights.

⁶ Aqil Ahmad: *Mohammadan Law*, p165, revised by Prof. Iqbal Ali Khan, Central Law agency.

⁷ *Moonshee Buzloor Rahim v Laleefutoon nisa*, 8 MIA 397.

⁸ **Article 21 of the Constitution of India, 1950** : "No person shall be deprived of his life or personal liberty except according to procedure established by law."

⁹ supra at 4.

In the matters related to Inheritance, Quran gives equal rights to men and women. But present scenario depicts a different picture. The daughters, widows are kept in bottom line of the succession order and this discrimination is seen in customary practices. In Shariat, daughters and widows are not excluded by any other heirs. But brothers and other male member of the family use to cheat them as they have lack of awareness regarding their property rights. In many instances, Mahr which is considered as consideration in a Muslim marriage is not being paid even after the divorce (neither in Faskh or nor in Khula). Most of the time sisters are made to surrender their rights over their share in the joint property due to lack of knowledge of Islamic principles and emotional attachment and this again lead to Gender Inequality.

D. Option of Puberty (Khyar-ul-bulugh) and Gender Inequality:

Option of Puberty is a right of a minor who after attaining the age of puberty can approve or repudiate the marriage which has been contracted by guardian except father and grandfather. So, Contract of marriage is voidable at the option of minor. Married females have this right after attaining the age of puberty and it exist till the age of 18 if marriage is not consummated. On the other hand, there is no such age limit for the males to exercise this right. Therefore, again there is gender inequality in Muslim law.

III. PROPOSED REFORMS TO ACHIEVE GENDER EQUALITY:

A. Towards a Uniform Civil Code – A new path towards gender equality:

Uniform civil code (UCC) is proposal to replace all Personal law by a common set of law that would govern every citizen.

Whenever there is a debate on UCC, it is always discussed under the light of mainly Muslim Personal Law. Though the Muslim law are more discriminatory, but it is not just Muslim Personal law rather all other personal laws are also discriminatory too. So, instead of targeting only Muslim religion, all injustices against women of all religion shall be eliminated from personal laws of our country. By the implementation of Uniform civil code, every person will be governed by the single set of rules and regulations regarding their personal matter and this in turn would ensure equal rights to all.

However, if we implement Uniform civil code, the minorities would see it as an attempt to destroy their identity and culture. They would feel majority opinion is being imposed on them. India is a land of diversity and its beauty lies in its diverse culture, tradition and people. Moreover, the prevalent soico-political condition of the country does not allow the immediate implementation of Uniform civil code. So, it would be better that until the Uniform Civil code is implemented, some internal amendments be made in personal laws to uphold the basic human rights and human dignity. Also this reform would provide equal rights to both men and women and justice to women.

Not only this will serve the same purpose of Uniform Civil code (UCC) but will also be seen as gradual step towards having a UCC in the country. As the time will come when all personal laws are at the equal footing, we can have a Uniform civil code which will not destroy the feelings and sentiments of minorities and ensure peace.

B. Reforms in Law of Divorce:

A great step has been taken in this direction by the honourable Supreme Court of India when it declared that practice of Triple talaq (Talaq-ul-biddat) which is considered as sinful and irregular form of talaq as unconstitutional. Moreover, The Supreme court in the case of *Mohd. Ahmed Khan v Shayara Bano*¹⁰ has recently struck down section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 through which the practice of Triple Talaq derived its authority. Bringing an end to triple talaq would automatically shut the cases for Nikah halala (Muslim man has the liberty to divorce and remarry the same woman but in order to remarry the former wife, she has to marry someone else and such marriage should be consummated and only after the dissolution of the second marriage she can get remarried to her former husband). The Supreme Court clearly issued an injunction for a period of six months prohibiting a Muslim husband to pronounce Triple Talaq and further directed Government of India to enact a law to regularise the proceedings of divorce as per Shariat law.

The instant injunction will be a force for a period of six months. If legislative process commences before expiry of the period of six months, and a positive decision emerges towards redefining 'Talaq-ul-biddat'- as one can alternatively. If it is decided that the practice of 'Talaq-ul-biddat' be done away altogether the injunction would continue, till legislation is finally enacted. If it fails, then injunction shall cease to operate¹¹.

Similarly, section 2 of dissolution of Muslim marriages Act, 1939 provides for various numbers of grounds on which a Muslim woman can ask for divorce. On the other hand, Men are not allowed to give their decisions on these grounds. Therefore, the uniformity must be there in order to ensure equality between men and women. These steps will have a great impact in ensuring equality within community rather than equality between different communities. The judiciary should try to check such laws that are colourable in nature and through judicial review there is need to check the laws that create inequality amongst women. Thus, in this way the present scenario can be changed and in the end justice should be ensured to every person of the country.

¹⁰ AIR 1985 SC 945

¹¹ India : Triple Talaq, judgment Of Hon'ble Supreme Court And The Most Anticipated Triple Talaq Bill . Available at: <http://www.mondaq.com/india/x/668468/divorce/Triple+Talaq+Judgment+Of+Honble+Supreme+Court+And+The+Most+Anticipated+Triple+Talaq+Bill>

C. Reforms in Muslim Maintenance:

Likewise, in the case of maintenance, previously the Muslim women were entitled get maintenance only during the iddat period. In case of *Mohd. Ahmed Khan v Shah bano begum*¹², the court held that Muslim women are entitled to get maintenance beyond the period of iddat under section 125 of Code of criminal procedure¹³. The true position is that if a woman is able to maintain herself then she will get the maintenance only during the period of iddat but if she is unable to maintain herself then she can take recourse to section 125 of code of criminal procedure. After this judgement, there was a huge outcry among the orthodox Muslims and many protested. To settle this unrest, the government enacted Muslim women (Protection of rights on divorce) Act 1986. Section 3(1)(a) of the act states that “a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband”. The constitutionality of this act was challenged in case of *Daniel Latifi v Union of India*¹⁴ on the ground that it did not provide sufficient maintenance to divorced Muslim women beyond the period of iddat. The Supreme court interpreted section 3(1)(a) of the act in the favour of Muslim women and held that according to section 3(1)(a) of the act, the husband has to make provision for maintenance *within the iddat period* as is evident from the word ‘within’ . Also responsibility will shift to the parents and relatives of the women in which they would inherit the property and if they fail to provide the maintenance then the responsibility shifts on the waqf board.

Thus, apart from implementing Uniform civil code and securing uniformity among different communities, it will be again a better step that uniformity is secured within community and this would surely ensure equality among women.

D. Steps to educate women:

Lack of knowledge and awareness among Muslim women facilitate the violation of their rights. For example, though prescribed in Islam, the consent of women is one of the essentials of marriage. But consent is treated more as a kind

¹² supra at 10.

¹³ 125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

1. Subs. by Act 45 of 1978, s. 12, for " Chief Judicial Magistrate" (w. e. f, 18- 12- 1978).

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

¹⁴ (2001) 7 SCC 740

of rituals and thus it has become a choice rather than one of the essentials of marriage. Women due to lack of education and knowledge about Islamic jurisprudence are being cheated and this results in hampering their rights. Moreover, various campaign and organisation must be formed to organise awareness programme to make the women aware of their rights. Therefore, there is an urgent need to educate the Muslim women of our country and launch various awareness campaign against violation of rights of women regarding personal matters like marriage, property rights etc.

E. Establishing Women's court:

A great step in providing the rights of women is by setting up a one's own system of women court .In Islam there is Pardah system and due to this the women hesitate to approach the court where men are there and after establishing the women's court, the women would feel free to go to the court. As women are mostly dependent on the men financially and socially but by setting up women's court the women can become independent as they would obviously move to the court for enforcing their right and to get justice. Women court would also ensure that dispute between women and family member is resolved and reconciled through the convenient mechanism. The women would be free to approach the court as a safe and unthreatening environment will be provided to women. Therefore, the inequality can be removed by establishing women's court.

IV. CONCLUSION:

India is a diverse country in which people of various communities, religion, caste, creed, etc live together. Controversies on the questions of gender inequality are stuck with the Personal laws. Every community in the country are regulated and governed by their Personal laws. Muslim law in particular has further the gender inequality. Islam is based on the holy book Quran that says that equal rights must be given to men and women. But, Personal laws which are the laws made by the legislature according to the need of the society. These Personal laws are the source of inequality in the country and create many issues like polygamy, triple talaq etc. These Personal laws and Muslim Personal laws in particular have very lesser rights for the women as compared to the rights provided to the men. The patriarchal thinking and mindset which exist in today's society has caused gender inequality. Many efforts had been taken to protect the women's right. But Despite the efforts by the government and legislature, inequality and discrimination against women in India is prevalent and one of the most important areas where this inequality is evident is in Mohmmaden Law. These inequalities are harmful for the unity and integrity of the nation. Due to all such inequalities, women are being exploited and they had become the vulnerable section of society.

Family laws like Muslim Law, Hindu law etc, has created many problems in the life and one of such problems is gender inequality. No matter how much changes had been taken place the inequalities are still very prevalent in the country.

The time has come to remove such inequalities by various reforms and steps by the legislature and government in particular. Implementation of Uniform civil code to the extent that it won't hurt religious sentiments must be a good reform. Moreover, educating women and women's court should be established by the state. The chaos which has been created by the Personal law should be removed then only the real democracy will be achieved in the country.

