



## Gender Equity in Islam: A Legal Discourse

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There is a conflict of laws between the *shariah* law and the Muslim personal law of India. It also violates equality before law and equal protection of law contemplated in the Constitution of India.

In a country like India, there are people belonging to multiple religions and thus, it has opted to be a secular State. It is the right of every citizen here to be safeguarded against discrimination on grounds of religion, race, caste, gender and birth place, etc. In certain scenarios, is it legitimate and excusable to allow a particular personal law to be continued in a prejudiced manner under the claim that they have the right to be governed by their own personal law however prejudiced it may be, especially in a case scenario where the basis of such law is highly equitable and non-discriminatory? The answer should be a big 'no'. The basic reason behind bias on the basis of gender existent in the Muslim personal law and the desecration of the true *Shariah* law in the matter of marriage and divorce is the absence of a codified Muslim personal law in India and lack of education and awareness among Muslims.

There is unfortunately no doubt that Muslim law prevalent in India at present, is far from Islam's actual idea of equal protection of law and equality, social justice and dignity of the individual and unity of people, the traits and principles clearly enshrined in the Qur'an. The inspiring equality of men and women in the eye of the Almighty is something that has been clearly stated in it. The latter provided mankind with the concept of equality of men and women. In the Holy Qur'an, the conception of justice is quite central and of great worth and significance. The idea of justice is so thoroughly in depth in the Qur'an that no field has been excluded where it is not applied including the matter of conjugal remedies. The most foundational ethics of Islam expounded in the Holy Book of Muslims, are compassion, benevolence and justice.

It is evident that gender justice is innate in the Qur'an and teachings of the Prophet (PBUH), however much of the true spirit of justice and equality was misplaced when the Islamic scholars legislated under the impact of their own social code and ethos. It is ill-fated that the Qur'an gave women equal status but in all Muslim societies, they were deprived of their rightful place and their rights were taken away in the name of Islam. It is a profound mockery and tragedy that the Holy Qur'an, despite its strong affirmation of human equality and the need for

justice to all of God's creatures, has been interpreted by a number of Muslims as sanctioning various forms of human inequalities. The progressive injunctions of the Qur'an are interpreted by the various schools of Islamic law and theology to suit the patriarchal structure of the society and act as a detriment to women's rights in marriage and divorce. There is thus, a wide gap between theory and practice, law and facts.

The status of women in Islam is free and holds a respectable position. Muslim law not only establishes their right to lead their life in the best possible manner they wish to live in, but also gives them the authority to choose whom they wish to marry, right to get their dower (*mahr*), right to be maintained decently by their husbands, right to dissolve their marriage, if life is difficult beyond control with her husband. Islam has given them the right to inherit from their father, husband and son, as well. This reformation came with a great purpose and prospect. The purpose was to liberate and free the other half of the humanity from suppression, exploitation and the clutches of injustice. The condition of women was in a deplorable state at a time and Islam reformed it remarkably bringing them at par with the society. The reforms are of great eminence to the discourse of women as per the legal status. Nonetheless, it opens a door for discussion on the effect of these rights and freedom, upon men.

The surge of divorce by Muslim men presently is alarming and of great concern. In fact, the divorce rate among Indian Muslims is scandalous which gained impetus after the legislation relating to the Triple *Talaq*. The mention of or referral to the word (*Talaq*) divorce became so cheap and common that in some marriages, arguments end with this word with the husband threatening the wife with it. Islam considers marriage, an extremely desirable institution and a sacred union, therefore, the conception of marriage is the rule of life and divorce is merely an exception to that rule. It is a fallacy validating that a Muslim male enjoys a monocratic power to dissolve his marriage by unilateral pronouncement of *talaq*. Islam permits divorce, but it also emphasises on it being a measure to be undertaken only when there is no other alternative and that when the situation is beyond control. It must be the last resort. The Qur'an clearly lays down the procedure of divorce that is fair, just and gives time to the couple to make efforts of reconciliation. Muslims as well as non-Muslims have always been under a big misconception regarding the right of Muslim males to divorce without any reason and get rid of their wives and their obligations towards them. This is not in any way, in consonance with the *Shariah* law. The methods of *Talaq-us-Sunnat* must be resorted to by the husband, only if all attempts to reconcile fail. It is a method that has been approved by the Qur'an and the Holy Prophet (PBUH). Methods of *ila*, *lian* and *zihar* are not that prevalent in India, however, there are a few cases of *mubara'at*. *Talaq-ul-Biddat* has been declared illegal and void by the Muslim Women (Protection of Rights on Marriage) Act, 2019. This Act has several loopholes in it and thus, needs amendment.

Islam has given women equal privileges and rights as men to dissolve their marriages. This must be understood and Muslims must get aware of this fact, both men and women.

It is evident and clear that Muslim women have been empowered with the rights to dissolve their wedlock both through the court or without the intervention of the court. Muslim law gives to the wife the right of *khula*, i.e.

dissolution of her marriage, a position at equal standing with *talaq*. A husband who is fully convinced of an irretrievable breakdown of his marriage and for dissolving it resorts to the pronouncement of *talaq*, similarly a wife having the same sentiment and persuasion may also dissolve her marriage by adopting the method of *khula*. But dismally, the Muslim personal law in India does not permit a woman the right to resort to *khula* without her husband's consent. Thus, naturally, most of the husbands exploit their wives and extract much higher compensation, than justified. Although, *Shariah* has given Muslim women the privilege of out-of-court divorce, but still in the patriarchal structure of the society like ours, the right of *khula* has practically been withdrawn. *Khula* is, unfortunately, considered to be a method of dissolution of marriage by mutual consent. The way it is practised in India, it gives the power to make the final decision to the husband. Though, in many countries like Pakistan, Bangladesh that are our neighbouring countries and were covered under our laws (The Muslim Personal Law (*Shariat*) Application Act, 1937 and The Dissolution of Muslim Marriages Act, 1939) it has clearly been stated and reiterated by the courts that *khula* is the absolute right of the wife. So, even if the husband is not in agreement of divorce, the wife still can dissolve her marriage by judicial *khula*.

*Talaq-e-Tafweez* as a method is the least talked about issue of Muslim law. It is almost invisible. Only a small percentage of the Muslim population has just heard the term *talaq-e-tafweez*, but have absolutely no idea as to what it means. There is, unfortunately, so much stress on the methods that help a husband initiate divorce that the fact that a wife too has the power to dissolve a marriage loses all the attention. *Talaq-e-Tafweez* is an extremely healthy and a practically valuable procedure that must be incorporated in marital agreements and *nikahnama*. It is vital as Islam has always stood for women empowerment and *talaq-e-tafweez* gives women that empowerment. It is hardly practiced because it is a process barely known to anyone. It has absolutely no mention in television debates on divorce laws of Muslims, newspapers, journals or any other debates involving legal scholars and other knowledgeable persons or Muslim leaders and hence, people are ignorant towards it. There is no remark or indication towards it. Even the Muslim Personal law scholars do not speak of it. Therefore, there is a need to bring this useful process into light and have positive and worth-while discussions over it, as to how to incorporate the same into the process of dissolution of marriage in an out-of-court procedure.

Judicial divorce i.e. *faskh*, has developed in the recent times and the Dissolution of Muslim Marriages Act, 1939 is being resorted to by women in large numbers. Cases like, *Shamim Ara*, *Shayara Bano* and *Shah Bano* etc. are some of the major judicial pronouncements that gave women the encouragement and power to approach the courts for their rights and justice. The Act of 1939 was a boon in the history of *Shariah* law in India as well as in the lives of Muslim women. This method has not only safeguarded their right to dissolve a failed marriage but in cases when this method has been clubbed with the Muslim Women (Protection of Rights on Divorce) Act, 1986, it protects their rights and interests after their divorce, such as dower, maintenance and child custody.

The role of judiciary holds great significance as its role to interpret the law is directed towards the citizens, personally and directly. The role of judiciary has seen a tremendous growth, right from where it gave judgements that distorted the principles of Islam regarding divorce and marriage to the judicial pronouncements where it

upheld the true spirit of Islam and the principles laid down in the Holy Qur'an. Cases like *Mohd. Ahmed Khan v. Shah Bano* of 1986, *Shamim Ara v. State of Uttar Pradesh* of 2002 and *Shayara Bano v. Union of India* of 2017, encouraged various Muslim women who were hesitant to approach the court, now reach up to them for justice and upliftment of their rights that have been given to them by Islam, but unfortunately, have been curbed and hushed by the patriarchal structure of the society.

When we look at the international scenario of Muslim divorce law and analyse it, we can see that majority of the nations have either banned triple *talaq* or have not approved it in their legal system. Philippines, Egypt, Morocco, Sudan, Jordan, Iraq, UAE, Yemen, Syria and Kuwait have simply banned and derecognised the concept of triple *talaq*. Even three pronouncements in one go is considered as a single revocable divorce. In countries like Lebanon, Morocco, Kuwait, Jordan, Egypt, Iraq, Sudan and Syria, *talaq* is not effective if pronounced in the state of intoxication, insanity, provocation, depression, duress or anger. In the Malaysian law, if *talaq* is revoked by the husband it has to be registered with the authorities of the State. In countries like Jordan, Iraq, Syria and Maldives, even the husband has to approach the court to get a divorce. In Malaysia, Indonesia, Algeria, Somalia, Yemen and Tunisia, husband cannot get divorce without the intervention and permission of the court. Reconciliation efforts are first ensured by the court in all these countries. In Pakistan and Bangladesh, even the husband has to notify *talaq* to the competent authority and then the matter goes to the Arbitration Council as laid down in the Muslim Family Laws Ordinance of 1961. Without the prior permission or subsequent involvement of a court or *Kazi*, arbitrators, civil officials, *talaq* does not become effective in various countries. Violation of these legal rules leads to penal action. Also, the method of *khula* is adopted and practised in its true sense and spirit. In countries like Libya, Mauritania, Qatar, Philippines, Algeria, Egypt, Sudan, etc. *khula* is a part of their legislations as per the Islamic law. In Pakistan and Bangladesh, it has been ruled that *khula* is a woman's right and it does not depend on husband's consent for its enforcement. In Malaysia, courts come forward to arrive at a settlement and fix a consideration if the parties fail to do so. Women have been given the same grounds almost in all the nations to dissolve their marriages as the ones laid down in The Dissolution of Muslim Marriages Act, 1939. In almost all the countries, the court has to attempt reconciliation between the couple in all suitable case scenarios as per the procedure laid down in Chapter IV, Verse 35 of the Qur'an. In several countries like, Jordan, Kuwait, Yemen, Egypt, Iraq, Qatar and Syria, women who get divorced arbitrarily and have no sources to maintain themselves and their children are maintained by their husbands even after divorce. In Bangladesh and Pakistan, it has been pronounced by their Apex courts that a divorced woman has to be maintained by the husband divorcing her till she remarries.

It can be clearly seen that many nations have modified and codified Muslim personal law in their countries keeping in mind the changes and developments in the society, without challenging or hindering the basic tenets of Islam laid down in the Holy Qur'an or *Ahadith*. Muslims in India must see and admit to the fact that it is not a sin to bring about modifications in the law of *shariah* until and unless it challenges the very essence and spirit of Islam.

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