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Rethinking Codification of Muslim Personal Law: A Gender-Based Approach

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This article critically examines the codification of Muslim personal law, with a special emphasis on gender disparities. It seeks to explore different facets of personal laws, like marriage, divorce, maintenance, etc., shedding light on the inherently discriminatory practices against women. The various interpretations of the Islamic texts have been a reason for ambiguity, resulting in a system where women were often treated unequally. Muslim personal laws, especially regarding marriage and divorce, have favoured men, often leading to an imbalance of power. It delves into the concept of marriage, polygamy, different procedures to carry out divorce, and their impact on women's autonomy. It points out the gender imbalances in the society. It also highlights the limitations imposed by the Muslim Women (Protection of Rights on Divorce) Act 1986. Further, it explores the possibility of implementing a Uniform Civil Code as a viable alternative to address these issues to create a unified legal system. UCC aims to establish a set of laws regarding matters covered by personal laws that transcend the religious backgrounds of the citizens. It argues that UCC can help address gender disparities and create an equitable society. This is followed by a collaborative and consultative approach regarding its effective implementation. In conclusion, this article advocates for re-evaluating existing laws of Islamic jurisprudence and the urgent need for reforms to align them with the fundamental rights enshrined in the Constitution.

Keywords: *gender disparity, uniform civil code, equitable society, consultative approach*

INTRODUCTION

The codification of personal laws has been scrutinized for a long time, especially in a country like India, which encompasses several societies. This article is aimed at delving into the intricacies of Muslim personal law, predominantly from a gender-based approach, to address the inherent discriminatory practices against women. It focuses on the imperative need for evaluating the existing framework across different facets the personal law covers, including-marriage, divorce, maintenance, inheritance etc. which collectively form the societal fabric of any community.

Since the time of independence, the codification of Muslim personal law has been based on the interpretations of the Islamic texts, leading to a system, despite its intended principles, where women were not treated at par with men. The Muslim community is often critiqued for its patriarchal norms that seem to be unfair to women and are against their rights to a dignified life. Women, particularly, have to face many challenges surrounding issues of marriage, divorce, and maintenance. The times call for an urgent need to rethink and evaluate the existing legal frameworks and uphold the principles of justice and equality enshrined in the Constitution of India.

Article 44 of the Indian Constitution¹ also highlights establishing a Uniform Civil Code for all citizens, irrespective of their religious background. It aims to implement a standard set of laws that govern subjects around personal law, promoting a solid feeling of a united nation but, more importantly, upholding values of justice and equality. Hence, introducing a UCC in the country can help navigate these legal intricacies surrounding personal laws and serve as a more viable alternative for a secular and unified legal framework.

CONCEPT OF MARRIAGE

Islamic jurisprudence upholds the values of free will of marriage based on the consent of both parties. However, it takes a distinct turn when it comes to the dissolution of marriage. It

¹ Constitution of India 1950, art 44

provides the right to the husband to initiate divorce, known as ‘talaq’. In contrast, for women, it has to be done through a process called ‘khula,’ which includes parting away from their financial assets as a form of consideration for the dissolution of marriage. Many jurists have reasoned the same with the idea that between the two partners, the man is more physically and intellectually superior. Hence, this makes the wife subordinate to the husband. Some even claim that the dower at the time of marriage served as a consideration for the alienation of marital freedom of the wife.²

CAPACITY TO MARRY

According to Muslim law, every male who has attained puberty and is of sound mind is competent to contract marriage. It is assumed that a minor reaches puberty after 15 years.³ Similar is the case for girls, one who has attained puberty and is of sound mind is competent to contract for marriage. However, all marriages are now governed by the Prohibition of Child Marriage Act 2006, which specifies the minimum age to be eighteen and twenty-one years for a girl and boy, respectively.⁴ However, The Sachar Committee, which was established to analyze the socio-economic status of Muslim women in the country, found that out of 4,710 women surveyed, 15.5% were married below the age of 15 years and 39.8% between the ages of 15-18 years.⁵ Examining some instances where the empirical data stands in contradiction highlights the challenges and poses a question of ineffective implementation in the legal framework.

POLYGAMY

Polygamy, that is, the practice of having more than one wife, is also permitted under Muslim law. In Islamic jurisprudence, a man is allowed to have up to four wives. However, this comes with a condition for the man to treat all her wives equally. The Koran explicitly states, ‘of women who seems good in your eyes, marry one only..... this will make justice on your part easier’. ‘And ye will not have it all in your power to treat your wives alike, even though you would fail

² Abdul Rahim, 327

³ The Radd ul-Muhtar, II, 517

⁴ The Prohibition of Child Marriage Act 2006

⁵ Noorjehan Safia Niaz and Zakia Soman, ‘Muslim Women’s Views on Muslim Personal Law’ (2015) 50(51) Economic and Political Weekly 83 <<https://www.jstor.org/stable/44002996>> accessed 13 January 2024

to do so.⁶ The husband must treat all his wives equally on all terms, including financial support, time, emotional care, etc. Failure to do so contradicts Islamic laws.

If a husband fails to treat his wives equally, any one of the wives can take legal action against the husband. This unfair treatment can stand as a ground for divorce under The Dissolution of Muslim Marriage Act.⁷ However, the wife will have to prove the same as a question of fact in the court that her husband was treating her unequally. According to the study of The Sachar Committee, 91.7% of the women surveyed were against polygamy and did not support it in any circumstance. The same study also highlights that 78.7% of women were homemakers, 7.9% worked in organized sectors, and 13.4% worked in unorganized sectors. Even among these working women, much of their income is handed over to their husbands to maintain the family. With significantly less financial autonomy in the household, it is even more challenging for women to reach out for lengthy legal procedures. Along with it comes other fears of being alienated from the community, which does not let them voice their concerns. The same study also sheds light that 53.4% of the surveyed women have also been a victim of domestic violence⁸. It stands as proof of how legal avenues are not the first choice for many women in the community.

DISSOLUTION OF MARRIAGE

The dissolution of marriage⁹ in Islamic law is done either due to the death of one of the parties or by divorce. Divorce, under Muslim Personal Law, is often critiqued as being discriminatory against women. Several activists and women's organizations have called for reforms in this law to ensure gender equality and uphold the values of justice provided in the Constitution. There are two types of divorces: men take the instance of the husband. These include *Talaq-ul-sunna* and *Talaq-ul-badai*.

⁶ The Koran, IV, 129

⁷ The dissolution of Muslim Marriages Act, 1939, S.2 (viii) (If), this is included under the definition of cruelty.

⁸ Niaz (n 5)

⁹ Shagufta Omar, 'Dissolution of Marriage: Practices, Laws and Islamic Teachings' (2007) 4(1) Policy Perspectives 91-117 <<http://www.jstor.org/stable/42909165>> accessed 13 January 2024

Talaq-ul-sunna also has two different forms named *Ahsan and Hasan*.

Ahsan is considered the least disruptive method for divorce. Under this, the husband can divorce his wife by a single pronouncement. This pronouncement has to be made during the period of '*Tuhr*,' i.e. the period between menstruations or any other time when the wife is not menstruating and is followed by an abstinence from sexual intercourse. However, if the divorce is made by writing, these conditions need not be fulfilled. The divorce is followed by a waiting period known as *Iddah*, which can serve multiple objectives. These objectives include determining if the wife is pregnant and time to reconcile or to allocate resources for financial matters. This is considered to be the most favourable type of divorce. The reason is that it is revocable in nature. If the husband changes his mind and wishes to continue the marriage, he can do the same by cohabiting with his wife by saying, 'I have retained thee.' This would not require any new marriage contract.

Hasan is one of the other methods under Islamic laws through which a husband can divorce his wife. Unlike *Ahsan* talaq, it is a more gradual process spread over three consecutive '*Tuhrs*.' For example, a husband X divorces her wife Y in her first *Tuhr*. This is followed by one month or thirty days before the second pronouncement. So, *Hasan* is also a revocable form of divorce. If the husband decides to continue the marriage after the first pronouncement, he can do so. He will make the second pronouncement if he wishes to proceed with the divorce. There exists a second waiting period of thirty days. This provides the husband with a second opportunity to reconcile. If there is no reconciliation at this stage, the second waiting period ends. The final pronouncement follows this. The third waiting time is the last opportunity for the husband to revoke his divorce. If he does not do so and the waiting period ends, the divorce becomes final and irrevocable.

Hasan is said to prevent hasty decisions made in the heat of the moment as it provides multiple opportunities to reconcile. However, much criticism has been of the existing divorce methods in Islamic laws. The central point of debate and discussion is the unilateral decision-making power these laws have granted men. The ability to initiate divorce lying in the hands of men has been known to create an imbalance in the power dynamic of the marriage, often putting women

in somewhat vulnerable positions. There exists a lack of female agency as not only men lead the initiation of divorce, but also even the power to reconcile the marriage is not in the women's control. This system often makes women feel no autonomy over their marital fate and feel out of control. The revocable nature, which is often seen as an advantage, can lead to uncertainty in the minds of women about whether the divorce is finalized or not. This can add to immense stress and anxiety and can have psychological effects on the women. It also raises concerns for financial security for Muslim women who are dependent on their husband's income. The stress of navigating post-divorce economic struggles, along with social stigma, adds to an extra level of anxiety. These practices can often lead to the exploitation of women by their husbands, as they have the authority to initiate and revoke a divorce at their whims. This unilateral power dynamic reinforces the patriarchal norms where the authority to take decision-making power is concentrated among the male members of the society.

Talaq-ul-badai (commonly called triple talaq) was another way for men to divorce their wives by the triple declaration of 'I divorce thee, I divorce thee, I divorce thee' during the time of purity (time during menstruations, or a time followed by menstruation with abstinence from sexual intercourse). This is an irrevocable form of divorce. However, the Hon'ble Supreme Court in the judgment of *Shayara Bano and Ors* has declared this form of divorce unconstitutional.¹⁰ In this case, Shayara Bano married Riyaz Ahmed, and they have been together for fifteen years. She was a survivor of domestic violence. In 2016, her husband divorced her using the practice of triple talaq. She filed a writ petition before the Supreme Court questioning the validity of this practice as it violated Article 14¹¹, Article 15¹² and Article 21¹³. In the judgment, a majority of 3:2 held triple talaq or *talaq-ul-badai* unconstitutional.

In an article in *The Hindu*, Ziya US Salam analyses the condition of Muslim women after five years since the verdict was passed. The ambiguity of the judgment prevails. Ziya says, 'The women petitioners continue to live a life of half-divorcees. Technically still married, practically

¹⁰ *Shayara Bano v Union of India & Ors* AIR 2017 SC 4609

¹¹ Constitution of India 1950, art 14

¹² Constitution of India 1950, art 15

¹³ Constitution of India 1950, art 21

divorced, they enjoy no conjugal rights nor receive any regular maintenance from the estranged husbands. Practically abandoned, the women cannot remarry in the absence of a legally valid divorce. After the verdict, none of the men were visited by law enforcement bodies and told to take back their wives. Further, no arrests could be made for giving instant triple talaq as the Muslim Women (Protection of Rights on Marriage) Act, 2019 came into force long after the pronouncement of instant talaq.¹⁴

Hence, there is a need to address these new concerns due to Triple Talaq's judgment and lay some objective rules and guidelines to handle the same.

Apart from these methods, one avenue for women to seek divorce from their husbands is through the practice of '*Khula*'.

The term '*Khula*' means 'to release' and is a practice by which women release themselves from marital ties by offering some form of consideration to their husbands. It is a vital framework for women to liberate themselves from troubled marriages. The unique feature of '*Khula*' is the concept of 'consideration,' where the wife may offer some form of financial compensation or some property or asset to the husband, which is usually her '*mehr*' (an obligation, in the form of money or possessions, given to the wife by the husband at the time of marriage), a part or whole of it.

However, this practice of '*Khula*' sheds light on gender equality within Islamic law. The husband can initiate and revoke the divorce at his own will, whereas the woman has to offer some form of consideration to free herself from the marital ties. However, this isn't the case in which the husband initiates the divorce. The husband takes even the terms of the bargain for such an arrangement for the women into consideration. No consideration exists in the case of '*Ahsan*' or '*Hasan*'. This arrangement puts the women in financially vulnerable positions. Not only is the woman fighting for her post-divorce maintenance, but she also parted away from whatever

¹⁴ Ziya Us Salam, 'Five years after Supreme Court's triple talaq verdict, petitioners living life as 'half-divorcees' *The Hindu* (13 August 2022) <<https://www.thehindu.com/news/national/five-years-after-supreme-courts-triple-talaq-verdict-petitioners-living-life-as-half-divorcees/article65765026.ece>> accessed 13 January 2024

financial resources she holds during this process of 'khula.' Such challenges in personal laws highlight the need for reform to ensure an equitable application of 'khula'.

RIGHT TO MAINTENANCE

Maintenance after divorce is an essential part of the family law for women to navigate the challenges they might face post-divorce. These challenges are usually due to the intricacies of the intersection of personal laws, customs and traditions, societal norms, etc.

According to Muslim personal law, the husband is only obliged to pay her wife during the time of 'iddat', i.e., a time period of around three months. After three months, the wife is not entitled to any form of maintenance from her husband. Challenging this was the case of *Mohd. Ahmad Khan v Shah Bano Begum*¹⁵ in the Hon'ble Supreme Court. On divorcing her first wife, Shah Bano, aged 62, the former husband stopped giving her monthly maintenance of 200 rupees, and she filed a criminal suit against him, claiming that she had no means to support herself and her child. This suit was filed under section 125¹⁶, demanding a maintenance of 500 rupees to sustain her and her child.

Supreme Court gave a judgment in favour of Shah Bano, stating that section 125 of the Code of Criminal Procedure applies to all women despite their caste, creed, or religion. Section 125 of CRPC deals with maintaining the wife, children, and parents. It stated that the husband must pay maintenance until the woman re-marries. It was ruled that Shah Bano should be given the maintenance money to support herself and her child.

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT 1986

The judgment of the Shah Bano case paved the way for numerous debates and discussions about the intersection of personal laws, religious freedom, justice, and equality. The case was a moment to affirm gender equality by providing maintenance under Section 125¹⁷. However, it did stir controversy due to the interference in the Islamic personal laws. One significant

¹⁵ *Mohd. Ahmad Khan v Shah Bano Begum* AIR 1985 SC 945

¹⁶ Code of Criminal Procedure 1973, s125

¹⁷ *Ibid*

disagreement from this interpretation of Section-125 of CrPC was that it was a general law and contradicted its application to Sharia principles. The critics argued that personal laws should prevail over a general provision. The societal backlash prompted the government to address these sensitive issues surrounding the air. This led to the passing of the Muslim Women (Protection of Rights on Divorce) Act, which is often considered to be a hasty Act with numerous shortcomings. This Act¹⁸ reversed the judgment of the Shah Bano case. It again put a cap on the maintenance amount given to the wives by their former husbands.¹⁹ The limitation is set back to the '*iddat*' period, restricting their financial support. This Act, which was enforced in 2019, is ambiguous in nature. The Act permits a 'reasonable and fair' payment as 'mehr' or any other amount that both parties have decided. However, there is no specific criterion that determines any fair amount. This subjectivity in this Act has often led to disparities in maintenance.

Section 4 of the same Act also provides recourse in case the woman is unable to maintain herself after the three months of '*iddat*.' This includes the provision to claim maintenance from the relatives who will inherit the property after her death. This maintenance can be provided from the proportion of the property itself. If there are no such relatives, or they cannot provide her maintenance, she can approach the State Waqf Board to provide her maintenance.

In a similar case, Daniel Latifi and Anr v Union of India²⁰, which challenged the validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986. It was argued that it was just the Muslim women who were excluded from claiming maintenance under Section 125²¹. This violates Article 14²² of the Indian Constitution, as Muslim women do not benefit from the remedies available in Section 125 of CrPC. Similarly, section 125 of CrPC was supposed to be

¹⁸ The Muslim Women (Protection of Rights on Divorce) Act 2019

¹⁹ Lucy Carroll, 'The Muslim Women (Protection of Rights on Divorce) Act 1986: A Retrogressive Precedent of Dubious Constitutionality' (1986) 28(3) Journal of the Indian Law Institute 364–376
<<http://www.jstor.org/stable/43951025>> accessed 13 January 2024

²⁰ *Daniel Latifi and Anr v Union of India* AIR 2001 SC 3958

²¹ Code of Criminal Procedure 1973, s 125

²² Constitution of India 1950, art 14

secular. Hence, it is discriminating against Muslim women and violates Article 15²³. This would also infringe on their right to a dignified life present under Article 21.²⁴

However, the Hon'ble Supreme Court interpreted that the term 'fair and reasonable' might extend to a woman's entire life until she remarries. This amount to sustain her life is paid within three months. If it does not suffice, it can also be claimed by the relatives and the State Waqf Board.

However, the subjectivity of the Act leaves it to a different interpretation of the term 'fair and reasonable.' The following liability on relatives and the State Waqf Board further adds another layer of complexity for women seeking justice. The complicated legal procedures and the corruption among the members of the State Waqf Board affect the lives of divorced women at the end of the day. This Act fails to provide some concrete solution to divorced women, complicating their post-divorce life even more.

CONSIDERING THE IMPLEMENTATION OF A UNIFORM CIVIL CODE:

The civil code refers to a set of rules and regulations that govern the citizens of a country on matters including marriage, divorce, maintenance, inheritance, etc. Implementing a Uniform Civil Code will lead to common laws relating to marriage, divorce, maintenance, etc., irrespective of religion, to promote a sense of unity among the citizens of the nation.²⁵

Gender equality remains a crucial aspect of a just society, and personal laws play a significant role in shaping the status of women. Muslim personal laws are based on their traditional principles which have been interpreted differently. Despite its intentions to uphold justice and equity, there have been several instances where women have been discriminated against. A critical analysis of the existing provisions of Islamic jurisprudence reveals the disparities in the principles of gender equality.

²³ Constitution of India 1950, art 15

²⁴ Constitution of India 1950, art 21

²⁵ Shabbeer Ahmed and Shabeer Ahmed, 'Uniform Civil Code (Article 44 of the Constitution) a Dead Letter' (2006) 67(3) The Indian Journal of Political Science 545-552 <<http://www.jstor.org/stable/41856241>> accessed 12 January 2024

Unilateral divorce provisions provided by the law to the husbands often leave women in vulnerable positions where they can be exploited. The process of initiating divorce by women through the method of '*khula*' is often seen as discriminatory on financial grounds. A cap on the maintenance amount a woman can claim from her husband after divorce by excluding them from Section-125 of CrPC also poses a threat to financial security, who had been previously utterly dependent on her husband. Even the inheritance laws are discriminatory in nature, as the daughter gets half the share as compared to that of the son.

Also, the different kinds of laws complicate the system of personal laws. For example, Muslim men are allowed to have more than one wife, whereas Hindu Christians cannot do the same. Marriage under Muslim law is considered a civil contract, whereas Hindu Marriages are sacramental. Extrajudicial ways to get a divorce are allowed for Muslim men, whereas the same is not permitted for Hindus or Christians.²⁶

The Directive Principles in the Constitution also mention the need for a Uniform Civil Code in Article 44. It says, 'The state shall endeavor to enact a Uniform Civil Code for the citizens throughout the country.'²⁷ However, what's interesting is that even though the Constitution of India came into force on January 26, 1950, no steps have been taken to implement the Uniform Civil Code. Even the Hon'ble Supreme Court of the country, in the famous case of *Sarla Mudgal & others v Union of India*,²⁸ has suggested the parliament frame a Uniform Civil Code for the country. Still, there has been no evidence of any official Activity regarding the same.

There are several arguments in favour of a UCC. First, as the name suggests, it includes one common law for all the country's citizens concerning marriage, divorce, inheritance, etc. Hence, forms a single legislation for governing people belonging to different communities.

The non-enforcement of Article 44 of the Constitution violates the fundamental rights enshrined, including the right to equality and non-discrimination based on sex and religion. A separate law

²⁶ DC Manooja, 'Uniform Civil Code: A Suggestion' (2000) 42(2/4) Journal of the Indian Law Institute 448-457 <<http://www.jstor.org/stable/43953824>> accessed 13 January 2024

²⁷ Constitution of India 1950, art 44

²⁸ *Sarla Mudgal & Ors v Union of India* AIR 1995 SC 1531

for Muslims, like the Muslim Women (Protection of Rights on Divorce) Act, 1986, has its drawbacks- one of the major ones being its ambiguous nature.

However, implementing a UCC in the country also poses specific challenges. The major one is that India is such a diverse country of people of different cultural and religious backgrounds that it becomes essential to respect different perspectives. Different from other Islamic countries like Syria, Pakistan, Morocco, etc., which have codified their laws, it is particularly challenging for India to initiate this significant change.

One of the leading arguments against the codification of personal laws is that god makes the Muslim Law. It is an essential part of Islam, and any changes or alterations made in the following would result in depriving the Muslim community of the right to practice their religion. Therefore, nobody, not even the state, can intervene in their right to practice their religion. India is a secular country, and interference with people's right to practice a particular religion would lead to a violation of their Constitutional rights.

However, a counterargument exists for the same. It has been stated in the Constitution that the government should not interfere with the rights of citizens regarding their religious practices unless a violation of fundamental rights is enshrined in our Indian Constitution. As several laws in Islamic jurisprudence have been considered gender-discriminatory, the government can make societal reforms by exercising its powers.

These issues can be resolved by forming a set of laws that consider the rights provided in the Constitution in articles 14 to 18. Also, bringing all these issues under a single roof prevents discrimination among people based on different religions.

However, navigating the implementation of the Uniform Civil Code needs to be a gradual process. A consultative approach must be considered instead of imposing immediate change, which might lead to disputes. A committee of stakeholders, legal experts, and community leaders should be engaged in discussions while drafting the law. One of the most important goals of UCC is to prevent gender discrimination in society, so it becomes essential to include the vulnerable section of society facing these issues. We need maximum participation of women

who can paint a realistic picture of the ground reality and the struggles that come alongside navigating issues relating to personal law.

A paramount significance must be given to the diverse opinions of various communities. Forums and open discussions can promote this to create a collaborative environment where the public does not feel excluded. It helps foster an inclusive legislative process to address people's concerns, dispel misconceptions, and build a consensus while handling sensitive cultural nuances. There is a need to educate people about their fundamental rights and how implementing UCC is a step towards safeguarding them. This can be done through public awareness programs encompassing media channels, educational institutions, and events. This will help to demystify the concept of UCC and help even an ordinary man make an informed decision.

The nature of law is dynamic, and the exact needs to be considered while introducing a UCC. It needs to evolve according to the needs of society and should be flexible enough to incorporate changes. The most prominent misconception people need to be aware of regarding UCC is that its implementation is it will lead to them parting away from their right to religion. However, it needs to be realized that the goal here is to create a just, equitable, and harmonious society. Hence, a collaborative approach towards UCC can help achieve a balanced implementation of principles of secularism and individual rights and liberties.

CONCLUSION

The imperative need for evaluating and reforming the laws of Islamic jurisprudence cannot be overstated. The examination of different dimensions of personal law has revealed that there exists a deep-rooted gender disparity in the legal framework. Despite the principles of upholding justice as mentioned in the Islamic texts, the interpretation has often led to the formation of a system where women have to face discrimination, particularly in matters of marriage and divorce.

The analysis of this power imbalance, with divorce procedural laws that disproportionately favor men. The unilateral divorce given by men reflects an imbalance in marital relationships.

Permitting the practice of polygamy leaves women in positions of financial vulnerability. A follow-up on the maintenance law reveals that the Muslim Women (Protection of Rights on Divorce) Act, 1968 is ambiguous in nature and also limits by putting a cap on the maintenance amount a wife can demand post-divorce.

The proposal for implementing a UCC (Uniform Civil Code) is an alternative for addressing this multifaceted issue regarding personal laws. UCC is even envisioned in Article 44 of the Indian Constitution. This can not only help to address the gender inequalities and discrimination faced by women but also help to unify the legal framework dealing with personal laws by transcending religious backgrounds.

In maneuvering the path towards UCC, a gradual and consultative approach is essential to prevent disputes. This, coupled with a collaborative initiative to involve especially women, can help shape the legal discourse.

Ultimately, it is the need of the hour to revise the existing legal frameworks of Muslim personal law and to create a system that upholds the values of equality and justice. Hence creating a more balanced society