
BETWEEN FAITH AND FUNDAMENTAL RIGHTS: THE EVOLUTION OF MUSLIM WOMEN'S MARITAL RIGHTS IN INDIA

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1. ABSTRACT

This article examines Muslim women's conjugal rights in India and how they relate to the conflict between the persistence of faith-based specific laws and characteristic indigenous protections of gender equality. It takes into account significant legal reforms like the Muslim Personal Law (Shariat) Application Act of 1937, the Dissolution of Muslim Marriages Act of 1939, the Muslim Women (Protection of Rights on Divorce) Act of 1986, and the Muslim Women (Protection of Rights on Marriage) Act of 2019, as well as recent Supreme Court rulings like Shah Bano(1985), Danial Latifi(2001), and Shayara Bano(2017). It also considers the evolution of the discourse on the Uniform Civil Code and Muslim women's organisations to induce change from within. It suggests that the part of long-term gains is to amplify Muslim women's voices, instead of exploiting their rights for majority political agendas.

Keywords: Indigenous, Gender, Equality, Women, Political.

2. Introduction

Among the diverse and perhaps contradictory organisations of Indian law, none has presented greater challenges than the marriage of Muslim women. In fact, this isn't merely a matter of particular law, or of Islamic justice, but of indigenous equivalency and its religious regulation. India's Muslim particular law- with its influences of classical Islamic justice and corridor in British colonialism- is part of an Indian legal tradition.

India's journey of Muslim women's conjugal rights has been long drawn out. It's a story told against the backdrop of the timber of laws, comprising legal cases, feminist activism, academic arguments, Muslim beliefs and healthy politics. From the passage of the Muslim Women(Protection of Rights on Divorce) Act in 1986 to the Supreme Court's corner ruling on triple talaq in 2017, each part of this narrative shows the real problems in governing a different republic where particular law and indigenous rights intersect.

This article explores this journey- tracing the legal foundation of Muslim particular law in India, the inequality that exists within traditional marriage and divorce law, the large-scale judicial and legislative changes that have conversely attempted to redress these, and the big debates that accompany this circuit.

Indian Muslim Personal Law

India is unique amongst modern republics in having an obligatory legal governance of particular law for various religious communities. While the law of criminality and a part of municipal law is public in the sense that it is universal in application, other matters- marriages and divorces, heritage, relinquishment- are governed by different rules for the Hindus, Muslims, Christians, Parsis and so on. For example, the primary piece of law for Muslims is the Muslim Personal Law(Shariat) Application Act, 1937, which provides that matters of particular law shall be governed according to the Shariat (Islamic law).¹

The analogies of this frame was in part a legacy of the social era. The British wanted to avoid the ire of the religious groups and hence let them follow their particular customs in cases of particular law. Post independence, the Indian state was wedded to this form, but also embraced a Constitution that afforded equality before law and prohibited discrimination on spiritual,

¹ Muslim Personal Law (Shariat) Application Act 1937.

coitus and other grounds. This struggle is yet to be resolved.²

Islamic law is based on the Hanafi School of Law, the most popular school of law in South Asia. It provides various rights for women in a marriage contract, such as the right to mahr(dower), provision from the husband during marriage and the right to disjoin in certain circumstances, but these rights have been rarely treated on a gender equal footing. The right of husbands to unilaterally divorce, to have four wives, and the right of women to divorce, have been highly controversial in the context of women's rights.³

Mahr, Marriage and Justice

According to Muslim law, marriage (nikah) is not a ceremony but rather a civil transaction. A price(the offer), its acceptance, two confirmations, and a request for mahr(a gift or acceptance from the woman) are all included in the contract.

Perhaps the best aspect of the Muslim marriage contract is the mahr, which is a sum of money or anything that the bachelor is expected to give to the bridegroom. It's intended to be a kind of fiscal protection for the wife. Its sufficiency has been fiercely contested.⁴

So the enforceability of mahr has been contested in various courts, including divorce courts in India. While the Supreme Court has confirmed that mahr is enforceable as a contractual debt, it has lost its value due to the nominal amount fixed at the time of marriage and over time. Feminists have argued that whereas mahr provides a nominal annuity, it isn't an assurance of the fiscal security possibly provided from indifferent divorce agreements.⁵

Another evolving problem is polygamy- a Muslim man's right to contract up to four utmost marriages. While Islamic law allows polygamy only on the condition that all women are treated inversely, feminist scholars have argued that the ultimate condition is insolvable to apply and that polygamy inversely disadvantages women. The Law Commission of India, women's groups and many Muslim women have demanded abolishment of polygamy. But this has been resisted by conservative Muslim leaders and secularism of their religious freedom.⁶

² Mulla, Principles of Mohammedan Law (LexisNexis).

³ Constitution of India arts 14 and 25.

⁴ Mulla, Principles of Mohammedan Law.

⁵ Asaf AA Fyzee, Outlines of Muhammadan Law.

⁶ Law Commission of India, Consultation Paper on Reform of Family Law (2018).

The Longest War Triple Talaq

Triple talaq (talaq-ul-biddat)- the practice of divorce that, until now, has meant that a Muslim man can disassociate from his wife by uttering the word "talaq" three times, either verbally or in writing or, most recently, by text messages or WhatsApp chat- has been the most visible, discussed, litigated and politically controversial aspect of Muslim particular law in contemporary India. Islamic intellectuals of the majority reject this divorce as contemptuous or immoral, and try to decide whether it's lawful or illegal. It has been prohibited for decades in other Muslim- majority countries such as Pakistan, Bangladesh, Indonesia and Egypt. However, it remained justified in India by the All India Muslim Personal Law Board (AIMPLB) on grounds of religion.⁷

The campaign against triple talaq started in the lead up to 2017. Thousands of Muslim women have petitioned the Supreme Court with their experiences of being disassociated by a phone call or text message, none with conversation or compensation, and some with children.⁸

In August 2017, in a 3-2 majority, in *Shayara Bano v. Union of India*, the Supreme Court declared instant triple talaq unconstitutional. The majority found that it was clearly arbitrary and did not accord with the right to equality in Article 14 in the Indian Constitution. While two judges in the court believed it was protected by freedom of religion, this faith highlighted a lack of unity even in the court around the intersection of the special law and indigenous rights.

The ruling of 2017 was a turning point for Muslim women's rights but it left a gap in the law. The court has ruled triple talaq unconstitutional but not illegal. It left Muslim men free to practice triple talaq with little fear of consequences. In 2019, the government introduced the Muslim Women (Protection of Rights on Marriage) Act which criminalised instant triple talaq with penalty of up to three years in jail. It was a controversial bill- some, such as women's rights groups, questioned the wisdom of making it a crime, as it would disadvantage women if the husband was imprisoned and couldn't provide maintenance. It showed the problems of felonious law reform in these circumstances.⁹

⁷ *Shayara Bano v Union of India* (2017) 9 SCC 1.

⁸ Muslim Women (Protection of Rights on Marriage) Act 2019.

⁹ Bharatiya Muslim Mahila Andolan Reports on Triple Talaq.

Dissolution Of Marriage And The Dissolution of Muslim Marriage Act , 1939

The unilateral power to divorce (claimed by the husband) was clearly a major issue, but there has been a shift in the law on the power of Muslim women to initiate divorce. The Dissolution of Muslim Marriages Act, 1939(enacted in response to mass abandonment of women under customary law) details the circumstances where a Muslim woman may seek a dissolution of the marriage, by way of court order such as in the case of the husband's absence for over four years, or his failure to support the woman, is locked, cruel, impotent, or certain other circumstances.

The 1939 Act was a milestone in Muslim women's attainment of a legal right to divorce that was preliminarily subject to qazis' discretion and the good-will of husbands. But there were multiple grounds for divorce and the process was time consuming and expensive, so only politically, educated and economically empowered women could exploit it.¹⁰

Khul or khula is another method of divorce for Muslim women, in which the woman files for divorce after returning the mahr, or other sum, to her husband. The Indian judiciary officially recognizes khula, and certain court rulings acknowledge a Muslim woman's right to pursue khula, which her husband cannot deny. However, this depends on the husband's approval and the wife's ability to repay the mahr, which can be difficult.¹¹

Minor And Abandoned Women (Shah Bano Case)

1985's Shah Bano case was the most political example of the battle for women's rights in India. Shah Bano Begum, a 62 years old Madhya Pradesh woman, was disassociated by her husband after 43 years of marriage, refusing her maintenance. She claimed maintenance from her husband under Section 125 of the Code of Criminal Procedure(CrPC), a secular legislation, which enabled a woman who was divorced by her husband and couldn't sustain herself to receive maintenance. The Supreme Court granted her appeal holding that the Section 125 applied to Muslim women and receiving maintenance didn't cease with the payment of mahr¹² (dowry).

The decision was highly controversial. The AIMPLB and other traditionalists in Islam accused

¹⁰ Dissolution of Muslim Marriages Act 1939

¹¹ Khurshid Bibi v Baboo Muhammad Amin PLD 1967 SC 97 (khula jurisprudence, persuasive).

¹² Mohd Ahmed Khan v Shah Bano Begum AIR 1985 SC 945.

the court of encroachment on religious affairs and Muslim divorces were an Islamic affair. The new Rajiv Gandhi government, in the midst of violent public protests, enacted the Muslim Women(Protection of Rights on Divorce) Act, 1986, which seemed to bar Muslim separated women from the compass of Section 125 and left them to seek support from the waqf (Islamic charitable trust) or their family.

The 1986 Act was bitterly condemned as a coalition compulsion at the cost of Muslim women.

But in later cases, the Supreme Court gave a liberal interpretation of the Act, that a separated Muslim woman must receive maintenance and reasonable and fair provision for life or until she remarries and not just for the iddat period of three months(as in *Danial Latifi v. Union of India*, 2001). This rendered the 1986 Act redundant and upheld that the state can not turn a blind eye to women's matters to their religious individual law.¹³

Uniform Civil Code Debate

One of the central issues in the debate on reform of Muslim particular law is Uniform Civil Code(UCC)- a temporal particular law common to all citizens of the country, regardless of co-religionist, as recommended under Article 44 of the Constitution as a Directive Principle of State Policy. Lawyers for the UCC argue that it's necessary to ensure gender justice across the nation and to do away with the various particular laws that privilege religious patriarchies over individual rights. On the other hand, critics argue that an invariant law imposed against a non-uniform population will result in assimilation and that the UCC movement is frequently used for the purposes of furthering majoritarian political interests, rather than feminist justice.¹⁴

The UCC discussion is so complicated because it involves issues of nonage rights, denomination and public identity. Women's organisations have dissociated their fight for reform of particular law(which they drink) from accepting a UCC assessed unilaterally by the state(which they disapprove). The hope is that it might be done from the outside, through legal literacy and empowerment of women in the community, rather than from the inside, possibly for political gain. More recently, there has been a revival of the UCC debate with the first Uttarakhand Uniform Civil Code (UCC) coming into effect in 2024. It is still a public matter, with the Law Commission of India inviting submissions on the topic. This is for sure if we are

¹³ *Danial Latifi v Union of India* (2001) 7 SCC 740

¹⁴ *Sarla Mudgal v Union of India* (1995) 3 SCC 635.

to move forward we need the opinions and wishes of Muslim women- not as bargaining agents.¹⁵

Muslim Women's Role In Reform

A discussion of the conjugal rights of Muslim women in India that concentrates merely on courts and congress might miss the greatest players. Nationally, Muslim women's organisations such as the Bharatiya Muslim Mahila Andolan(BMMA), the Bebaak Collaborative and the All India Muslim Women Personal Law Board have been patiently documenting injustices, providing legal counselling and advocating for reform from an Islamic perspective. Such organisations have educated women qazis(Islamic scholars), drafted model nikahnamas(marriage contracts) that protect against injustice, and fought ministers' supremacy through popular mobilising.¹⁶

The Muslim women who filed a solicitation in the Supreme Court triple talaq case weren't insulated- they were part of a legacy of Muslim women invoking their rights under Islam and the Indian Constitution. They didn't claim that Islam is inequitable to women, but that patriarchal interpretations of Islam are inequitable, and that Islam and the Indian Constitution can do better.¹⁷

This slyness can be lost in divisive public debates that pit Islamic law against women's rights. Rather, many Muslim women skillfully draw on both, using civil courts when the Islamic law doesn't accommodate, seeking Islamic rights when they're salutary, and advocating for reform to align Islam with the Constitution.¹⁸

Conclusion

The story of Muslim women's marital rights in India isn't one of unalloyed success or paltry failure. It's a dynamic narrative, in courts and congresses, mosques and homes, nikahs and divorces. At each major milestone- Shah Bano, the 1986 Act, Danial Latifi, the 2017 triple talaq judgment and the 2019 criminalisation- the goalposts have shifted, sometimes

¹⁵ Law Commission of India, Consultation Paper on Family Law Reform (2018).

¹⁶ Bharatiya Muslim Mahila Andolan Official Reports.

¹⁷ Bharatiya Muslim Mahila Andolan Official Reports.

¹⁸ Zoya Hasan and Ritu Menon, *Unequal Citizens: Muslim Women in India* (OUP 2004).

unchallenged, sometimes askew, and sometimes in the proper direction.

One thing that doesn't change is the opening appeal of Muslim women themselves to be treated as citizens of the Indian Republic, with the guarantees of the Constitution and members of a religious community with its own practices (legal and religious). These places aren't antithetical, they're authentic and they need to be admired by a just state.

The work to be done isn't easy. Polygamy is still found, maintenance is not enforced. Divorce is not easy for poor & pastoral women. Muslim child marriage is plonking but not dead. Innovations in the nikahnama (marriage document) to reduce women's rights at the time of marriage are ad hoc and voluntary. The Uniform Civil Code debate goes on, with an uncertain future.

But, there is a reason to be sanguine, as well. Those women who fought for decades to end triple talaq (and won, not only in the Supreme Court, but public opinion too) demonstrate it is possible when Muslim women are given the opportunity to fight for their rights. Their victory was just in the morning. It was a chapter. The rest is yet to be written.