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## A STUDY OF MUSLIM WOMEN'S RIGHT TO DIVORCE IN EGYPT AND INDIA

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### **Abstract**

Certain areas in Islamic laws are perceived to be incompatible when it comes to women's rights and universal standards of gender equality. The thin line of distinction of oppression towards women in Muslim and non-Muslim countries is that in Muslim countries, it is done in the name of Islam. Personal status laws in Islamic countries justify the discrimination meted towards women by claiming that these laws are based on the Sharia law, so the discrimination towards their women are hence in congruent with the Sharia law. In reality, the deterioration of women's status in these countries have nothing to do with Islam, but rather the patriarchal interpretation of the sacred laws. The traditional male dominated societies try to dominate the women folks under the pretext of Islam. This paper will look into the aspects of divorce of Muslim women according to personal status laws in Egypt and India. The author will address how these personal laws affect the rights and freedom of the women who are subject to their purview.

**Keywords: personal status law, women, divorce, Egypt, India**

**INTRODUCTION:** A personal status system can be defined as a system in which members of various ethno-religious communities, which are

judicially recognized as such by central authorities, are subject to jurisdiction of communal (rather than national or territorial) norms regarding matters such as marriage, divorce, spousal maintenance, and inheritance.<sup>1</sup>In the past, colonial rulers employed personal status systems to label subjects into ethno-religious and confessional groupings, and to distribute goods and services while denying certain populations the benefits of full membership in the political community.<sup>2</sup>*See generally*

Postcolonial nations that inherited the pluri-legal personal status systems were faced with the question of: what were they going to do with these fragmented systems, which were not necessarily conducive to building a modern bureaucratic machinery or a civic sense of national identity? Some countries opted for institutional unification (consolidating the courts of different groups under an overarching system of national courts); some for normative unification (abolishing different bodies of communal laws and enacting in their place uniform territorial laws); some for both; and some for neither.<sup>3</sup>

In the end, the choices of these postcolonial countries were determined by the ideological orientations of their ruling class elites. For some it was determined by the

capacity of ethno-religious groups of these nations to resist government interventions in personal status. Egypt therefore inherited the Ottoman Millet System. Under this system fifteen ethno-religious communities were granted autonomy to run their own courts and apply their own laws regarding their members' matters of personal status.<sup>4</sup> But in 1955 the Nasserite regime enacted Law No. 462 which abolished all religious courts in the country, including Sharia courts. They were brought into a principal network of national courts. From 2004 "secularly-trained" judges at civil courts and specialized family courts began to continue. They applied

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<sup>1</sup>YükselSezgin, *A Comparative Study of Personal Status Systems in Israel, Egypt and India* 1 (Int'l Council on Hum. Rts. Pol'y, Working Paper No. 169, 1999).

<sup>2</sup>MahmoodMamdani, *Citizen and Subject: Contemporary Africa and the legacy of late colonialism* (1996).

<sup>3</sup>YükselSezgin, *Legal Unification and Nation Building in the Post-Colonial World: A Comparison of Israel and India*, 8 J. COMP. ASIAN DEV. 273, 275–76 (2009).

<sup>4</sup>YükselSezgin, *A Comparative Study of Personal Status Systems in Israel, Egypt and India* 1 (Int'l Council on Hum. Rts. Pol'y, Working Paper No. 169, 1999)

different bodies of religious laws to people of different ethno-religious backgrounds.

The case of India was a bit different in the sense, after Independence the Indian leaders felt the necessity to abolish and replace the personal laws with a Uniform Civil Code (UCC). This code would be applicable to all the citizens of the country irrespective of their caste and religious affiliation. However this dream could only be partially fulfilled as a result of opposition especially from the Muslims. They unified the law for Hindus, Sikhs, Buddhists, and Jains through the 1955 and 1956 Hindu code bill reforms, The Hindu Marriage Act, No. 25 of 1955, The Hindu Succession Act, No. 30 of 1956, The Hindu Minority and Guardianship Act, No. 32 of 1956, The Hindu Adoptions and Maintenance Act, No. 78 of 1956 and agreed to continue separate personal laws for Muslims, Christians, and Zoroastrian Parsis.

### **WHAT IS SHARIA LAW?**

"Shari'ah is an Arabic word that means the Path to be followed," referring to a number of legal injunctions known as Islamic law.<sup>5</sup> Islamic law has its primary source through Holy Quran, as well as other supplementary sources. The other primary source is Sunna, which are the oral teachings of the Prophet. Both of these sources have divine origin. There are three other human made sources called Qiyas, Ijmaa and Ijtihad, which are primarily based on human reasoning. Therefore Sharia law is not a static entity but a rather evolving and changing entity that adhere to the principles of justice and welfare of the people and society.

### **Divorce in Sharia Law**

Divorce is referred to as 'talaq'. Islam allows women the right to divorce her husband on several grounds but Islam seeks to reconcile among the spouses.

Talaq comes from the word tallaqa meaning "to release a human being from any obligation incumbent upon him."<sup>6</sup>

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<sup>5</sup>Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* 2 (1984).

<sup>6</sup>Ragaa Bahloul, *Ijtihad: A Feminist Interpretation of Islam* 114 (19-20 Feb. 1999).

There are two different ways in which a man can divorce his wife in Islam: Talaq-al-Sunna and Talaqal bidaa. Talaq-al-Sunna is drawn from the teachings of the Prophet and Talaqal bidaa which is considered to be an innovative form of divorce adopted by men, which do not follow the Prophet's teachings. The system of Talaq-al-Sunna is where the men can divorce his wife under a single pronouncement. Thereafter a period of three months of sexual abstinence needs to be maintained between the spouses. This period is known as iddah. In this period the husband can reconsider his decision and reconcile with his wife. But at the end of the period, if the husband doesn't change his decision then the marriage will be dissolved. Thus, if a person wants to reconcile with his wife whom he had just divorced after the period of iddah, he would require to marry her again. Further, if the man has divorced his wife three times before, then he is not allowed to marry her the fourth time unless the wife has divorced and married another man during the interim period.

In Talaq-al-bidaa, the man can divorce his wife by uttering 'I divorce you' three times at once. After the end of the iddah period, the separation takes place finally. This system doesn't find mention in any of the Islamic texts and goes purely against the whole notion of the iddah period as the Iddah period opens room for reconciliation between the couples, and this system ruins this chance of reconciliation.

For a woman to obtain divorce in Islam the following ways need to be obtained:

The first is called TalaqTafwid: Under this, a wife has the right to divorce only if her husband delegates this right to her which is generally included in their marriage contract. This delegated form of talaq is known as the Right of women to divorce at will. This right is exclusive for women, yet it doesn't deprive the right of men to obtain a divorce through their ways.

The second way for women to obtain divorce is called Khul. A woman can sacrifice a part or whole of her dowry in order to get divorce. The permission of khul is deduced from Sura 2, verse 229 and Sura 4, verse 128 of the Quran. The Quran also permits a woman to request a Khul if she fears that her husband would be cruel towards her or abandon her. Classical jurists agree on the legality of this system of divorce. This

system is seen as a mutual agreement between both the parties and the wife can obtain divorce by returning something to the husband and by uttering khul or something similar that carries the same meaning. The Maliki school of law believes that women can retrieve her dowry if the wife forces her into the khul, however the divorce would still be valid.

The third way is through divorce by a judicial authority. Within the various schools of law, there are variations as the Maliki school is more liberal and grants women the right to divorce in case of maltreatment, desertion or absence for more than a year, physical or mental unfitness of the husband, and so on. However the narrower schools such as the Hanafischool restricts the interference of court, other than in cases of absence of husband for prolonged period or he is unable to consummate the marriage.

Another way for divorce is if there is a breach in the marriage contract. Divorce conditions include a woman's right to divorce her husband at will, no divorce unless by mutual consent, and the prohibition of polygamous marriages.<sup>7</sup>

After discussing the rights of divorce of men and women under Sharia, it is noteworthy that there is emphasis to be found in Quranic verses there was the importance of justice and kindness towards both men and women. The relationship between the spouses should be based on love and mercy and "women shall have rights similar to those against them, according to what is equitable," (Quran, Sura 2, verse228). Women and men were treated equal and reciprocal to each other. This spirit of positivity however was not reflected in the classical Islamic jurisprudence. They gave the man explicit unilateral right to divorce and return to the wife whenever they pleased without her consent. The consent of the wife was rendered as unimportant.

## EGYPTIAN WOMEN'S RIGHT TO DIVORCE

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<sup>7</sup>Azizah al-Hibri, *A Study of Islamic Herstory: Or How Did We Ever Get Into This Mess?*, in *Women and Islam* (1943).

The different grounds under which an Egyptian muslim woman can divorce her husband are listed under the Personal Status Law of 1929, later amended in 1985. Non-Muslims are subject to their own communal laws only if both spouses belong to the same sect (*ta'ifa*) and rite (*milla*); otherwise, Sharia law is applicable to them.<sup>8</sup>

Traditionally Egypt was governed by Islamic Sharia law in all sphere of lives. But by 19<sup>th</sup> century judicial courts started taking control, however the family sphere remained out of the purview of the secularised courts. But by 1920 the Egyptian Laws of Personal Status appeared in the legal scene and made certain arrangements in the matters of marriage, divorce and maintenance.

A wife can ask for a judicial divorce under the following grounds:

- Serious defect of the husband which is incurable
- Maltreatment or harm (*darar*) towards the wife: under such circumstances, the harm needs to be proved.
- Polygamous marriage by the husband which causes material or moral harm to the wife.
- Desertion or missing case of the husband for more than a year.
- Imprisonment for more than three years, but the wife is eligible for divorce only after one year of the sentence has passed.

The right to judicial divorce or Faskh, can be used to dissolve a marriage on the grounds of darar, which is caused due to harm or injury as stated above. The conditions of darar may vary from situation to situation, such as sexual incompetence of the husband or desertion by the husband. In such cases the judge may grant divorce at the wife's request.<sup>9</sup> The process of Faskh is a lengthy and expensive process, as compared to Talaq.

In Islamic jurisprudence, the wife if leaves the marital house of obedience without her husband's will or without any reason prescribed under Sharia

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<sup>8</sup>Aznan Hasan, *Granting Khul' for a Non-Muslim Couple in Egyptian Personal Status Law: Generosity or Laxity?*, 18 ARAB L.Q. 81, 81 (2003) (citing Law No. 462 of 1955 (Dissolution of the Sharia and Confessional Courts and Transfer the Complaints that Would be Heard Before them to the National Courts), *Al-Waqai al-Misriyah*, 21 Sept. 2003 (Egypt)).

<sup>9</sup>Asma Barlas, *"Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* 94-95 (2002); Judith E. Tucker, *Women, Family, and Gender in Islamic Law* 30-31 (2008).

law, then she will be considered as disobedient and will eventually lose her right to maintenance.<sup>10</sup> The husband can therefore file a case of obedience against his wife. This concept of obedience law goes against Quranic stipulations. Yet it finds its place in the Islamic jurisprudence. The obedience case is not the same as a divorce case, however the judge's verdict in the divorce case may be impacted after investigating the obedience case.

The inability of the Personal Status Law of 1985 to tackle the issues of divorce and pressure from the civil society eased the predicament of Egyptian women by the enactment of Law no 1 in 2000. Although the new law (No. 1, January 2000) addresses many personal status issues, it became known as the Khul Law because of Article 20, which stipulates that women can obtain a divorce by a court order, even without the husband's consent, if she agrees to pay him back the dowry and the rest of her material rights. This Law no 1 have opened doors to no fault divorces in Egypt.

This law was opposed by various classical jurists stating that the judge does not have the authority to divorce like the Prophet. Khul system was opposed saying that it will lead to destruction of the Egyptian family structure since claiming divorce for women was easier now, and this would prompt women to file for a divorce instead of reconciliation within the marriage.

### **MUSLIM WOMEN'S RIGHT TO DIVORCE IN INDIA**

In India, divorce of Muslims can be judicial as well as extra judicial. Women in India can divorce under three categories

- talaq-i-tafweez
- lian
- Dissolution of Muslim Marriages Act 1939

Talaq-i-tafweez and lian are extra judicial ways of getting divorces in India.

Talaq-i-tafweez is prevalent within the two Shia and Sunni sects of Muslims whereby the husband delegates his power of pronouncing divorce

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<sup>10</sup> Article 11(II) of the Personal Status Law of 1985.

to us wife. This delegated form of divorce has become a tool of empowerment for the muslim women to break away from their marriages without the interference of any court. Prenuptial agreements generally deal with such arrangements of delegated divorce.

The second form of divorce known as Lian was seen in the Nurjahan v Kazim Ali case of 1976. If the husband files any case of adultery against his wife which proves to be false, then this is perceived as assassinating the character of the wife and thus the wife has the right to claim divorce under Lian.

The third and the most prominent judicial way to obtain divorce is through the Dissolution of Muslim Marriages Act 1939. The grounds of such divorces would be when:

- The husband goes missing for atleast four years
- Failure of provision of maintenance by the husband for a period of two years
- The husband is sentenced to imprisonment for seven years or more
- Failure of the husband to perform marital obligations for a period of three years. Grounds of divorce could be due to serious physical or mental illness, or incurable diseases. The court is bound to give time to the husband to improve the illness. In GulMohd. Khan vsHasina case, the wife filed a suit on the grounds of impotency, the court gave the husband time to prove his potency when he seeked the court an order for proving his potency. Other reason of divorce could include if she had been given in marriage by her guardian before she attained the age of fifteen.
- Cruel treatment by the husband to the wife by infringing physical harm through assaults, leads an infamous life,forces the wife to lead an immoral life, disposes her property off or prohibits her from performing her legal rights, forbids her religious practice, unequally treats his wives.

The Allahabad High Court observed that cruelty inflicted upon muslim women would be under universal standards causing bodily or mental harm of the wife and need not be sufficed as 'Muslim crulety' or 'Hindu cruelty'.



- Divorces can take place under irretrievable breakdown of marriages: when the husband fails to pay maintenance and when there no way of reconciliation between the spouses. This came into force after the NeorbibivsPirBux case of 1949.

### **CONCLUSION**

After looking at the Muslim laws regarding right to divorce of women of both Egypt and India, it was found that judicial rulings have made it easier for muslim women in India to obtain divorce. The Supreme Court of India deemed Talaq-i-bidda or triple talaq as unconstitutional and made it punishable with effect from 1<sup>st</sup> August 2019. Egyptian discourse has seen a liberal trend in the later years and women have gained several rights yet the cultural practices in Egypt continue to unequally treat women. The rights of women are not put into practice. Islamic religion is misunderstood and unjustifiably blamed for being unequal towards men and women. Muslim women in India are one of the most under privileged sections of the society. More and more institutional reforms are needed to uplift them and bring equity in society.