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The jurisprudence of Islamic Personal law by means of upholding Morality

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Islamic Law has always been a way forward in teaching ethics and values through its own rules and regulations. They have always worked in the path of religion, set forward their goals, and accordingly tried to follow them in the best possible way. It has various Personal Laws which has time and again realized the sanctity of a thing. When this same thing is combined with Morality, one of the best outcomes is revealed. We have Laws that tell us about the rules and regulations but we here have tried to relate it to morality in order to know the humanistic principles and their subsequent reactions. Morality is a concept that brings ethics, virtues, values, principles, righteousness, etc and we have sufficient personal laws in hand to prove their sanctity. Every personal law has its objective to achieve the means of justice and Islamic Personal Law serves as a perfect example to it. Learning humanity is not enough but realizing its consciousness is important which is delicately researched in this article. Islamic personal law will serve a perfect vigor to this research article.

Keywords: *morality, ethics, justice, consciousness, values, principles.*

INTRODUCTION

Laws are rules set forth in a system and enforced by governmental or state institutions to regulate activities.¹ It takes the form of statutes, legislation, decrees, precedents, etc, where principles are established under an authority. So, practices are set, rules are made applicable and then enforced under an authority. Law tells about conducts about how they must be uniformly enforced in the state and its people. Its basic objective is to regulate activities in an ideal way to permit or restrict them. The concept of Law and Order talks of stricter enforcement by a sovereign authority for the binding and proper functioning of the society as a whole.²

WHAT IS MORALITY?

Morality refers to the standards laid to determine how a society should live and what are 'right' and 'wrong' and which are acceptable. Through actions and decisions, a particular construct is established. In morality, a set of standards and principles are derived from a code of conduct and a particular individual is instructed the same, which makes it universal to all.³ These are forwarded to society and guided in the same way. Morality instructs the behavior of people. Mere instructing a code is not enough, the society and its people have to meet the certain condition and must be understood in the same sense by all.⁴

RELATION BETWEEN LAW AND MORALITY

Law and morality are well-connected in the form of ethics and values as it shapes the foundation of law in a positive way.⁵ For example, in Criminal Law, the court provides us with a legal proclamation and this is somewhat related to morality in the form of Justice. This is well-connected as it establishes the legitimacy of law. This connection between law and morality is derived from the normative approach of law itself. The law has an authority that

¹ Geoffrey Robertson, *Crimes Against Humanity* (Penguin Books Ltd 2012) 90

² *Ibid*

³ Bernard Gert and Joshua Gert, 'The Definition of Morality', *Stanford Encyclopedia of Philosophy* (Fall edn, 2020) <<https://plato.stanford.edu/archives/fall2020/entries/morality-definition/>> accessed 02 December 2021

⁴ *Ibid*

⁵ *Ibid*

asserts a rationale and looks upon the rules and enforced through the values and accordingly, normative structures are built and are stated as the symbiotic relationship between law and morality. Law basically sets standards on which a particular stint must be governed and these standards are built upon the principles of morality because however strict or lenient the retribution may be, it's still kept in light of human values of morality. Law is seen from a utilitarian perspective where it cares for the greatest good and this is morality.

ISLAMIC PERSONAL LAW

Personal law refers to a set of laws that are religion-based and their consequent faith and culture. If we come to India then it is bifurcated between different castes taking customs into account. Islamic Personal Law or Muslim Personal Law is governed by Muslim Personal Law (Shariat) Application Act, 1937.⁶ It commands over marriage, divorce, adoption, inheritance, maintenance, etc of the Islamic community. Section 4 of the Act states State Government is authorized to make rules in effect to the law. This law basically came to build a relationship between the community and society of the Islamic world. So basically it sets socio-cultural standards in relation to religious faith. Islamic Personal law has many sources starting from the holy Quran, the teachings of Prophet Mohammed, Ijma, Kiya's to different digests and commentaries. This Personal Law protects the legal relationships in relation to personal disputes. It has its interpretations from Quran and Hadith.⁷

⁶ Arijia Rooychowdhary, 'Shariat and Muslim Personal Law: All your questions answered' (*The Indian Express*, 4 May 2016) <<https://indianexpress.com/article/research/shariat-muslim-personal-law-sharia-history-shayara-bano-shah-bano-triple-talaq-personal-laws-religious-laws-uniform-civil-code-2784081/>> accessed 02 December 2021

⁷ *Ibid*

OBJECTIVES

- It establishes a School of Thought for the Indian Muslims.
- It establishes a common goal for coordination and fraternity among the sects in society.
- It acknowledges the teachings of religious law from the Quran called Shariah.
- It prepares a holistic framework regarding how a particular religious law needs to be observed and further implemented by Muslims.
- It makes the application goal-oriented and tries to ensure justice.⁸

RELATION BETWEEN ISLAMIC PERSONAL LAW AND MORALITY

Islamic Personal Law encloses the virtuous and moral standards as stated in Muslim religious teachings. Whatever is included under this law has been mentioned in the religious writings of Islam. Be it Quran or Hadith, the personal laws finds their place, instruct beyond justice to become a morally righteous person. It basically preaches its value through religion. Faith is often considered deficient without having moral consciousness.⁹ Through these laws, they want to ensure justice and preach the sayings of their God and this is what morality encompasses. When we talk of religion then it comes from God and he through its theology sets out the path of morality.¹⁰ All that is needed is to satisfy God. The legal responsibilities have been mentioned in Quran which is in itself built upon the moral objectives. Islamic Personal Law wants the welfare of people by administering justice and is presumed to translate to the people in the form of virtuousness so that it can be experienced by every individual.

THREE ISLAMIC PERSONAL LAWS

Divorce: Talaq is constructed on Quran and according to the Islamic God, marriage is a divine relationship between a husband and wife but there are certain conflicts within them that can't be avoided, for which they go for Talaq or divorce.

⁸ *Ibid*

⁹ Muhammad Al-Ghazali, *Muslim Character: An American-English Translation of Muhammad Al-Ghazali's Khuluq Al-Muslim* (Mufti A H Usmani tr, 2nd edn, Kazi Publications 2004)

¹⁰ *Ibid*

Talaq-e-Ahsan: It is a form of negation of marriage where the word ‘Talaq’ is pronounced by the husband only once. But this announcement of Talaq has to be met with certain conditions:

- When the husband pronounces, it has to be within the Tuhr of his wife. Tuhr is the interval between the two menstrual cycles of his wife and during this Tuhr period, consummation is possible. But if this Tuhr stage is not there then the Talaq can be pronounced by him any time.
- When it is pronounced by the husband then the period of Iddat is observed by the wife which is equivalent to three menstrual cycles. If the wife in the case is pregnant during the time the husband pronounces Talaq then Iddat remains till the child is delivered. If the Talaq is to be retracted then it shouldn't be during the Iddat phase.
- If after the Talaq, the husband cohabits with his wife then it is implied that he wants to restore his relationship with his wife.
- At the same time during the Iddat phase, the husband didn't reverse the Talaq, now it becomes irrevocable.¹¹

It is told that Morality distinguishes between Right and Wrong and works upon the set principles. If we take the above form of divorce into account then it is correct that a wife's menstrual cycle is taken into consideration, here one of the basic elements of morality i.e. Harmony is followed by taking into account the whole body and health.¹² It is considered among the most proper form of divorce as it gives a chance to the couple to retain the purity of their marriage or relationship by allowing them to cohabit. But at the same time, the liberty is given to the husband to pronounce Talaq whether it is once or several times is wrong. And that too it is upon the discretion of the husband whether he will cohabit with his wife or not is also wrong. The ethics of morality is not at all followed. The sanctity of a relationship is seen to be broken. It doesn't stand up to the test of Morality completely but definitely can be seen as a step closer to Morality.

¹¹ *Ibid*

¹² *Ibid*

Talaq Hasan: Unlike the other form of divorce, here Talaq has to be pronounced by the husband once but in three rounds. The rules and conditions in every round are different

- Firstly the husband singly pronounces Talaq to his wife and this is announced during the interval of Tuhr i.e. the cycle between two menstruations.
- Secondly, during the subsequent Tuhr another time i.e. for the second time Talaq is pronounced by the husband to the wife.¹³
- But now at this time, the scope of Morality can be seen as after the above two pronouncements, the husband can go back to the marriage and restore it by cohabiting which is implied or else can be done expressly, and here Talaq becomes revocable.
- But if the above things don't happen then the third or last pronouncement of Talaq is announced by the husband to the wife and after this, he can't go back to the first position and Talaq now becomes irrevocable and this is to be pronounced during the third period of purity in a Tuhr. As soon as this is made, the divorce becomes irrevocable and marriage terminates. But after this, the wife has to complete the Iddat phase.¹⁴

Considering Morality, in this type of divorce, morality is somewhat in the middle as at some point of time through its revocability, the pleasure of a relationship is taken into contemplation and at the other, the husband is given the authority to control the marriage and the wife without any choice has to subdue and somewhat loses her respect and the wall of Morality couldn't stand up well.¹⁵ There should be reciprocity in the relationship between a husband and a wife because it is the foundation stone of moral character. At some point there is purity but at the other time this element, purity of fairness is converted to authoritativeness. Care and harm are also considered in the domain of morality and here harm is caused to the female community and the care is compromised. Here 'right' and 'wrong' in a practice are totally

¹³ *Ibid*

¹⁴ Faiz Badruddin Tyabji, *Muslim Law : the personal law of Muslims in India and Pakistan* (4th edn, N M Tripathi Private Limited 1968) 146

¹⁵ *Ibid*

ignored. Morality goes step-by-step in an activity but here mid-way it breaks. These clauses made this form of divorce a ‘proper form of talaq’.¹⁶

Talaq-e-biddat or Triple Talaq: It is a form of divorce where instant talaq is uttered three times in succession as ‘talaq, talaq, talaq’, and divorce is completed from that time itself and thus is irrevocable. Though it has not been mentioned in the Islamic texts like Quran but was established when Prophet Muhammad died and Muslims tried to use it in order to escape the Muslim Law’s strictness. Here husband as soon as utters the three words gets independence from the marital relationship. This very practice was legalized through The Muslim Personal Law (Shariat) Application Act of 1937.¹⁷ The wife who was divorced could remarry her first husband only after she married another man, consummate, and divorce, this practice is most commonly called Nikah Halala.¹⁸

But this very form of divorce was replaced by The Muslim Women (Protection of Rights on Marriage) Act, 2019¹⁹ which didn’t abolish triple talaq but it was made illegal and it was not only in spoken form but also in written or digital form. If the husband violates it then he will be jailed for three years.²⁰ This law also gives the woman or wife the allowance to ask for maintenance for her dependent children.²¹ This judgment was delivered by quorum from five different communities.²² Muslim women’s lives and their according statuses are intrinsically assigned to the features of the Islamic tradition. Their social status is judged upon this very criterion only. A relationship between husband and wife is very delicate as it is built on ethics and this is what constitutes morality. Here the husband is given the right to shape both his and his wife’s life is utterly immoral.²³ Calling out a relationship just by uttering three words is abnormal in itself. And that to the wife’s say not taken into consideration made the whole foundation upon which morality is built, very weak. Morality is not limited to bodily morality

¹⁶ *Ibid*

¹⁷ Muslim Personal Law (Shariat) Application Act 1937

¹⁸ *Ibid*

¹⁹ Muslim Women (Protection of Rights on Marriage) Act 2019

²⁰ *Ibid*

²¹ ‘President Ram Nath Kovind gives assent to triple talaq bill’ (*The Hindu*, 8 June 2020) <[Jurisprudence of islamic peronal law by means of upholding morality.docx](#)> accessed 02 December 2021

²² *Ibid*

²³ *Ibid*

rather also to religious and constitutional morality. Through this practice of Triple Talaq, it is not at all giving justice to the religious part which in itself is an integral part of the constitution and thus breaks the spirit of both the concepts. If the doctrine in itself is relied upon then how can even a concept of morality be thought upon? This is the very concept which actually defines how a human community should be regulated and the inter-subjectivity between them. Morality can be decided upon the conscience of an individual and if this very conscience of a wife is not respected then morality cannot be established. So it does not uphold the principles of morality.²⁴

MAINTENANCE

To Wife: It is known as Nafqah. This maintenance was not based on conditions rather is absolute i.e. it's not taken into consideration whether she could maintain herself or not that is the financial condition of the women is not taken into account. This maintenance is done by the husband to the wife and this could be only during the period of Iddat and not after that, under Section 125 of the CrPC,²⁵ 1973.²⁶ The rights through this concept were protected²⁷ under the Muslim Women (Protection of Rights on Divorce) Act, 1986 and here the husband maintains the divorced wife.²⁸ The struggle faced by the women for maintenance²⁹ can be very well seen in Ahmed Khan v Shah Bano Begum.³⁰ These are secular laws and based upon Islamic religion and have been stated in the Quran. If the woman fails to maintain herself when the Iddat period ends then her relatives could be told to pay the same and that should be fair and reasonable and if this is not possible then the State Waqf Board will entitle the same amount to her. The quantum of maintenance is not known and it differs from case to case. But if the husband does the immoral practice of marrying another woman during the existence of

²⁴ *Ibid*

²⁵ Code of Criminal Procedure 1973, s 125

²⁶ Shagufta Omar, 'Dissolution of Marriage: Practices, Laws and Islamic Teachings' [2007] Pluto Journals 91

²⁷ *Ibid*

²⁸ Preamble Muslim Women (Protection of Rights on Divorce) Act 1986

²⁹ *Ibid*

³⁰ K K Sangari, 'Politics of the Possible: Essays on Gender, History, Narratives, Colonial Press' [2002] Indian Journal of Gender Studies 405-407

the first wife and also ill-treats his first wife then the first wife can claim maintenance against the husband.

To Children: Under Islamic Law, the father is qualified to maintain his children but it has to be met with certain conditions i.e. they will be maintained till the son attains majority and the daughter gets married. But other than that, if the children are disabled or lunatic then the father has to maintain him/her, and also if the daughter's husband cannot maintain her. He should also maintain the son unless he gets a job. The wife too here can't take the advantage of the law by misusing it to get maintenance in the name of not having the desire to stay with her husband.³¹

Establishing the concept of Morality here is very much important. It can be seen in many instances. Morality can be seen when the husband is being faithful towards the wife in order to give her the maintenance. The husband or father obeyed the religious laws of Islam under Quran and filled the gap of maintenance to his wife or children respectively. The principle of fairness is followed. The husband also took up the moral duty to take care of his wife or children, as the case may be, according to the circumstances of the case. The children's rights concern is also being addressed. The faithfulness, obeying of laws, and moral duty are the building principles of morality and have perfectly established the 'rights' in a system of law or society in general. The struggle of women is also pointed out and their right to money, property, or maintenance is also a good example of Morality.³²

It also stated Morality at the point where it told the wives not to take an unfair advantage against their husbands and further proved the point of morality by stating the 'wrongs' in principles. The balancing of these 'rights' and 'wrongs' is the principle of Morality. Morality is built on ethical standards rather than on technical grounds. So this very personal law perfectly upholds the principles of morality.

³¹ *Ibid*

³² *Ibid*

GIFT DEEDS

It is called Hibanama and if this gift is given under a will then is called Wasiyat as is mentioned in the Mohammedan Law. The full property can be given during a person's lifetime but at the same time only one-third of property can be given under a will and this property would only be those which are acquired through ownership. But it has to be met with conditions. There should be declaration and acceptance of the gift by the donor and donee respectively and after that, there should be the transfer of possession and subsequent transfer. This transfer of property could be movable or immovable and can be oral or written. In the case of *Ilahi Samsuddin v Jaitunbi Maqbul*,³³ it held the oral transfer of property valid. If there are multiple donees then it has to be separated equally. If the donee is a minor or is of unsound mind then it will be accepted by the guardians.³⁴ The transfer and acquiring of property should be through free consent and Bonafide intention. The Hiba is divided into two types that are, Hiba-il-iwaz where consideration is paid and quantum may differ and the other is Hiba-ba-Shart-ul-Iwaz where consideration is not paid.³⁵

Morality is measured according to intention and subsequent action. The practice of Gift deeds follows this. A code of conduct is followed here. A standard that is uniform to all in the Islamic religion is followed here. Ethics here is the golden rule. Morality can be approached in two ways i.e. with values and without values. If without values, then it will work on the principle of 'right' and 'wrong' and this topic under Islamic Personal Law gives justice to both of them.³⁶ If there are multiple donees present, then it maintains the principle of fairness and doesn't give an opportunity to anyone to take advantage of others.³⁷ This very thing can also be seen when a minor or a person of unsound mind's right to a Gift deed. One of the highlights of this deed

³³ *Ilahi Samsuddin v Jaitunbi Maqbul* [1994] 5 SCC 476 (SC)

³⁴ *Ibid*

³⁵ *Ibid*

³⁶ Bernard Gert and Joshua Gert, 'The Principle of Beneficence in Applied Ethics', *Stanford Encyclopedia of Philosophy* (Spring edn, 2019) <[Jurisprudence of islamic peronal law by means of upholding morality.docx](#)> accessed 02 December 2021

³⁷ *Ibid*

is it established morality with the reasoning that is reasonable, practical, and rational.³⁸ The loyalty is sufficiently proved. So it definitely upholds the principles of Morality.³⁹

CONCLUSION

Ethics and values since time immemorial considered pillars of morality. And this brings legitimacy to law. Law brings in itself rationale and is taken forward through normative structures and brings symbiosis. And this is the utilitarian view of morality. Islamic Personal Law brings in itself faith and culture. When the topic of marriage, divorce, maintenance, etc comes then it brings the rule of law and subsequently brings socio-cultural aspects and therefore builds a relationship between individual and society. This whole aspect has been brought out from Quran and Hadith and it also brings legal relationships. Islamic teaching brings morals and virtues and therefore gives instructions beyond justice to become a morally righteous person. Here the value is enriched in a way that brings the moral consciousness. The teachings of God are preached and morality is ensured. The Quran is not restricted to faith rather also sets legal obligations. Here legalities are ensured through virtuousness. From Divorce, we got to know the principle of 'right' and 'wrong' in morality. And this context has been brought in the respect of the woman's body and why harmony should be maintained. The purity of a relationship and the liberty of a man have been represented in the light of morality. The ethics are at times mismatched.⁴⁰ Divorce lays the foundation stone of morality because it covers the transition from not upholding morality to somehow in between that and then breaking midway. The purity changes to authoritativeness here. This morality brings out the social status of an individual. Giving justice to religion and respecting the Constitution is the main factor governing law and morality. Respect, fairness, faithfulness, and not taking advantage are addressed through maintenance and gift deeds. The intention and subsequent action with values bring out the right mindset of individual morality.

³⁸ Edward Uzoma, 'Morality within the limits of practical reason: a critique of Kant's concept of moral virtue' (2020) 36 International Journal of Ethics and Systems 205

³⁹ *Ibid*

⁴⁰ *Ibid*