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## A Secular Legal Perspective on the Ongoing Prejudice against Muslim Women in Marriage and Divorce

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*Marriages and divorces in Muslim society still pose challenges to this day. There are also some trends, where the focus on marriage and divorce is mainly secular and considers religion only intermittently. This paper therefore considers the examples of Muslim marriage and divorce laws and highlights the restraining forces arising from the umbrella of religion and forces that call for treating every person in every society equally irrespective of gender. Most of these societies remain patriarchal which means they still abuse women. Major family law disparities exist between Muslim women and women of other religions in most of these societies. Such differences involve the right to seek a divorce, how marital property is divided after the dissolution of a marriage, and the right to seek custody of children born during the marriage. Most of the time, the existence of these inequalities is largely because of the codification of the classical jurisprudence of Islam into state law making them laws of the land and creating a dual system of laws that is often at odds with the declared equality before the law and objective international law. The Indian legislation regarding the marriage and divorce of Muslim women has a historical point of conflict between the secular laws of the state and the religion-oriented personal laws. Important changes include a judgment of the Supreme Court of India in *Shayara Bano v Union of India*<sup>1</sup>, which forbade the practice of triple talaq in 2017; the act that followed was in reaction to this ruling, and it banned triple talaq into the law in 2019. These changes within the policy of secularism in India are of great significance, but traditions or their practice still meet opposition from historical conservative patriarchal structures and cultural practices. The Uniform Civil Code*

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<sup>1</sup> *Shayara Bano v Union of India* (2017) 9 SCC 1

*controversy is another case in which someone has to weigh one's claim to religious autonomy against the demand for gender equality. The situation in India illustrates the obstacles posed to the reform of personal laws in a multicultural setting that cherishes religious liberties but insists on equal rights for Muslim women.*

**Keywords:** *muslim women's rights, marriage, divorce, legal principles, gender equality.*

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## INTRODUCTION

In the context of India matrimonial and separation rights for women in the scope of religion, especially Muslim rights, present to us some of the highly sensitive and legal complexities. This aspect is unfortunately at the crossroads of religious tradition, secularism and human rights which makes it even more difficult for the Indian lawgivers, the judiciary and the society at large. The legal structures and practices of India today still contain bias against Muslim women, especially regarding marriage and divorce.

In India, secularism presents a problematic situation for Muslim women. On domestic affairs, these women are stuck between religious laws (which might not offer them adequate support) and the concept of a common civil code (opposed by some). It is very difficult to find a solution that can safeguard both their religious freedom and equality. This inescapably creates a legal environment such that the conventional notions of Islamic law the equality provisions of the constitution and the universal human rights instruments clash. This division of society has created a vibrant discourse that has been both legal and social in the country for a long time.<sup>2</sup>

It is distressing that in India, matrimonial and custodial disputes of Muslim women are still governed by policies that are evident in discriminatory practices, solicits the question of where the thin line between religious practice and gender equality falls, which and how the Indian justice system in its values and mores that have religion deeply embedded in the society that promises equality and is a constitutional right. Such tensions have also found expression in several legal issues namely:

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<sup>2</sup> Flavia Agnes, *Family Law: Volume 1: Family Laws and Constitutional Claims* (OUP India 2011)

- Access to divorce was skewed in favour of men, due to the legalization of practices like the triple talaq.
- Disproportional allocation of wealth that was acquired during the marriage at the time of marriage dissolution, and has at many times, placed women in a disadvantageous economic standing.
- The issue of child custody is also another problem for women, which, however, is difficult to control within the rules of Islamic law.
- Polygamy was also permitted, and indiscriminate towards the issues of women's rights regarding marriage and guarantees of their welfare.
- The role of making decisions about marriage, which in some cases compromises the freedom of women.

Over the last decade, however, efforts focused on changes to such legislation have started to gain traction in India, primarily spearheaded by various Muslim women's rights groups, feminist scholars, Human rights advocates and progressive religious leaders. The reform movements seek to validate that the elevation of women to the same status as men are permissible and do not offend Islamic laws, unlike the patriarchal misogynistic interpretations that have been used against Muslim women for centuries. The most recent developments in the process of this reform include a recent judgment delivered by the Indian Supreme Court abolishing triple talaq and the subsequent enactment of the Muslim Women (Protection of Rights on Marriage) Act, 2019.<sup>3</sup>

## HISTORICAL BACKGROUND

**Evolution of Personal Laws in India:** India has a two-tiered legal system: a set of secular laws applicable to individuals irrespective of their religion and a set of personal laws governed by different religions in the country. It was within this context of colonial rule that there was a policy of legal pluralism where the relations of every religious community were allowed to keep

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<sup>3</sup> Muslim Women (Protection of Rights on Marriage) Act 2019

their customs and laws. These, of course, had to take the shape of personal laws for Hindu, Muslim, Christian, and other communities.

An important landmark in this process among the Muslims is the Shariat Act, which was enacted in 1937 and aimed at reinforcing the Islamic tenets of marriage, divorce and inheritance into confines within the law<sup>4</sup>. Once more, such provisions for codification differed in their meanings and interpretations and, worse of all, were more restrictive of women's rights than the Law of Succession. It has always been the case historically that such a patriarchal interpretation filtered through such documents has had the effect of limiting the capacity of women to be self-determined within conjoined relationships.

**The Shah Bano Case<sup>5</sup>:** The 1985 judgment on the Shah Bano case<sup>6</sup> was a milestone in the unresolved discussion on the rights of Muslim women. Shah Bano, a divorced Muslim woman, claimed for maintenance to her ex-husband under Section 125 of the Criminal Procedure Code.<sup>7</sup> The Supreme Court upheld her appeal and allowed divorcee women of all religions to seek maintenance from their former husbands. This resulted in animated debate and opposition from orthodox Muslims. To calm the rising and persistent storm, the Indian government introduced the Muslim Women (Protection of Rights on Divorce) Act of 1986, which sought to limit the scope of maintenance provisions under civil law. It was argued that the Act was regressive as it substituted a woman's right to equality with 'personal laws' that ultimately tolerated injustice to women.<sup>8</sup>

## LEGAL FRAMEWORK GOVERNING MARRIAGE AND DIVORCE

In India, both the laws governing marriage as well as those governing its dissolution differ markedly from one community to another, containing elements of both personal laws and state laws. Take for example the case of the Muslim community; the Muslim Women's Protection of Rights on Divorce Act 1986<sup>9</sup> is applicable in marriage (Nikah) and even in dissolution of

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<sup>4</sup> The Muslim Personal Law (Shariat) Application Act 1937

<sup>5</sup> *Mohd. Ahmed Khan v Shah Bano Begum and Ors* (1985) 3 SCR 844

<sup>6</sup> *Ibid*

<sup>7</sup> The Code of Criminal Procedure 1973, s 125

<sup>8</sup> The Muslim Women (Protection of Rights on Divorce) Act 1986

<sup>9</sup> Muslim Women (Protection of Rights on Divorce) Act 1986

marriage (Talaq) which a husband can pronounce by merely repeating talaq three times. The Dissolution of Muslim Marriages Act of 1939<sup>10</sup> also listed certain reasons why a Muslim woman could obtain a divorce. Such grounds include the husband being missing for four consecutive years that he has retreated from marital duties, or even if he has not, he has failed to take care of his wife. All in all, while personal laws are made for particular communities, secular too provide the common ground that helps achieve justice and equality in matters concerning marriage.

**Muslim Personal Law (Shariat) Application Act, 1937:**<sup>11</sup> This act governs personal matters for Muslims, including marriage and divorce. Key features include:

- **Marriage (Nikah):** Governed by Islamic law, which requires mutual consent between parties.
- **Divorce (Talaq):** A husband may initiate divorce by pronouncing talaq three times. However, this practice has been criticized for being discriminatory<sup>12</sup>.

**Dissolution of Muslim Marriages Act, 1939**<sup>13</sup>: This act provides grounds for Muslim women to seek divorce. Grounds include:

- The husband's whereabouts have been unknown for four years.
- Failure to provide maintenance for two years.
- Imprisonment for seven years or more.

Recent developments have included the introduction of the Muslim Women (Protection of Rights on Marriage) Act, 2019<sup>14</sup>, which criminalizes the practice of triple talaq and mandates maintenance rights for divorced women.

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<sup>10</sup> The Dissolution of Muslim Marriages Act 1939

<sup>11</sup> The Muslim Personal Law (Shariat) Application Act 1937

<sup>12</sup> *Ibid*

<sup>13</sup> The Dissolution of Muslim Marriages Act 1939

<sup>14</sup> Muslim Women (Protection of Rights on Marriage) Act 2019

## RECENT JUDICIAL RULINGS

Judges and courts have been active combatants against the social problems of gender discrimination because such suffocating ideals are prominent within even personal laws. Recent landmark judgments have propelled women's rights forward;

**Triple Talaq Judgement:** Perhaps the most significant judicial intervention was the Supreme Court judgment on triple talaq when the court declared that this practice was unconstitutional. The judgment held that triple talaq violated the fundamental right guaranteed under Articles 14 and 21 of the Constitution,<sup>15</sup> which deals with equality before law and the right to life, respectively. It particularly underscored that personal laws cannot perpetuate discrimination between genders-that marked a significant step towards assuring that Muslim women were placed within the protection of secular law.

**Shayara Bano Case 2017:**<sup>16</sup> This judgment, consequent upon triple talaq, also included another very important case, the Shayara Bano case: A writ was filed against customs like polygamy and nikah halala, which are part and parcel of Muslim personal law related to women. The deliberations before the Supreme Court highlight the angle according, to which these movements, discourses, and writings link and weave the necessity for reforming personal laws with constitutional values, thus elucidating the paramount criteria for ensuring personal laws resonate with the ethos of equality and justice as enshrined in the Constitution. However, the judgments did not rule on these customs, but perhaps they pointed towards future dialogues on women's rights in the field of Shariah as well.<sup>17</sup>

On August 22, 2017, the Supreme Court of India, in the case of Shayara Bano v Union of India, held by a majority of 3:2 that the practice of instant triple talaq (talaq-e-biddah) was unconstitutional. The ruling stressed that, in effect, the practice violated rights conferred by Article. 14 (equality before law), Article. 15 (non-discrimination), and Article. 21 (right to life with dignity) of the Indian Constitution. The judgment invoked the fact that numerous Muslim

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<sup>15</sup> The Constitution of India 1950

<sup>16</sup> *Shayara Bano v Union of India* (2017) 9 SCC 1

<sup>17</sup> *Ibid*

countries had already abolished the practice on the basis that it was not prescribed by the Quran and had neither been encouraged nor followed by the Prophet. Shayara Bano challenged the constitutional validity of triple talaq, polygamy, and nikah halala in a writ petition because they violated her fundamental rights. The Union of India along with several women's rights organizations supported Bano's petition, whereas the All India Muslim Personal Law Board (AIMPLB) contested it, stating that Muslim personal law is not open to constitutional scrutiny in courts. The Supreme Court thus declared triple talaq unconstitutional; indeed, it is a watershed in the history of women's rights and personal law in India.

**Section 125 CrPC Maintenance Rights:**<sup>18</sup> In one of its most landmark rulings concerning maintenance rights, the Supreme Court upheld the rights of divorced Muslim women, including those divorced by triple talaq, to claim maintenance under Section 125 of the Criminal Procedure Code (CrPC)<sup>19</sup>, irrespective of personal law. It clarified that Section 125<sup>20</sup> applies universally to all women and does not conflict with the provisions under the Muslim Women (Protection of Rights on Divorce) Act, 1986.<sup>21</sup> The court mentioned it as a supplementation instead of a restriction of rights.<sup>22</sup>

In the case of *Mohd Abdul Samad vs State of Telangana*,<sup>23</sup> The Supreme Court dismissed the petition challenging the rights to file a claim by a Muslim divorced woman under Section 125 CrPC.<sup>24</sup> The petitioner argued that the provisions within personal law disallow such claims, yet the court reasserted that Section 125<sup>25</sup> will continue holding sway and put emphasis on equal rights through the law for women.<sup>26</sup>

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<sup>18</sup> The Code of Criminal Procedure 1973

<sup>19</sup> *Ibid*

<sup>20</sup> *Ibid*

<sup>21</sup> Muslim Women (Protection of Rights on Divorce) Act 1986

<sup>22</sup> Ashish Tripathi, 'Divorced Muslim woman entitled to seek maintenance under Sec 125 CrPC: Supreme Court' *Decan Herald* (10 July 2024) <<https://www.deccanherald.com/india/divorced-muslim-woman-entitled-to-seek-maintenance-under-sec-125-crpc-supreme-court-3099690>> accessed 12 January 2025

<sup>23</sup> *Mohd Abdul Samad v The State of Telangana* (2024) INSC 506

<sup>24</sup> The Code of Criminal Procedure 1973

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*

## SOCIAL IMPLICATIONS TOWARDS MARRIAGE AND DIVORCE

Traditionally, marriage signified a sacred institution deeply embedded in socio-cultural and religious customs in India. This conditioned divorce as a taboo subject associated with social stigma and familial disgrace. Societal condemnation had historically implied that divorced women were subject to severe moralistic judgments, rebukes, and ostracism, particularly given prevailing customs prescribing homemaking and caregiving as the womanly ideal. Societal stigma was deeper in conservative communities for a failed marriage, which in turn branded the woman with ineptness.<sup>27</sup>

However, attitudes toward marriage and divorce have begun to change with globalization, urbanization, and educational access being some of the factors empowering women's rights and their quest for fulfilment beyond the frontiers of unhappy married life. The younger generation is promoting the idea based on finding personal happiness over the older issues of duty and obligation, and the resultant rise in the rate of divorce.<sup>28</sup>

Media representations assume critical and essential roles in the context of social percepts. Indian television shows and films depict divorce as a lived experience in marital wrangling, set against traditional tales memorializing the value of living through miserable marriages. Such instances endear themselves to the audience and gradually bring divorce into the normal.

Positive as these moderate signs of acceptance are, stigma still clearly survives, most tragically with women victims. Divorced women are judged severely by society, and this society pities them when they make attempts to revive their lives<sup>29</sup>. Women are slowly beginning to have access to networks and support groups that offer tools from which it becomes less lonely and more supportive during a hard time.

With the developing moral horizon steadily getting attuned to the recognition of individual well-being and mental health, nowadays, it is gradually believed that it is better to terminate

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<sup>27</sup> *Ibid*

<sup>28</sup> *Mohd Abdul Samad v The State of Telangana* (2024) INSC 506

<sup>29</sup> Govind, 'The Rising Tide of Divorce in India: An In-Depth Analysis 2024' (*Fastrack Legal Solutions*, 24 June 2024) <<https://fastracklegalsolutions.com/divorce-in-india-best-divorce-lawyer/#:~:text=Conclusion,their%20happiness%20and%20well%2Dbeing.>> accessed 12 January 2025



an unhappy marriage than to bear societal scrutiny. Encouragement for endless dialogues to streamline relationships is the ultimate way towards derailing the stigma against the backdrop of divorced persons.

## THE ROLE OF SECULAR LAW

**Equality Before the Law:** Article 14 of the Constitution of India<sup>30</sup> assures the principle of equality before the law, which states, “The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India”. The principles laid down in this are fundamental to establishing a legal structure that prevents discrimination based on religion, race, caste, sex, or place of birth, establishing equal stand before the law.<sup>31</sup>

Equality before the law contains two different but related ideas: equality before the law and equal protection of the laws. The former means that every man and woman have to answer to the same laws and the facilities of the same legal process, however high or low he or she might be. The other ensures that persons in like circumstances should receive equal treatment and legal protection from the law. It reinforces the rule of law which forms the basis of a democracy.

Elucidation of these principles has been provided by court decisions. For instance, the Supreme Court of India in *Indira Nehru Gandhi v Raj Narain* (1975)<sup>32</sup> ruled that equality before the law is a basic feature of the Constitution that cannot be abridged even through constitutional amendments. The *Daniel Latifi v Union of India*<sup>33</sup> case reiterated that provisions made under secular law for maintenance to divorced Muslim women apply equally, therefore bringing in parity between communities.<sup>34</sup>

Despite these constitutional guarantees, the idea of absolute equality is still a far-fetched dream due to deeply embedded societal norms and discrimination. Therefore, continued efforts are

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<sup>30</sup> Constitution of India 1950, art 14

<sup>31</sup> *Ibid*

<sup>32</sup> *Indira Nehru Gandhi v Shri Raj Narain & Anr* (1976) 2 SCR 347

<sup>33</sup> *Daniel Latifi v Union of India* (2007) 3 SCC (Cri) 266

<sup>34</sup> Constitution of India 1950, art 14

needed to preserve these principles and ensure that equal access to justice is available to all citizens, without bias and discrimination.

**Bridging Gaps Between Personal and Secular Laws:** Connecting the gaps between personal and secular laws in India is central to providing gender justice and equality, particularly to women. Personal laws dealing with marriage, divorce, and inheritance for different religious communities often contain discriminatory or patriarchal provisions. By contrast, secular laws attempt to give equal rights and protection to all humans, regardless of which religion they subscribe to.

Judicial activism has come to be a great dynamic force in averting these disparities. The Indian judiciary is constantly trying to mould personal laws so that they abide by the principles of the Constitution. Landmark cases, such as *Shayara Bano v Union of India*<sup>22</sup>, have emerged which have commonly attacked and brought to the forefront of debate practices that are considered discriminatory, such as triple talaq, asserting that personal laws shall have no way to dilute the fundamental rights guaranteed under the Constitution.

The courts have further explained that the provisions under secular laws, for instance, Section 125 of the Criminal Procedure Code<sup>35</sup>, apply profusely in favour of women governed by personal laws. This favours legal parity and serves as the basis for extending legislative reforms for the unification of personal law with secular statutes.<sup>36</sup>

In addition, the gender-inclusive language, rather than generic language, within the law will build a gender-neutral court environment. For instance, courts can adopt appropriate guidelines and practices that enhance women's access to justice while ensuring their dignity and privacy in court. The very act of the judiciary working within such a reformative process enables it to fulfil its role in bridging the gap between personal and secular laws, thus contributing towards an inclusive society where everyone freely exercises her/his rights without discrimination.

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<sup>35</sup> The Code of Criminal Procedure 1973, s 125

<sup>36</sup> Constitution of India 1950, art 14

## COMPREHENSIVE LEGAL REFORMS

It is very essential to carry out comprehensive legal reforms in India toward gender justice and equality, especially about marriage and divorce. A vital aspect of these reforms is the introduction of a Uniform Civil Code (UCC), which seeks, at a national level, to replace a variety of personal laws, governing various religious communities, with one uniform set of secular laws applicable to all citizens. Enshrined in Article 44 of the Indian Constitution<sup>37</sup>, the UCC aims to promote national integration and remove discrimination based on religion, caste, or gender.

The UCC will standardize laws governing marriage, divorce, inheritance, and maintenance, thereby addressing current inconsistencies across personal laws. As an example, some communities permit polygamy or unilateral divorce through practices of triple talaq, while others impose strict regulations. Through a UCC, India can guarantee equal rights and protections for all, especially among women who are generally more likely to suffer from such discriminatory practices.

Furthermore, comprehensive reforms should consider improving existing laws, such as the Protection of Women from Domestic Violence Act<sup>38</sup>, and strengthening their mobilizing capacities for the effective guarantee of the legal rights of women. Legislative changes must be made for such laws to be designed toward awareness of their legal rights among socially and economically marginalized communities and to enable them to plead their claims.

## CONCLUSION

Discrimination against Muslim women in marriage and divorce in India represents one of the biggest challenges to gender equality and justice within the legal field. Against the constitutional guarantee of equality under the law, persistent cultural stereotypes and systemic practices rife with gender discrimination failing from spiritual ideals through various mediums of minority personal law undermine what is rightly women's rights. Judgments from these

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<sup>37</sup> Constitution of India 1950, art 44

<sup>38</sup> The Protection of Women from Domestic Violence Act 2005

interventionists thus came at a moment when there was a decisive change recognizing the need for a more inclusive legal regime safeguarding the rights and dignity of all human beings, irrespective of their religious belief.

The judgments given by the Supreme Court on matters including triple talaq and maintenance rights have spotlighted upholding constitutional values against archaic personal laws. These landmark judgments not only give wings to women's rights but also open the pathway for further reforms aimed at dismantling other systemic barriers. However, beyond judicial activism, the more burning need is for the direction of comprehensive legislative reforms, including the Uniform Civil Code (UCC), that would normalize marriage, divorce, and inheritance laws in all communities, granting every citizen equal rights and protection under secular law.

Slowly, societal attitudes towards marriage and divorce are changing, with far greater awareness and advocacy efforts. As women come into their own in terms of financial independence and respect for their rights, there is recognition that personal happiness should take precedence over societal expectations. Such a change is especially important in a situation where individuals make decisions regarding their relationships with the assurance that they will not be stigmatized or ostracized.

In the final analysis, genuine gender justice for Muslim women in India demands an integration of judicial interventions, legislative reform, and a change in attitudes in society. India, thereby unifying the spheres of personal and secular laws with a culture of equality and respect for individual rights, marches on toward realizing its constitutional commitment to justice for all citizens. The path of gender equality will continue to unfold in our country; however, an excellent hope for a more just and equitable future for Muslim women and other marginalized groups will brighten with the synergistic response of all sectors of society, the government, judiciary, and civil society.