

## **Divorce and Maintenance Vis a Vis Muslim Women**

**Pearl Monteiro<sup>1</sup>**

### **Abstract:**

A country's development maybe measured by the development of its women. Women empowerment and development is regulated by the cultural and societal milieu. In the modern era, laws regulate influence behaviour and thereby regulate the culture and society. While law arises from the volkgeist, aims, aspirations, and culture, and it often finds expression in binding statutes. There is thus a dual interplay of law and culture which influence each other In India, personal laws are religion based, with secular matters such as marriage, divorce, maintenance, guardianship and inheritance, being different for different individuals based on the religion that they follow. The Constitution of India, while exhorting the State to enact a uniform civil code, at the same time protects the religious as well as the minority rights. Personal laws were and are regarded as sacrosanct and inviolable, based on the premise that they are dictated by religion. Law and culture are irrevocably intertwined and influence each other; this relationship is most evident in the Muslim personal laws. The Shariat Application Act 1937, extended the Shariat as the law governing personal matters of the Muslims. The position of Muslim women with regard to matters such as divorce, maintenance, inheritance is neither at par with Muslim men nor with women of other religions. This paper traces the Muslim legal position with regard to divorce and maintenance. Statute and precedent are cited and analysed. Suggestions for reform are made.

**Keywords:** Women Empowerment, Divorce, Maintenance, Muslim Law, Uniform Civil Code

### **Introduction**

*"You can judge a nation, and how successful it will be, based on how it treats its women and its girls."*

—President Obama

Savigny has cited volumes on the interrelationship between culture and law. Indigenous cultures have a great impact on legal institutions.<sup>i</sup> Many societies demonstrate the interrelationship between law and religion.<sup>ii</sup> Historically, jurists sought ethics, morality and theology, as strong foundations for law.<sup>iii</sup> Cultural influences are also visible in judgments.<sup>iv</sup> Cultural underpinnings are more significant in countries emerging

---

<sup>1</sup> Associate Professor & Research Scholar, V.M. Salgaocar College of Law, Goa University



from colonial rule, as new legal systems are being imposed on old ones.<sup>v</sup> Colonial systems often manifest a hybrid culture, which is then reflected in its legal system<sup>vi</sup>. Legal rights in a society and their protection are influenced by the culture of that society.<sup>vii</sup> Jurisprudence and statute not only mimic the local culture but sometimes is influenced by the culture of neighbouring States.<sup>viii</sup> Myths dominant in the culture help legitimize legal institutions.<sup>ix</sup> English legal system and laws modernized traditional India to a large extent.<sup>x</sup> The colonial masters had scant regard for customary law and left it to the lowest echelons of society to follow.<sup>xi</sup> Very often religious sentiments are portrayed as culture, and perpetuated, even in secular societies.<sup>xii</sup> Blackstone decrees that the judge should find law in the culture of the land.<sup>xiii</sup> Indian society is more acceptable to personal laws which claim to reflect religion and culture.<sup>xiv</sup> In many societies religion and culture are irretrievably intertwined and it is extremely difficult to separate them.<sup>xv</sup> Even dietary prohibitions in religions should be understood in cultural context.<sup>xvi</sup>

Religious law is complex, with different under currents, however, often elements of modern law may be culled from it.<sup>xvii</sup> Culture and religion are strong determinants of society's response to situations.<sup>xviii</sup> Religious and cultural beliefs underlie the assumption that positive law is accountable to a higher divine law.<sup>xix</sup> Societal reform becomes difficult by mere legislation, as by and large society accepts laws which are in tune with its ethos, religion and culture. This interrelationship and resistance to change is witnessed by all societies including those following the Islamic religion and culture.

### **Problem Defined**

Any Society, specially one which claims equality and justice as cherished constitutional goals cannot develop and progress, if half the population, namely women, are denied fundamental rights and freedoms in the name of culture and religion. Society and family controls women using culture and religion. Women are controlled preventing their self-determination, development and empowerment. Cultural rights are often used to justify claims, which would not have been legitimized in modern legal scenarios.<sup>xx</sup> Politicians often misuse religious sentiments to polarize people for their own use.<sup>xxi</sup> Conflicts between religious beliefs and statute lead to noncompliance.<sup>xxii</sup> Constitutional freedom of religion, is used to justify a religious bias and reasoning for secular matters.<sup>xxiii</sup> On the one hand, the Constitution of India, promotes secularism which is not only a defined goal in the Preamble, but also been held by the Supreme Court in a plethora of cases to be "basic structure", that is to say, Secularism can never cease to be a Constitutional ideal, and the Country can never become theist or communist. At the same time, freedom of religion is a fundamental right, guaranteed by the same Constitution. This religious freedom has been used to perpetuate various customs and practices which are at strange variance with the secular structure of the Constitution, Religion is used

as a convenient “scapegoat” for unlawful actions such as violence.<sup>xxiv</sup> Law and legal reforms by themselves are ineffective to bring about empowerment and emancipation of women without the support of societal reform.

## **Islam and Law**

Ancient Arabia, was a male dominated society. Women had very few rights. Even in matters of inheritance, the property of a man devolved, on his agnatic male relatives, called “comrades in arms”. The Prophet Muhammad, revolutionized this system and gave women certain rights including the right to inherit and a very limited right of divorce. On the other hand, males dominated the society with the system and practice of polygamy and unrestricted right of divorce. These practices continued to be followed by the practitioners of Islam. When the Mughals and Persians migrated to India, they brought along with them their religion, culture and law. The British did not touch this Islamic legal system governed by the Shariat. All aspects of a religious Muslim’s life is regulated by the Shariat.<sup>xxv</sup> Modern Islamic culture focuses on the individual, his piety, duties and relationships.<sup>xxvi</sup> Most Islamic jurists do not give credence to natural law theories but rather give much importance to positive law.<sup>xxvii</sup> Many of the rules in Islam are based on rebuttable presumptions.<sup>xxviii</sup> Individuals in democratic and secular Islamic countries still show a covert preference for the Shariat over the secular law.<sup>xxix</sup> There are four sources of Muslim law, the Quoran, the traditions of the prophet, the opinion of his close followers and rules deduced by reason and analogy. Usually, the Court does not interpret the Quoran, but rather relies on established interpretation of the jurists.<sup>xxx</sup> After independence, the Muslims, except for Goan Muslims, continue to be governed by the Shariat.

## **Divorce**

Islam defines marriage as a contract, like all other contracts, marriage can be terminated by following a procedure.<sup>xxxi</sup> There is no gender equality in the grounds of divorce, in fact there are different grounds for divorce for males, called as talaq and females, called as Khula, wherein she buys the right to divorce herself from her husband for valuable consideration. Further, if her husband compared her to a woman who he was forbidden to marry, for example, mother or sister, she could divorce him, this was called Zihar, If he took a vow of abstinence and refrained from physical relationship with his wife for at least four months, she could divorce him, called as Ila. Talaq-e-Tafweez (Delegated Divorce) was another form wherein the husband might delegate his power of divorce to his wife, false accusation of adultery could also lead to divorce, called Lian. Islam also recognizes divorce by mutual consent, called mubaraat. Talaq as available for males, traditionally was of two types, Talaq-e-ahsan, the approved, talaq pronounced over a period of three months,

and talaq-e-biddat the disapproved triple talaq, pronounced thrice on one occasion. Divorce as available to the woman under the Shariat was thus very restricted and usually availed on either of the two grounds, the mutual consent and the khula, or purchased right to divorce for valuable consideration. Additional grounds such as disappearance for four or more years, neglect and failure to provide maintenance for two or more years, cruelty, desertion, conversion, imprisonment, impotency, venereal disease, insanity, failure to perform marital obligations, were introduced by legislation,<sup>xxxii</sup> now the woman has similar grounds, as compared to any other woman. However, the arbitrary, unbridled, power of the Muslim husband to unilaterally divorce the wife without intervention of Court, on mere utterance of the word, “talaq” thrice continued. The triple talaq provision was much controversial, with reformists seeking to abolish it. The repercussions faced by the wife, who was often unable to maintain herself has been portrayed in several movies, more recently Haq, where in often penury and destitution was unavoidable results. Finally, it was declared unconstitutional by the Court<sup>xxxiii</sup> and made a penal offence by legislation and renders it void.<sup>xxxiv</sup>

### **Maintenance**

The Shariat provides for maintenance of wife and children. The Husband was obliged to maintain the wife as long as she lived with him and was obedient to him. However, the position of divorced wife is not in pari materia as compared to that of other women governed by different personal laws. The husband has to maintain his divorced wife only for the iddat period, approximately three months, or until child birth, if she was expecting at the time of divorce, after which she has no claims on him. The unbridled triple talaq couple with the obligation to maintain for a mere three months is disastrous for the woman, especially if she is unemployed. The famous *Shah Bano Case*<sup>xxxv</sup>, which inspired the movie Haq, saw this provision brought into public focus, where a divorced wife sought to claim maintenance under the Criminal Procedure Code.<sup>xxxvi</sup> The husband tried to interpret the provisions of the Code to avoid paying maintenance, by claiming that the mehr, which he had paid was, set off as per the code.<sup>xxxvii</sup> The Court ruled in favour of the wife. But the protests and aftermath of the case, mainly a result of the court interpreting the Koran, instead of relying on established, pre-existing interpretation, led the Parliament to enact the Muslim Women Protection of Rights on Divorce Act<sup>xxxviii</sup>, which gave the couple the freedom to choose whether they wished to be governed by the Act or by the Code.<sup>xxxix</sup> The Act retains the liability of the husband as under the shariat, and puts the onus of post iddat maintenance of the wife on her potential heirs or the Wakf Board<sup>xl</sup>. A similar case, *Danial Latifi*, did not meet with much flack, as the Court here, did not interpret the Koran itself, but relied on existing interpretations.<sup>xli</sup> The new legislation makes it mandatory for husband to provide for subsistence allowance to his wife, if he pronounces the talaq.<sup>xlii</sup> The Supreme Court of India



has upheld that divorced Muslim women can also claim maintenance under secular law<sup>xliii</sup> and emphasized that the Act does not extinguish that right<sup>xliv</sup>

### **Suggestions**

Today, the Supreme Court bases many of its judgments on the concepts or tests of “Constitutional Morality” and “Essential Religious Practices”. This means that Constitutional Morality, not social or public morality is followed, further the Court tests the practice as to whether it is essential, meaning without the practice, the religion ceases to be the same, or whether it is ancillary or not fundamental to the religion in upholding or striking it down. Literal interpretation of religious texts without contextual references to time and space, can prove very dangerous<sup>xlv</sup>. A sense of pride in one’s culture and heritage can be channelized towards good administration and compliance with laws.<sup>xlvi</sup> Wise political leaders should utilize religious beliefs to promote cooperation rather than conflict.<sup>xlvii</sup>

Reform and amelioration of weaker sections can meet with success, only if legislation is sensitive to the ethos and culture of its people and the same meets recognition with its object and purpose.<sup>xlviii</sup> It is time for implementation of Uniform Civil Code which will be gender and religion neutral.

### **Conclusion**

Understanding the cultural underpinnings and enacting legal reform on their basis are more conducive to their implementation<sup>xlix</sup>. Natural law theories which ultimately are usually based on religion, provide a valuable ethical check on positive law, this was most evident during World War II and the consequent importance given to human rights and humanitarian law.<sup>1</sup> Interdisciplinary focus on law and religion enriches the study of the theory and practice of law, and leads to greater scope of compliance<sup>li</sup> Emancipation of women, their empowerment and development is impossible with only legal reform and needs a wholistic approach.

### **References**

---

<sup>i</sup> Khare, R. (1972). Indigenous culture and lawyer's law in India. *Comparative Studies in Society and History*, 14(1), 71–96. <https://www.jstor.org/stable/178061>

<sup>ii</sup> Grenda, C. (2006). Religious culture & natural rights: Understanding the “paradox” of early America. *Journal of Law and Religion*, 22(2), 353–395.



- <sup>iii</sup> Shingleton, B. (2012). Recognition and mutuality: Pannenberg's theology of law. *Journal of Law and Religion*, 28(1), 225–252. <https://www.jstor.org/stable/23645231>
- <sup>iv</sup> Kahan, D. (2010). Culture, cognition, and consent: Who perceives what, and why, in acquaintance-rape cases. *University of Pennsylvania Law Review*, 158(3), 729–813. <https://www.jstor.org/stable/20698345>
- <sup>v</sup> Yngvesson, B. (1989). Inventing law in local settings: Rethinking popular legal culture. *The Yale Law Journal*, 98(8), 1689–1709. <https://doi.org/10.2307/796612>
- <sup>vi</sup> Merry, S. E. (1992). Anthropology, law, and transnational processes. *Annual Review of Anthropology*, 21, 357–379. <https://www.jstor.org/stable/2155992>
- <sup>vii</sup> Somers, M. R. (1993). Citizenship and the place of the public sphere: Law, community, and political culture in the transition to democracy. *American Sociological Review*, 58(5), 587–620. <https://doi.org/10.2307/2096277>
- <sup>viii</sup> Blankenburg, E. (1998). Patterns of legal culture: The Netherlands compared to neighboring Germany. *The American Journal of Comparative Law*, 46(1), 1–41. <https://doi.org/10.2307/841077>
- <sup>ix</sup> Crank, J. P., & Langworthy, R. H. (1992). An institutional perspective of policing. *The Journal of Criminal Law and Criminology*, 83(2), 338–363. <https://doi.org/10.2307/1143860>
- <sup>x</sup> Rudolph, L. I., & Rudolph, S. H. (1965). Barristers and Brahmans in India: Legal cultures and social change. *Comparative Studies in Society and History*, 8(1), 24–49. <https://www.jstor.org/stable/177534>
- <sup>xi</sup> Comaroff, J. (2001). Symposium introduction: Colonialism, culture, and the law: A foreword. *Law & Social Inquiry*, 26(2), 305–314. <https://www.jstor.org/stable/829077>
- <sup>xii</sup> Beaman, L. G. (2012). Battles over symbols: The “religion” of the minority versus the “culture” of the majority. *Journal of Law and Religion*, 28(1), 67–104. <https://www.jstor.org/stable/23645227>
- <sup>xiii</sup> Brewbaker, W. S. (2006). Found law, made law and creation: Reconsidering Blackstone's declaratory theory. *Journal of Law and Religion*, 22(1), 255–286. <https://www.jstor.org/stable/27639043>
- <sup>xiv</sup> Subramanian, N. (2017). Islamic norms, common law, and legal reasoning: Muslim personal law and the economic consequences of divorce in India. *Islamic Law and Society*, 24(3), 254–286. <https://www.jstor.org/stable/44634472>
- <sup>xv</sup> Amoah, J., & Bennett, T. W. (2008). The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment? *Journal of Law and Religion*, 24(1), 1–20. <https://www.jstor.org/stable/27639130>
- <sup>xvi</sup> Altmann, P. (2019). Banned birds: The birds of Leviticus 11 and Deuteronomy 14. *Mohr Siebeck*.
- <sup>xvii</sup> Welker, M. (2014). The power of mercy in biblical law. *Journal of Law and Religion*, 29(2), 225–235. <https://www.jstor.org/stable/24739140>
- <sup>xviii</sup> Malmin, M. (2013). Warrior culture, spirituality, and prayer. *Journal of Religion and Health*, 52(3), 740–758. <https://www.jstor.org/stable/24485024>

- <sup>xxix</sup> Johnson, J. T. (2014). Ethics, law, and humanitarian intervention: Biggar's argument for the precedence of moral order in the dialectic with positive law. *Soundings: An Interdisciplinary Journal*, 97(2), 228–238. <https://doi.org/10.5325/soundings.97.2.0228>
- <sup>xx</sup> Schneider, D. M. (1984). When the natives manipulate their own culture: The law of marriage in England and Wales. *RAIN*, (64), 4–6. <https://doi.org/10.2307/3033436>
- <sup>xxi</sup> Uelmen, A. J. (2006). Traveling light: Pilgrim law and the nexus between law, politics and Catholic social teaching. *Journal of Law and Religion*, 22(2), 445–479. <https://www.jstor.org/stable/27639059>
- <sup>xxii</sup> Gordon, S. (2008). Review essay: Where the action is—Law, religion, and the scholarly divide. *Religion and American Culture: A Journal of Interpretation*, 18(2), 249–271. <https://doi.org/10.1525/rac.2008.18.2.249>
- <sup>xxiii</sup> Reyes, R. (2011). Common cause in the culture wars? *Journal of Law and Religion*, 27(2), 231–271. <https://www.jstor.org/stable/23645133>
- <sup>xxiv</sup> Östman, L. (2007). The sacrificial crises: Law and violence. *Contagion: Journal of Violence, Mimesis, and Culture*, 14, 97–119. <https://www.jstor.org/stable/41917670>
- <sup>xxv</sup> Al-Hibri, A. Y. (2020). Islamic law and the law of the land. In R. Jones (Ed.), *Fine differences: The Al-Alwani Muslim-Christian lectures 2010–2017* (pp. 88–92). International Institute of Islamic Thought. <https://doi.org/10.2307/j.ctv19pr4t.11>
- <sup>xxvi</sup> Müller, D. M. (2013). Post-Islamism or pop-Islamism? Ethnographic observations of Muslim youth politics in Malaysia. *Paideuma: Mitteilungen zur Kulturkunde*, 59, 261–284. <https://www.jstor.org/stable/24672388>
- <sup>xxvii</sup> Emon, A. M. (2004). Natural law and natural rights in Islamic law. *Journal of Law and Religion*, 20(2), 351–395. <https://doi.org/10.2307/4144668>
- <sup>xxviii</sup> Sabreen, M. (2017). Custody in Islamic law: A law based on presumptions. *Islamic Studies*, 56(3/4), 223–244. <https://www.jstor.org/stable/26617653>
- <sup>xxix</sup> Powell, R. (2012). Evolving views of Islamic law in Turkey. *Journal of Law and Religion*, 28(2), 467–487. <https://www.jstor.org/stable/23645195>
- <sup>xxx</sup> *Aga Mahomed Jaffer v Koolsom Beebee*, (1897) 25 Cal. 9, 18
- <sup>xxxi</sup> Khadduri, M. (1978). Marriage in Islamic law: The modernist viewpoints. *The American Journal of Comparative Law*, 26(2), 213–218. <https://doi.org/10.2307/839669>
- <sup>xxxii</sup> The Dissolution of Muslim Marriages Act, 1939
- <sup>xxxiii</sup> *Shayara Bano v. Union of India & Others* (2017) 9 SCC 1
- <sup>xxxiv</sup> The Muslim Women (Protection of Rights on Marriage) Act, 2019
- <sup>xxxv</sup> *Mohd. Ahmed Khan v. Shah Bano Begum & Ors* AIR 1985 SC 945



- xxxvi Section 125 in The Code of Criminal Procedure, 1973
- xxxvii Section 127 in The Code of Criminal Procedure, 1973
- xxxviii Muslim Women (Protection of Rights on Divorce) Act, 1986
- xxxix 5. Option to be governed by the provisions of sections 125 to 128 of Act 2 of 1974
- xl 4. Order for payment of maintenance.
- xli Danial Latifi v. Union of India AIR 2001 SC 3958
- xlii S. 5.
- xliii Section 125 of the Code of Criminal Procedure (CrPC)
- xliv Mohd. Abdul Samad v. The State of Telangana & Anr. (2024) SC 452
- xlv Merrill, T. W., & Cannon, B. (2012). Ox in the mire? The legal and cultural war over Utah's Sunday closing laws. *Journal of Mormon History*, 38(4), 164–194. <https://www.jstor.org/stable/23292636>
- xlvi Konagaya, H. (2020). Heritage production in national and global cultural policies: Folkloristics, politics, and cultural economy in Ryukyuan/Okinawan performance. *Asian Ethnology*, 79(1), 45–66. <https://www.jstor.org/stable/26929484>
- xlvii Said, A. A. (2020). Making peace: Islam and the West. In R. Jones (Ed.), *Fine differences: The Al-Alwani Muslim-Christian lectures 2010–2017* (pp. 25–30). International Institute of Islamic Thought. <https://doi.org/10.2307/j.ctv19pr4t.7>
- xlviii Niaz, N., & Soman, Z. (2015). Muslim women's views on Muslim personal law. *Economic and Political Weekly*, 50(51), 83–86. <https://www.jstor.org/stable/44002996>
- xlix White, J. W. (2014). Augustine's Confessions as read by a modern law teacher. *Journal of Law and Religion*, 29(2), 330–335. <https://www.jstor.org/stable/24739146>
- <sup>1</sup> VanDrunen, D. (2013). Wisdom and the natural moral order: The contribution of Proverbs to a Christian theology of natural law. *Journal of the Society of Christian Ethics*, 33(1), 153–168. <https://www.jstor.org/stable/23563071>
- <sup>li</sup> Rothchild, J. (2008). Law, religion, and culture: The function of system in Niklas Luhmann and Kathryn Tanner. *Journal of Law and Religion*, 24(2), 475–506. <https://www.jstor.org/stable/25654327>

**Publisher's Note:** *The views and opinions expressed in this article are solely those of the author(s) and do not necessarily reflect those of the publisher, editors, or the editorial board.*