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# RIGHT TO MARRY OF MUSLIM WOMEN ON DIVORCE : AN ANALYSIS

**Dr. Raghuvinder Singh* and Arti Sharma****

**Abstract**

*Divorce alters the status of married woman and can leave her destitute. The condition of Muslim women, especially the poor ones, is pathetic than the divorced women belonging to other communities for twin reasons; firstly, because of the husband's unilateral and private declaration of divorce; Secondly, after divorce she is entitled to claim maintenance for a limited period. Therefore, in such circumstances, remarriage is better option for her. However, remarriage is also not easy for a woman because of the stigma attached to the word 'divorce'. Thus, in such a scenario the law should be such that it encourages remarriage of divorced women. Therefore, in this paper, an attempt is made to analyze the grey areas, in the present Muslim law, as regards the right to marry of Muslim woman on divorce are concerned and also to provide suggestions for the existing grey areas.*

## INTRODUCTION

Divorce in '*vinculo matrimonii'* is a Latin phrase meaning divorce from the bond of marriage.[1] A kind of divorce of husband and wife dissolving the marriage tie; reverting the parties to their unmarried status from their matrimonial obligations and parties once again acquire the right to marry a person of their choice. It is different from 'an annulment' since it ends the marital status, whereas an annulment substantiates that a marital status never existed. It is also different from a *menso et thoro* which is a divorce from bed and board that means separation of parties by law, than a dissolution of the marriage.[2]

When the relationship between married couples runs aground, it is better to resort to the remedy of divorce for the welfare of the parties and family as a whole.[3] However, the

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1 BRYAN A. GARNER, BLACK'S LAW DICTIONARY, 1450 (8th ed. 2004).

2 *Ibid*.

3 Furquan Ahmed, "Muslim Law" LII ASIL 797 (2016), (May 30, 2020, 04:20 PM), http://14.139.60.114:8080/

segregation of family unit has always brought upheavals and vagrancy in the life of the Muslim women especially the poor ones, for two reasons; firstly, because of the unbridled and arbitrary power of the husband to pronounce unilateral talaq upon his wife; and secondly, after divorce, she is entitled to maintenance for a limited period called iddat, and then she is left to the vagaries of fate. Although, she can claim maintenance under Section 125 Cr.P.C., however, that too only if her former husband consents to it.[4] In such circumstances, the option of remarriage after divorce can be proved to be very helpful to protect her from destitution. Nonetheless, it is also true that after divorce, there are fewer possibilities for women getting married easily than men.

Table 1 below shows the divorce rate, according to Census 2011, in the Hindu and Muslim communities. The divorce rate is defined as the total number of divorces of males/females in a particular community during a specific year to the total married males/females of that community.[5] Thus, the divorce rate formula is;

"Divorce rate = D x K/P

Where D is the total number of divorces in one year, P is the population at risk of divorce and K is a constant 1000"[6]

Table 1- Divorce Rate in the Year 2011

| | **HINDU** | **MUSLIM** |
|---|---|---|
| **FEMALE** | 2.64 | 5.64 |
| **MALE** | 1.54 | 1.60 |
| **TOTAL** | 2.09 | 3.66 |

*Source: Census of India 2011*[7]

jspui/bitstream/123456789/43231/1/27_Muslim%20Law%20%28793-842%29.pdf.

4 S.N. MISRA, THE CODE OF CRIMINAL PROCEDURE, 1973, 136 (Central Law Publications, Allahabad, 17th ed. 2010).

5 CLIFTON D. BRYANT and DENNIS L. PECK (ED.), 21ST CENTURY SOCIOLOGY A REFERENCE HANDBOOK, Vol. 1, , (May 30, 2020, 04:25 PM); https://books.google.co.in/books?id=C6g5DQAAQBAJ&pg=PA277&lpg=PA277&dq=divorce+refined+ratio+formula&source=bl&ots=dYf1RLkXIN&sig=ACfU3U09ihSkEZ5NgYEwA59MqvQvmBLbDg&hl=en&sa=X&ved=2ahUKEwjPu6zQudjpAhUryjgGHXiPA8Q6AEwD3oECAsQAQ#v=onepage&q=divorce%20refined%20ratio%20formula&f=false.

6 *Ibid.*

7 C-3 Marital Status by Religious Community and Sex – 2011, (May 29, 2020, 01:04 PM), https://censusindia.gov.in/2011census/C-series/c-3.html.

Table 1 shows that the divorce rate is higher in the Muslim community than the Hindu Community. The divorce rate for Hindus is 2.09 and for Muslims is 3.66, which implies that there are 2 divorced Hindus per 1,000 married Hindus and there are 3.7 divorced Muslims per 1,000 married Muslims. Across gender, the gap is larger because most men remarry but women cannot, hence, the disparity.[8] There are 5.6 divorced Muslim women per 1,000 married Muslim women, while there are 1.60 divorced Muslim men per 1,000 married Muslim men. In the Hindu community, there are 2.64 divorced Hindu women per 1000 married Hindu women, while there are 1.54 Hindu divorced men per 1000 married Hindu men. This means that after adjusting population and marital status, Muslims are more likely to be divorced than Hindus, and Muslim women bear almost the whole burden of this difference.[9]

To skew the Muslim women's divorce rate and to save them from destitution after divorce, there is a need for improving the legal status of Muslim divorced women by the codification of Muslim personal law, in such a way that could broaden the range of their right to marry after divorce. Article 25(2) and Article 44 read with Entry 5 of the Concurrent List contained in the Seventh Schedule empower the state to regulate secular affairs surrounding religion and to enact measures of social welfare and reform.[10] Further, on this, Mohammad Ghouse[11] argued that in matters relating to marriage and divorce and other aspects relating to personal law, the state can validly enact measures of social welfare and reforms in the Muslim Personal law. Reforms so made and replacement so made of the Muslim personal law is valid and not unconstitutional.[12]

Presently, the matters relating to marriage and divorce are governed by the Muslim Personal law (Shariat) Application Act, 1937 (hereinafter called the Muslim personal law), which makes the principles of *Shariah* applicable on the right to marry of Muslim women after divorce. The rules governing the matters of marriage and divorce under the Muslim personal law, however, are not expressly codified and are, thus, governed according to the prevailing customs and usages. These customs and usages provide for certain impediments on the right to marry of Muslim women after divorce. In this paper, an attempt is made to

8 Yugank Goyal, *Hindu and Muslim: The True Picture Of Divorce*, (Mar 17, 2020, 12:25 AM) https://www.livemint.com/Opinion/ydCWT2mGxmg4d9NXrMaxEI/Hindus-and-Muslims-The-true-picture-of-divorce.html,

9 *Ibid*.

10 The Constitution of India, arts. 25(2), 44.

11 Mohammad Gouse, *Personal Law and the Constitution of India*, (Mar.17, 2020, 10:04 AM) http://14.139.60.114:8080/jspui/bitstream/123456789/736/15/Personal%20Laws%20and%20the%20Constitution%20in%20India%20.pdf.

12 *Ibid*.

analyze the right to marry of Muslim divorced women and the present impediments on the right to marry of Muslim women after divorce, as provided by the prevailing customs and usages and also to suggest some remedies.

## Right to Marry as a Human Right

The right to marry and to form a family is a human right, universally recognised by all the civilized nations. As a human right, it occupies a significant place in the Universal Declaration of Human Rights (hereinafter called UDHR) passed by the UN general assembly on December 10, 1948. As per Article 16(1) of the UDHR, all men and women of full age, without any discrimination on the basis of race, nationality or religion, have the right to marry and to found a family. Further, it provides that the family being a natural and fundamental unit of society is entitled to be protected by the state.[13] Furthermore, it provides that the marriage shall be entered into by the intended spouses only with their free and full consent.[14] Besides this, similar provisions are contained under Article 23 of the International Covenant on Civil and Political Rights, 1966 (hereinafter called ICCPR). Whereby, Article 23(2) provides that the right to marry and found a family of all men and women of marriageable age shall be recognised. And, article 23(3) of the said convention provides that no marriage shall be entered into by the intended spouses without their free and full consent.[15] Also, in 1979, the UN general assembly, adopted a Convention for the Elimination of all forms of Discrimination against Women (hereinafter called CEDAW) which also contains similar provisions for women. The convention, vide Article 16, provides that the state parties shall take all appropriate measures to remove discrimination against women in all matters relating to marriage and family relations. Further, it specifically provides that the state parties shall ensure, on the basis of gender equality, the same rights to enter into marriage, to freely choose a life partner, and to enter into marriage only with their free and full consent.[16] India is a state party to these conventions and covenants and, as such, is bound to give effect to them. Further, Article 253 read with Entry 10 and 14 of the Constitution empowers the Parliament to make laws to give effect to the said Conventions.

13 Universal Declaration of Human Rights, 1948, art. 16.

14 *Ibid*.

15 International Covenant on Civil and Political Rights, 1966, art 23.

16 Convention on the Elimination of all forms of Discrimination against Women, 1979, art 16.

## Right to Marry as a Constitutional Right

In India, every adult individual has a right to marry a person of his/her choice and form a family. In *Lata Singh v. State of U.P.*,[17] and in *Shakti Vahini v. Union of India and Others*,[18] the courts have recognised that an individual's exercise of choice in choosing a life partner is an integral aspect of the right to life and liberty, and therefore, is protected under Article 19 and 21 of the Constitution. In the *Shakti Vahini Case*, the court observed;

> "The petitioner is a major and was free to marry anyone she liked or live with anyone she liked. Since there is no bar to an intercaste marriage under Hindu Marriage Act or any other law, no offence was committed..."[19]

Further, the learned Justice observed;

> "[W]hen two adults consensually choose each other as life partners; it is a manifestation of their choice which is recognized under the constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected..."[20]

That means, for exercising the right to marry; firstly a person must be of the age of majority according to the law to which he is a subject; secondly, two adults consensually choose each other as their life partners; and thirdly, if such law creates a bar, then, he or she can remarry only after removal of that bar.

## Right to Marry of Muslim Women on Divorce and Muslim Law

Under Muslim law, certain impediments are provided for contracting a valid marriage. A marriage in contravention of these impediments is either rendered void or irregular. Here we are concerned with impediments on the remarriage of a Muslim divorced woman and their effects on her second marriage.

## Muslim Divorced Woman and Incapacity to Marry during *Iddat* Period

*Iddat* or *idda* may be defined as the period during which it is obligatory for a woman, whose marriage has been dissolved either by death or divorce, to remain in seclusion, and

17 *Lata Singh v. State of U.P.,* AIR 2006 SC 2522 (India).

18 *Shakti Vahini v. Union of India & ors*,, AIR 2018 SC 1601 (India).

19 *Ibid*.

20 *Ibid*.

to refrain from marrying another man.[21] According to Fyzee, the most suitable definition of *iddat* is 'the term, by the completion of which, a new marriage is rendered lawful'.[22] According to Section2(b) of the Muslim Women Protection of Rights on Divorce Act, 1986, the period of *iddat,* 'in the case of a divorced woman, is; (i) three menstrual courses after the date of divorce, if she is subject to menstruation; (ii) three lunar months after her divorce, if she is not subject to menstruation; and (iii) if she is enceinte, i.e., pregnant, at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier.'[23]

The purpose of imposing abstinence from marrying another man during iddat period is to ascertain whether the divorced woman is pregnant by the estranged husband or not, so as to avoid confusion of parentage.[24] Muslim personal law provides that if a woman undergoing iddat marries another man; her marriage would be rendered irregular under Sunni law and void under Shia law, as the Shia law does not recognize the difference between irregular and void marriage. Marriages, that are irregular under Sunni law, are void under the Shia law[25]

The Lahore High Court, at one instance, treated the marriage contracted during iddat period, under Sunni law, as void.[26] However, in *Mohammad Hayat & Ors. v. Mohammad Nawaz & Ors.*,[27] when again the question about the validity of such a marriage came up for consideration, the court held that a marriage contracted between Sunni parties, during *iddat* period, was only a *fasid* marriage and not *batil* and the children born of such a marriage were held to be legitimate.

Where a Muslim divorced woman remarries, while she is undergoing *iddat* period, the Muslim personal law prescribes the following consequences on her second marriage:

Under Sunni Law[28]

a) If her second marriage is consummated, then, on divorce; firstly, the woman would be entitled to proper or specified dower, whichever is less; secondly, even though the children born of such a marriage would be legitimate but it would not create mutual rights of inheritance between the parties.

21 Sir Dinshaw Fardunji Mulla, PRINCIPLES OF MAHOMEDAN LAW, 343 (22nd ed. 2017).

22 Tahir Mahmood (ed.), Outlines of Muhammadan Law 81 (5th ed. 2008).

23 The Muslim Women (Protection of rights on Divorce) Act, 1986, sec. 2(b).

24 *Supra* note 21 at 343.

25 *Supra* note 21 at 350.

26 *Supra* note 21 at 350, *Jhandu v. Mst Mussain Bibi ,* (1923) 4 Lah. 192.

27 *Supra* note 21 section 257(2*), Mohammad Hayat & ors v. Mohammad Nawaz & ors,* 1935 Lah 622.

28 *Supra note* 21 at 350.

b) If her marriage is not consummated then, no legal effects from such a marriage would flow on divorce.

Under Shia Law

(a) The second marriage of the divorced woman, while she is undergoing *iddat*, would not create any civil rights or obligation between the parties and;

(b) Children born of such a marriage would be illegitimate.[29]

## The Waiting Period under Hindu law

Before 1976, the Hindu Marriage Act, 1955, by the proviso attached to Section 15, prohibited the parties to marriage from remarrying before the elapse of one year from the date of the decree of divorce from the court of the first instance till the date of their second marriage.[30]

One of the purposes, of the said prohibition, was to avoid the confusion as to the parentage of the child born. However, the said proviso was deleted by Section 10 of the Marriage Laws (Amendment) Act, 1976 on the recommendations of the Law Commission of India. The commission recommended that the considerations of the parties and the freedom to marry, available to parties, outweigh the object of the proviso.[31]

## Muslim Divorced Woman and the Right to Remarry Former Husband until Nikah Halala is Performed

Nikah halala is made up of two Arabic words. Nikah meaning 'union of sexes' and in law it means 'marriage'. Marriage, according to Muslim law, is a contract for legalisation of intercourse and procreation of children.[32] Halala means 'halal' or 'to make permissible'. Thus, nikah halala is a practice to make a marriage permissible which has become forbidden. Remarriage between parties becomes forbidden as soon as talaq becomes absolute.

Before proceeding further it is necessary here to understand different kinds of divorce under Muslim personal law, as the practice of nikah halala is closely connected with it. Divorce,

29 *Ibid.*

30 MAYNE'S, TREATIES ON HINDU LAW & USAGE*, 417(*Bharat Law House, New Delhi, 17th ed., 2014).

31 Law Commission of India, 59th Report on *Hindu Marriage Act, 1955 and Special Marriage Act, 1954,* (March, 1974), at p.30.

32 *Supra* note 21 at 338.

under Muslim law, is divided into three categories; firstly, divorce which proceeds at the instance of the husband is called *talaq*; secondly, *khula* or *mubara'at* are types of divorce by mutual consent; thirdly, divorce by a judicial decree at the suit of husband or wife.[33] Divorce (*Talaq*) which is at the instance of the husband is of three types vis. *Talaq-e-ahsan*, *talaq-e-hasan* and *talaq-ul-biddat*. *Talaq-e-ahsan* is a single pronouncement of the formula of talaq by the husband during a *tuhre*, followed by a period of abstinence, which is called, *iddat*.[34] A talaq in *ahsan* mode becomes irrevocable and complete as soon as the period of iddat expires.[35] *Talaq-e-hasan*, is a form of divorce whereby the formula of talaq is pronounced thrice by the husband in successive *tuhrs* and no intercourse takes place during any of the three *tuhrs*.[36] Talaq in *hasan* mode becomes irrevocable and absolute on the third pronouncement, of the formula of talaq, irrespective of iddat.[37] Talaq-ul-biddat or triple talaq is pronouncing the formula of talaq thrice in single *tuhr*. It becomes irrevocable and absolute immediately on the pronouncement of the formula of talaq. As the talaq becomes irrevocable at once hence, it is also called *talaq-i-bain* i.e. irrevocable talaq.[38] The practice of triple talaq has been set aside by the Supreme Court on August 22, 2017 by a majority of 3:2.[39] Later, by passing the Muslim Women (Protection of rights on Marriage) Act, 2019, the Parliament has made it void and illegal.[40]

*Khula* is a divorce at the instance and consent of the wife, whereby, she offers or agrees to give consideration to her husband for her release from the marital tie.[41] As soon as the offer is accepted by the husband, it becomes *talaq-i-bain*.[42] *Mubara'at* is a divorce by mutual consent of both the parties. Herein, the offer may proceed at the instance of the husband or the wife, but once, it is accepted by either, it becomes complete and operates as *talaq-i-bain*.[43]

Ameer Ali says, 'When the power of reconciliation is lost, the separation becomes *bain* or absolute, while it continues, the talaq is simple *raja* or reversible.'[44] When a definite

33 *Supra* note 21 at p. 400.
34 *Shayara Bano v. Union of India*, LNIND 2017 SC 415 (India).
35 *Supra* note 21 at p. 408.
36 *Supra* note 21.
37 *Id*. at 409.
38 *Id*. at 408.
39 *Supra* note 34.
40 The Muslim Women (Protection of Rights on Marriage) Act, 2019, sec. 3.
41 *Supra* note 21 at 414.
42 *Ibid*.
43 *Ibid*.
44 SYED AMEER ALI, STUDENT'S HAND BOOK OF MOHAMMEDAN LAW, (S.K. Lahiri & Co.,

and complete separation takes place the parties so separated cannot remarry without the woman undergoing the formality of nikah halala.[45] However, the question which arises here is whether every irrevocable or absolute talaq creates a legal bar on remarriage and incumbents a wife to perform nikaha halala? To this the court, in Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan,[46] held that the formality of *nikah halala* was not necessary in the case where the husband had repudiated his wife by *ahsan* or *khula* mode. It is only in the case, when, the husband has repudiated his wife by pronouncing three *talaqs* against her, as in the case of *talaq hasan* and *triple talak*, it is not lawful for the couple to remarry again unless; firstly, the divorced wife observes *iddat* of divorce; secondly, she marries someone else; thirdly, the marriage is actually consummated with the other husband; fourthly, the latter husband has divorced her or dies after actual consummation of the marriage.[47]

The rule was framed to limit the husband's proclivity to pronounce *talaq* in Arabia. The check was intended to control a jealous, sensitive, but half-cultured race, by appealing to their sense of honors.[48]

## Consequences of the Practice of *Nikah Halala*

A marriage performed in contravention of the formality of *nikah halala* is irregular and not void.[49] However, courts in pre-independence India have taken a different discourse as in *Saiyid Rashid Ahmed v. Anisa Khatun*,[50] case. The facts of the case are that the plaintiffs were the brother and sister of the Ghiyas-ud-din, who would have been the heirs, if respondents no. 1 to 6 were unable to establish their claim to be a widow and legitimate children. The dispute is related to the succession to the estate of Ghiyas-ud-din, a Muhammadan, who died on April 04, 1920. On September 13, 1905 he pronounced the triple talaq in the presence of the witnesses, though in the absence of his wife. Though, the later received Rs. 1,000/- as payment of her dower on the same day for which a registered receipt was produced. There was also prepared a *talaqnama*, a deed of divorce on September 17, 1905. Anisa Khatun, respondent no.1, challenged the validity of divorce on two grounds that the divorce was pronounced in her absence and second that after as husband and wife for fifteen years and five children were born to the couple. Thus, Ghiyas-ud-din did not

Calcutta 6th ed. 1912).

45 *Ibid*.

46 *Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan,* AIR 2010 Bom. 109 (India).

47 *Supra* note 20 at 83, 124; *Mrs. Sabah Adnan Sami Khan v. Adnan Sami khan*, AIR 2010 Bom.109 (India)

48 *Supra* note 45.

49 *Supra* note 20 at 430.

50 *Saiyid Rashid Ahmed v. Anisa Khatun*, AIR 1932 PC 25 (India).

intend to divorce her. The Privy Council held that triple talaq pronounced in the absence of wife by Ghiyas-ud-din was valid and immediately effective. The validity and efficacy of the talaq would not be affected by Ghiyas-ud-din's mental intention. Further, since the respondent had not undergone *nikah halala* after divorce, the Privy Council held that she was not legally married to Ghiyas-ud-din and the children born were held to be illegitimate, resulting in the rejection of her claim for succession.

Again, in *Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan*,[51] the husband of the woman tried to misuse this practice against the claims of the wife. However, the court held that the formality of *nikah halala* was not necessary in the case where the husband had repudiated his wife by *ahsan* or *khula* mode.

## Nikah Halala: An International Perspective

Mahmood, in 'Muslim law in India and Abroad', said that the laws in Egypt, Iran, Jordan, Kuwait, Morocco, Philippines, Sudan, Syria, USE and Yemen, had totally derecognized the concept of triple talaq... the so-called device of halala for legalizing remarriage between the parties, which required wife's intervening marriage to someone else and subsequent divorce from him, also stood abolished in these countries.[52]

## On Remarriage Mother Loses the Right to Custody (hizanzt) of Minor

Under Muslim personal law, the right of the mother to the custody (*hizanat*) of the child is greater than the father. She is entitled to the custody of her male child till he attains seven years of age and her female child until she has attained puberty.[53] This right of a mother to the custody of her minor male/female child continues, although she has been divorced by the father of the child.[54] However, the mother, upon remarriage with a person stranger to the child, forfeits her preferential right to the custody of the minor child.

In *Mir Mohamed Bahauddin v. Mujee Bunnisa Begum Sahiba*,[55] the question before the Madras High Court was, whether, by the reason of marriage to a stranger, the mother loses the right to continue to have the custody of the minor child? The Court held that the custody of the child could not be given to a woman, who had married a second husband, as

51 *Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan,* AIR 2010 Bom. 109 (India).

52 TAHIR MAHMOOD*, MUSLIM LAW IN INDIA AND ABROAD*, 145, (Lexis Nexis, Delhi 2nd ed. 2016).

53 *Supra* note 20 at 446-447.

54 *Ibid.*

55 AIR 1951 Mad. 280 (India).

it was not possible for her to take care of the child and look after her well being. Further, the court observed that the mother of the child was firstly answerable to the husband and took care of his comforts before she could invest time for her child. Furthermore, the court observed that where there was a father who was not totally unsuitable or there were other relatives who could take care of the child, the mother, who had remarried, was not at all the person to whom the custody should be given. Again, in *Arafathunnisa v. T. I. Zeeyavudeen, Taraja Beevi and Mohammed Yasin*,[56] the Madras High Court, while deciding a similar question, observed that if a woman married a person who was not related to the child within the prohibited degree i.e. a stranger, then, as per the Mohammedan Law, she was disqualified to have the custody of the child and therefore, the court held that, though under the Mohammedan Law, she was entitled to have the custody of her girl child, till she attained puberty, as, she had married a stranger, therefore, she was not entitled to have the custody of the child.

However, the Bombay high court, in *Irfan Ahmed Shaikh v. Mrs. Mumtaz*[57], observed that there was no hard and fast rule under Mohammedan law that the mother became disqualified for the custody of her minor child, the moment she married a stranger regardless of the wishes and welfare of the minor child. The court, further, observed that in such cases the court must see the treatment to be met out to the child at the hand of her stepfather, with whom the mother had remarried. So also, the Andhra Pradesh high court, in *Saiful Islam Habeeb Ali v. Asma Begum*[58], held that the mother, who had married a second husband, was entitled to the custody of the minor child, as the child expressed her desire to stay with the mother only. Further, the court observed that solely based on the personal law, the father could not claim custody of the child since it is settled that in case of conflict between the personal law and the consideration for the welfare of the child, the latter should prevail over the former.

56 *Arafathunnisa v. T. I. Zeeyavudeen, Taraja Beevi and Mohammed Yasin*, (May 19, 2020, 12:25 AM) https://indiankanoon.org/doc/1429323/

57 AIR 1999 Bom 25.

58 Saiful Islam Habeeb Ali v. Asma Begum (A.P.)(D.B.) : Law Finder Doc Id # 502869, (May 31, 2020, 09:00 PM) https://www.lawfinderlive.com/Judgement.aspx?v=3n8ya6tOyaEIFYyx1n4feYc6Yq9yADGuQLat%2bMEuws4wd2vBKwBllKDlD26oLm5QE1BPCmkW%2f88zvrwWqtyyp8pCdmTrpVMvWqdmV%2fvZOZLDF5PiN89UMMSm20j9RGDyF1He0hioRRUZrj3Cfy0xN%2fgLld4tc13OjraJEQ6myPiVYA7TQypOZ6XFN9ykIesYUhpUqMBGm0ul99lcvZKtzm80XTPpPDdsmnmpWFLHi7KTJeMBmylakIZV4xybFgNigb%2botg2XdGHdOnmxfXiNSzXaVGXMV0rqcs0M9XmaU4TISQmY7BtIlrNRANYYd%2fkN2vuOnOoYukB3%2b8EJbcTbRksYjA9q%2bnG4E%2bOWztJiF8VqcqGb201rwPAqwXdb1OrOqVPMJ5RcYJTwG%2fo%2fShA7%2bQcc%2fv4K3oWDzqyqkjBWoXIAXO%2fRlwYHmF9B1l%2by8iaHpeRwKAgQrEFnWylJh6r64vhfmEeUMmm9bKHXoGFGibo%3d.

Therefore, it is evident that the Bombay and Andhra Pradesh high court went beyond the dictates of the Muslim personal law in a case where the minor child was capable of expressing himself/herself, however where the child could not express his/her wishes, as in case of Mir *Mohamed Bahauddin v. Mujee Bunnisa Begum Sahiba* and *Saiful Islam Habeeb Ali v. Asma Begum*, the Madras high court did not go beyond the dictates of Muslim personal law, that disqualifies a mother, upon marriage, of her right to custody.

## Muslim Women's Right to Custody of her Children upon Remarriage: An International Perspective

Today, almost all Muslim countries follow traditional *fiqh* rules, which divide the functions of parents into that of a custodian and guardian. The custodian is, generally, the mother of the child, who is responsible for the physical care and upbringing of the child up to a certain age, and the guardianship always rests with the father, who has the duty and authority over financial matters of the child. However, if the mother, after divorce, marries a person who is not a close (*mahram*) relative of the child, she forfeits her preferential right to custody of the child. In some Muslim countries, this traditional *fiqh* rule is considered as discriminatory against women and to grant the mother of her right to remarry, without the fear of losing custody of her children, has been modified by the statutory laws.

In Iraq, a mother has a preferential right to the custody of her children, as long as, it is in their interest. Article 57 of the Personal Status Law, 1959 has increased the maximum age to 15 years to which a mother is entitled to retain the custody of her children. After 15 years of age, a child himself can choose with whom he wants to stay.[59] Furthermore, before 1986, the mother used to automatically lose her right to custody of her children upon remarriage with a person not related to the child. To guarantee the mother's right to have a happy marital life, the legislator intervened in 1987 to repeal and redraft para 9b and 2 of Article 57 of the law. Now after 1987, vide article 57(2) of the law, the right to custody of mother remains valid after her marriage, provided, inter alia, that the court is satisfied that no injury would be caused to the child.[60] In case of a dispute between the father and the mother, regarding the custody of the children when the mother has remarried, the court is expressly empowered to decide the matter in the interest of the children.[61]

59 Article 57(5) of the Personal Status Law of 1959, (Aug 06, 2020, 04:30 PM) https://www.refworld.org/pdfid/5c7664947.pdf.

60 Article 57(2) of the Personal Status Law of 1959, (Aug 06, 2020, 04:30PM) https://www.refworld.org/pdfid/5c7664947.pdf.

61 *Ibid*.

In Morocco also, upon divorce, the mother has a preferential right to the custody of her children until the children attain the age of 15 years.[62] Upon the completion of the age of 15 years, a child himself is entitled to decide with whom he wants to stay. Further, a mother may forfeit her right to custody of her child, if she remarries a person, who is not within the prohibited degree of relationship or who is not a legal representative of the child.[63] However, Article 175 of the code provides certain circumstances in which the remarriage of the custodian mother does not result in the loss of the custody of her children, i.e., if the child is under 7 years of age or if such separation would inflict harm on him; if he suffers from some illness or is handicapped; or if she is the legal representative of the child.[64]

In United Arab Emirates (UAE) also, a mother has the preferential right to the custody of the child, after her, the father, then the maternal grandmother, then paternal grandmother and so on. A mother is entitled to the custody of her male child until he attains the age of 11 years and the female child until she attains 13 years of age.[65] However, the court is expressly empowered to increase the prescribed age limit in the interest of the child. Further, Articles 143 and 144 of the law provide certain conditions upon which a custodian may be disqualified from the custody of the child. Although, Article 144(1) of the law, inter alia, provides that a mother may forfeit her right to the custody of her children if she has married a person not related to the child, but the law also specifically states that the court is empowered, in such a case, to decide otherwise in the interest of the child.

Thus, Iraq, Morocco, and UAE, by way of codification of the rule, that the mother will not *ipso facto* lose her right to custody of her children and by expressly empowering the court to decide in the best interest of the child, have not only protected the right of the mother to remarry a person of her choice but also has gone beyond the dictates of traditional *fiqh* rule which denies the custody of the child to her in case she marries a person not a close relative of the child.

## Conclusion and Suggestions

The rules and customs, discussed above, are centuries old and these should be changed keeping in view the changing needs of the society. Social reforms should be brought in the

62 Article 166, the Moroccan Family Code (Moudawana) of February 5, 2004, (Aug 05, 2020, 04: 45PM) http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf.

63 Article 174, the Moroccan Family Code (Moudawana) of February 5, 2004, (Aug 05, 2020, 04: 45PM) http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf.

64 Article 175, the Moroccan Family Code (Moudawana) of February 5, 2004 , (Aug 05, 2020, 04: 45PM) http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf.

65 Article 156(1), Federal Law No. (28) of 2005 On Personal Status, (Aug 05, 2020, 03:30PM) https://legaladviceme.com/legislation/140/uae-federal-law-28-of-2005-on-personal-status.

present Muslim Personal law by way of codification, to ameliorate the plight of Muslim divorced woman and to save her from destitution. Thus, it is concluded and recommended that;

1. The rule relating to the waiting period, under Muslim law, has twin purposes; firstly, to allow parties to reconcile within iddat period of three months; secondly, to know the paternity of the child in the womb, if any. Hence, it is recommended that the period of waiting should be reconsidered, in case of iddat period running beyond three months, as the same is required for knowing the paternity of the child. Moreover, a similar provision under the Hindu Marriage Act, 1955, has been deleted keeping in view the freedom of marriage available to the parties to the marriage. Secondly, with the advancement of modern medical techniques of blood test and DNA testing, now, it is easy to determine the paternity of the child. Also, the courts in India have started using these methods for determining the disputed paternity of the children.[66] Further, the law commission of India has also recommended to include blood test and DNA testing methods as proof of paternity in addition to the non-access rule under Section 112.[67]

2. Nikah Halala: The practice of nikah halala is necessary in case of triple talaq and talaq-e-hasan. Since, the practice of triple talaq has been declared void and illegal by the Muslim Women (Protection of Rights on Marriage) Act, 2019, the Muslim women would be considered as a legally wedded wife, and would not be required to undergo the formality of nikah halala. As far as, the practice of nikah halala in the case of talaq-e-hasan is concerned, the practice restricts a Muslim divorced woman's right to marry her former husband, thereby, restricting her right to choose her life partner. It is, not only, against her human right to marry and found a family, as enshrined under Article 16(1) of Convention on Elimination of all forms of Discrimination against Women, but also, against her right to autonomy and dignity as envisaged by the Constitution under Article 19 and 21.[68] In *Navtej Singh Johar v. Union of India*,[69] the court observed;

   "[A]utonomy establishes identity and the said identity, in the ultimate eventuate, becomes part of dignity in an individual."

66 *Radhey Shyam v. Pappi*, AIR 2007 Raj 42, *Vandana Kumari v. P. Praveen Kumar*, AIR 2007 AP 17 (India).

67 The Law Commission of India in 185th Report on the Indian Evidence Act, 1972 (March, 2003).

68 *Supra* note 15.

69 AIR 2018 SC 4321 (India).

Thus, the practice is against her right to autonomy, which in turn is against her dignity. Under Article 51-A (1) (e), the state is duty-bound to renounce practices that are derogatory to the dignity of the women. Therefore, it is recommended to abolish the practice of nikah halala by making an appropriate law.

3. On remarriage, the mother loses the right to custody of minor: Although, the paramount consideration, in custody cases, is the best interest of minor children, but the remarriage of the Muslim mother should not be a ground for depriving her of her parental right of custody. She should be treated as a normal and independent woman. This practice restricts a mother's right to marry on divorce, guaranteed by the Constitution, by creating a threat of losing the custody of her children. Further, it is also violative of her human right to equality, in matters relating to marriage and family, as enshrined under Article 16(1)(d) of CEDAW, which provides for the same rights and responsibilities of men and women in matters relating to custody of children, irrespective of their marital status. The law commission of India has also highlighted the need for reconsideration of this rule as it would easily create a bias against the mother.[70] Besides, Iran, being a Muslim country, has also abolished this rule by expressly codifying that a mother does not forfeit her right to custody after remarriage. Therefore, it is recommended to reconsider this rule.

70 The Law Commission in Consultation Paper on Reform of Family law (August 31, 2018) at page 78 para 3.50.