

## Islamic Law and the Rights of Married Women

### ABSTRACT

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*This paper is concerned with Islamic Laws regarding the Rights of married women. There has been biased and incomplete interpretation of this aspect of Islamic Law resulting in the view that Islamic Laws are unfair to women. It is a universal fact that men are given more privileges in Islamic law compared to women, but there are many rights that are given only to Muslim women and no other religions have such types of specific laws made only for women.*

*The four main areas that are discussed in this paper in respect of the rights of married Muslim women are women's right to custody of their children, their right to dower, their right to maintenance and the law and legal procedures in regard to divorce. Issues such as hadanna, types of divorce, the role of dower and the changes that were made in many Muslim countries in regard to Islamic Law are the major focus of this paper. The different schools and their thoughts in Islamic Law make it difficult for anyone to reach a particular decision in relation to married women's right under Islamic Law. An analysis of the law and the interpretation of Islamic Law in this male dominated society would allow us to understand the unique nature of Islamic Law for married women and also clarify to us that indeed Islamic Law is not absolutely unfair and biased towards women.*

It is a commonly held view that Islamic law is worded in such a way that it views women as inferior to men and subjects them to continuous suffering and problems. Although there might be some credits to such type of statements, a thorough understanding of the Islamic Law would allow us to broaden our perspectives and make us understand that Islamic Law is not derived in a way with an intention to make women suffer. Indeed, under Islamic Law women are given many rights which are not recognized in many religious systems. Although it is very true that men are privileged with lot more facilities and power in Islam compared to women, women are also given some exclusive rights that belong to them only. The Koranic verses have been interpreted in many ways and in most of the cases these interpretations have been conducted by men allowing themselves to have unfair advantages over women. It is very true that the rights of women are very limited compared to men in Islamic law, and this article aims to give a better understanding of the power and rights of married women under Islamic Law.

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As we know there are many schools in Islam, and each school has its own set of rules and power which make it difficult for us to reach a particular conclusion in regard to the rights of women. Even at this time, the opinions and ideas of the schools remain divided and there are no strict guidelines of which schools to follow and there is also no set power frame in regard to the value or importance of the schools. This paper focuses on particularly four areas of Islamic Law; they are: women's right to custody, dower, maintenance and divorce.

### **Women's right to custody**

In Islamic law all schools and sects undoubtedly agree with the fact that the guardianship of the person of the child belongs solely to the father and in the absence of the father to the next kinsman as the agnatic heir, if the father is dead the first person to have custodial claim over the children is the paternal grandfather. The mother may never be the guardian of the child. According to all schools the right of the mother is restricted to keeping the child for a certain period of time which varies accordingly between different schools. This exclusive right of the mother to keep her child in her custodial care for a defined period is known as hadannah.<sup>1</sup> All schools and sects agree that hadannah is the primary right of the mother. However, if the mother is not alive or she loses her right of custody there is a disagreement between the schools regarding the transferring of the right of hadannah. The Hanafis and Malikis firmly believe that hadannah is the right of women and as a consequence will pass to the kinswomen of the mother. The Shafis, Hanballis and Shias do not put great emphasis on the right of the mother and in the case where the mother has no surviving female ascendants the right of custody shifts to the father.

All schools place restrictions on women with their right of hadannah in the name of "qualifications of the custodian". The two basic qualifications are that the custodian must be an adult and of sound mind. She must not be habituated to immoral lifestyle which can create a negative impact for the child. During the child's custodial periods the overall decision making power lies with the father, the mother is only responsible for the day to day care of the child, the father is the wali<sup>2</sup> of the child and he is the one who makes all decisions regarding the upbringing of the child.

There is also divided opinion between the schools regarding the religion of the custodian. According to the Hanfis and Malikis the custodian of the children need not to be a Muslim herself. Although, the mother will lose her right of Hadannah if she tries to impose her non-Islamic beliefs on the child. There is a radical difference in the opinion of the Hanbalis and Shafis, according to them a non-Muslim mother can never be a custodian of the child. There is also marked difference between schools regarding the time period of custodial care. According to the Hanafi doctrine the mother has the right of custody until the boy is seven years and for a daughter the bar is nine years.

Maliki law is less restrictive regarding the age limit; according to them the mother has custodial right over the child until he attains puberty and for the girl until she is married and ready to begin her married life. The Shafi school gives both boys and girls to choose the option of whether they want to stay with their mother after they are seven years old. For Shias the right of *hadannah* lasts till the boy is two years old and the daughter seven years old.

The overall picture that is revealed from the above analysis is that the mother has the right of custody of her child for a certain period of time despite the physical and emotional discomforts that she attains during her time of pregnancy. The father is the guardian of the child and is the ultimate decision maker regarding the future of the child. And this particular aspect of Islamic Law has given birth to many debates and arguments.

### **Dower**

In Islamic Law Dower is classified as one of the basic legal rights of a Muslim wife. In Islamic law dower is a sum of money or other property to be paid to the wife in consideration of the marriage and is basically mandatory under all Islamic schools and sects. Though Muslim marriage is in the nature of a civil contract and dower is consideration on the part of the husband, but strictly speaking it does not fall under the generalized terms of a contract. Rather, it symbolizes husband's respect to the wife.

### **Classification of dower**

Dower can be specified or unspecified. The amount of dower may be fixed in three different circumstances either before or at the time of marriage or even in some specific cases this can be fixed after marriage. In our culture (particularly in India, Pakistan and Bangladesh) the amount of dower is settled during the execution of marriage contract. Usually an entry mentioning the amount is made in the Register of marriage by the *Nikah Registrar* (Kazi) which is commonly regarded in Bangladesh as "*Den Mahar*".

But failure to fix the amount before or during the marriage ceremony does not relieve the husband from paying dower. He still remains liable for payment and if no amount is agreed upon by the parties, the Court will decide the amount to be paid based on certain circumstances of both the parties. In determining the amount of dower to be paid the husband's social position and his means are given minimal importance.

The obligation to pay dower is a legal responsibility on the husband and he cannot refuse to pay the dower even if there is no mention of any dower in their contract of marriage. Wife's personal qualifications are also given importance and serve as deciding factors; social position of her father's family and the amount fixed in the case of the other female members of her father's family, e.g. sisters, paternal aunts, etc. are the other factors that are taken into consideration while deciding the amount of dower to be paid.

Both the parties can reach a mutual agreement between themselves regarding the fact of whether the dower should be paid at the conclusion of the marriage or at some later stage. The parties also have the right to agree that part of the dower shall be paid upon the contract which is commonly regarded as prompt dower and part deferred until the termination of the marriage by death or divorce which is known as deferred dower.

The wife is given the right to refuse to consummate the marriage until the husband pays to her the first portion of the dower. The wife is entitled to the full dower once the marriage is consummated or by the death of the husband before the consummation of the marriage. However, if the wife is divorced before consummation takes place she is entitled to receive half of the settled dower and if no dower is fixed in the marriage contract the wife is still entitled to a *mut'a*<sup>3</sup> (which is an Arabic term for a gift of consolation). The requirement of dower is one of the most effective reforms effected by the Quran. As it is mentioned in the Quran 'give women their dower'.

Throughout centuries in every society women have been subjected to many discomforts and violence. The provision of dower and the fact that it is compulsory in every Muslim marriage reemphasizes the fact that in Islam women are given many rights that ensure their betterment. In today's so called western countries the new emerging concept is a 'pre-nuptial' which is derived to ensure that if a marriage is brought to an end the woman does not suffer. We have witnessed the emerging of such concepts in Islamic law (dower) before centuries ago.

### **Maintenance**

One of the basic rights given to a Muslim woman after she is married is the right to be maintained by her husband. However, the woman also needs to fulfil some specific criteria. A wife is entitled to be maintained by her husband even if she is rich and her husband is poor. There are many requirements fulfilling the concept of maintenance, they are: provision of dwelling, food, clothing and depending on the wife's background servants if necessary. The most important aspects is that the husband is required to provide the wife with a 'Sharia dwelling', that is a living place that is secure structurally and also is situated in a safe location, this location must be free from any other members of the family including the co wives. However, there is one exception to this, which is that the husband can require the wife to share her sharia dwelling with infant children from previous marriage.

There are also disagreements amongst the schools on how the scale of maintenance should be calculated. The Shia schools state that the scale of maintenance should be calculated taking into consideration the means of husband alone. According to Hanafi, Maliki and Hanbali law the scale of maintenance is calculated as a mean between the means of the husband and the wife's previous living standard. According to the Ithna 'asharis' the wife's previous standard of living is the sole relevant factor.

As discussed above that the husband has a duty to maintain his wife, in return the wife is also required to obey his reasonable and logical demands. So it can be said that the rights of obedience and maintenance are reciprocal. As soon as the wife submits herself to the husband the husband's duty to maintain the wife begins. In situations where the marriage has been contracted during the minority of the wife, the duty of the husband to maintain his wife begins as soon as she declares herself ready to begin cohabitation with the husband. If the husband expresses his unwillingness to take the wife to live with him despite her declaration, he will be under an obligation to maintain the wife even though she lives with her parents or other guardians.

The husband's right to maintain his wife continues throughout the marriage, unless the wife takes away her right to be maintained by being disobedient to her husband. However, if the wife disobeys her husband for some lawful reason, for example, the husband is impotent or is mentally unstable, the wife does not lose her right to be maintained. All schools agree that even a minor husband is obliged to maintain his wife if she is of an age where consummation of marriage would be possible.

Under Islamic law, there is no provision to maintain the wife out of the husband's estate and therefore the wife's right to maintenance terminates at the death of the husband (however, if the husband expressly declares his willingness to support his wife after his death, then it is possible for the wife). If the marriage is terminated by divorce maintenance would depend on the type of divorce, that is, whether it is revocable or irrevocable. All schools and sects agree that if the divorce is of revocable type then the wife is entitled to be maintained during the *iddat*<sup>4</sup> period (that is usually three months). According to all schools this right is given to the women because the husband has the freedom to take back his wife during this period.

In the pre-Islamic era the Arabs were allowed unlimited polygamy. The Islamic law limited these to only four wives. In Sura al-Nisa, the verse of the Quran that deals with polygamy reads as follows:

*"And if there is no fear that you cannot deal justly with orphans, then marry from the women who seem good to you, two or three or four. But if you fear that you cannot deal equitably, then only one or those whom your right hand possesses. This is better that you do not do injustice (or, that you may not be overburdened with children)" [Schacht,]*

This sura has been interpreted to the effect that the law obliges the husband to treat his wives equitably and he must spend an equal amount of time with each wife (which can sometimes create controversies).

Islamic Law has made many provisions to ensure that married women in Islam are treated with dignity and are entitled to be maintained by their husbands as they leave their parents and give themselves in the hands of a world dominated by unknown human beings (the husbands).

## Divorce

Although, divorce is classified as an end to a marriage, it is an important aspect in regard to the rights of women in Islamic Law. The power of talaq inherently belongs to the husband according to all schools and sects and 'the vast majority of jurists have given men the power of divorce for a cause or no cause and denied it to women'. 'The termination of marriage is regarded by law as an abomination in the sight of Allah and arbitration is counseled when serious difficulties arise'. The Holy Quran says that 'And if you have reason to fear that a breach might occur between married couple, appoint an arbiter from among his people and one from hers, if they both want to set things aright, Allah may bring about their reconciliation'. In contrast to Christianity, in Islam marriages are not regarded as "made in heaven" or "till death do us part". They are contracts, like any other with certain conditions that must be fulfilled. If either side breaks the conditions, divorce is not only allowed by all the different schools, but usually expected. Nevertheless, a hadith makes it clear that: "Of all the things God has allowed, divorce is the most disliked.

There are mainly three types of divorce. The first one is known as Talaq which involves the repudiation of the wife by the husband, the second type is known as Khula<sup>5</sup> which takes place by a mutual consent and the third form is known as Faskh, where the court steps in and dissolves the marriage.

Talaq is the most common form of divorce. There are mainly two types of Talaqs according to the majority of sunni schools. Which are ahsan and hasan. If only one revocable talaq is pronounced during the purity and the husband does not revoke it during the iddat period then the talaq becomes effective after the expiry of the iddah and such a talaq is called ahsan. Hasan is constituted of three single revocable pronouncements at three different periods of unconsummated purity, where the first two have been revoked either verbally or by consummation, then the talaq becomes effective at the moment the third pronouncement is made which cannot be revoked any more and this form of talaq is known as talaq hasan. Most of the authorities have mentioned it and it is also popularly believed that three pronouncements in hasan talaq are to be made in three consecutive periods of purity or in the cases of non-menstruating wives in three months consecutively, unless this is done the talaq will not be hasan.

For women, one of the major improvements made by Islam on pre-Islamic practice is that talak now only twice means a husband now can pronounce talaq two times and then the third one will be final where no more chance of revocation will be granted and thus husband's excessive power of divorce for unlimited times under pre-Islamic Arab society was limited.

One major drawback of Islamic law is the Bida divorce, which is now prohibited because it is unfair for the women and contradicts all previous methods. Sunni form of talaq al-bida is any talaq that is given violating

the rules of *hasan* and *ahsan*, usually takes the form of three pronouncements at the same meeting or single irrevocable pronouncement, both such pronouncements become final and irrevocable at the moment of pronouncement.

The fact cannot be denied that the interpretation of the Koran in the form of Shariat is extremely male-centered and negates the principle of equality between the sexes and therefore Muslim Personal Law cries for reform. Most of the reformations set the target to reform the sunni method of *talaq-al-bida*. In doing so, generally speaking *inter alia*, irrevocable pronouncement is made revocable, number of pronouncements has been made immaterial turning every pronouncement as single, etc. The Hanafi view of validity of *talaq* under intoxication and compulsion has been generally rejected.

Examples of some countries reducing a husband's power to divorce and on the contrary giving more rights to women are as follows. The modern reformation in the field of divorce under Islamic law starts in Turkey in 1917 that basically dealt with wife's power of divorce under Islamic Law. The Turkish Civil Code makes no distinction between men and women in application for divorce. In Indonesia, under Muslim Law, all divorces must go through the court. A husband married under Muslim laws must provide the religious court with a written notification of his intention to divorce, which must include the reasons for wishing to do so. In Tanzania, under s.107, for Muslim marriages a pronouncement of *talaq* is treated as an announcement of the intention to divorce, but the divorce is not final until a Marriage Conciliatory Board has met the spouse and the court has issued a decree of irreparable breakdown. In Iran, under Article 1133 of the Civil Code (law amended in 1993 following women's activism), the husband can divorce his wife without ascribing any reasons, provided he first settles all her financial rights. All divorce cases have to go through court.

The regulation of *talaq* in different states gives one common conclusion that they do not desire to keep the power of *talaq* unaffected and unrestricted. There have been many changes in the field of divorce, however, in spite of all these reforms still the husbands hold a clearly superior position under Islamic Law as regards the power of termination of marriage in comparison with the wives.

Throughout the world, a large proportion of population views Islamic Law as a violator of women rights. Islamic Law has become the centre of attention for many feminists who aim to bring changes in lives of women around the world. However, it is sad but true that very few of us have vast knowledge regarding the rights of women under Islamic Law to understand what Islamic Law actually means for women. We are dictated by the interpretation of Islamic Laws by the male dominated society. Before reaching any particular conclusion we should have an in-depth understanding of the rights provided to women under Islamic Law. Women are treated with dignity, respect and value under Islamic law,

it is mentioned even in our Quran that 'the decision whether a person will go to heaven after death depends on how he/she treated the mother'. Although, because of the interpretation of different sects, the 'mother' has been replaced by father and mother in many societies. The atrocities that have been committed against women in many Islamic countries are indeed very appalling. Throughout the world the plight of Muslim women is still deafening. Although it is a universal truth that men are given more power and privileges compared to women under Islamic law, the changes that are taking place are visible. After so many years of being humiliated by the men in the Muslim societies, it is indeed very difficult for a woman to view Islamic law as fair to them, but we must remember that the laws have been misinterpreted in many cases leading to an incomplete and biased understanding of Islamic law. With proper and unbiased interpretation of the Holy Quran and positive reformations the position of married women will surely improve in Islamic Law in the future. It is for us to give women the right they deserve, because Allah has blessed women with these rights that belong solely to them and no one can take these rights away from a woman in Islam..

1. The exclusive right of mother to keep the child in her custody for a certain period of time
2. The ultimate decision maker, who is solely responsible for someone's life
3. It is an Arabic word meaning a gift of consolation given to the wife by her husband
4. Waiting period
5. A form of divorce where both parties reach a common agreement.

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