

# FACTS *against* MYTHS

## Strengthening or Weakening Women's Empowerment? The Myths behind Religious Personal Laws - Part I

"I am no bird; and no net ensnares me: I am a free human being with an independent will" –  
Charlotte Bronte, in Jane Eyre

### Comment:

In the history of social development, the "woman's question" and, subsequently, gender justice were important political issues. Following Independence the principle of gender equality was enshrined in the Constitution but juxtaposed with a harsh social reality as reflected in the distribution of power within society and community, in the unequal access to life opportunities. It also reflected harshly on the status of women.

At the time, the country was confronted with a host of problems. Of these were the prevalence of various laws affecting the family e.g. marriage, etc., governing various sections of society. Socio-political realities<sup>1</sup> – ranging from the traditionalist to the anti-traditionalist and from the progressive to the post-colonial outlook – governed women's status. The one unifying theme however that underlined these perspectives is the recognition of the subordinate status of women compared to men.

In terms of India's ancient history and mythology the position of women dates back 4000 thousand years and, in modern times, India's subjugation as a colony and since 1947

to its regeneration as an Independent, democratic, secular nation experiencing the paradox of an egalitarian Constitution within an inegalitarian society.

From the above quote<sup>2</sup> it can be gleaned that women in India are hobbled by chains and are unfree, bound with the threads of various personal laws which call it a practice of their values, tradition and customs. These governing religious laws form social identities and divide rights, responsibilities and power between man and women and create disparity in their social status. Thus, the laws governing social reality are gender unjust and downgrade the legal status of women.

The legal system in India is a common law system – a relic of British colonialism. Under their rule ideas of utilitarianism and legal positivism led to many English laws being adopted in India. Moreover, the colonial administration found it politically expedient in not interfering with the existing personal laws that related to family, maintenance and inheritance rights. Their main driving force was trade, commerce and the exploitation of the natural resources of the country. They thus followed a policy of non-interference with the religious affairs of the people

under the rule: 'To Each Religious Community to its Own Personal Law'. No attempt was made to codify these religious personal laws.

Thus, the Indian legal system developed in response to the demands of the British whilst the laws in England were abandoned or modified most of these legal concepts. India instead maintains the "tradition" of these colonial laws. For instance, the concept of Religious Personal Laws.

In matters of marriage, divorce, etc., no community would be ready to accept modern secular laws. (Even today the debate on the Uniform Civil Code (UCC) has not been settled. Muslim, Hindus and other communities have been opposing the need for a modern secular law known as the common civil code. (see Box on page No.3) Any imposition of such laws would have created unmanageable conflict which the colonial power was not willing to risk. However, even for personal laws they introduced modern legal procedure and it was the British judges who

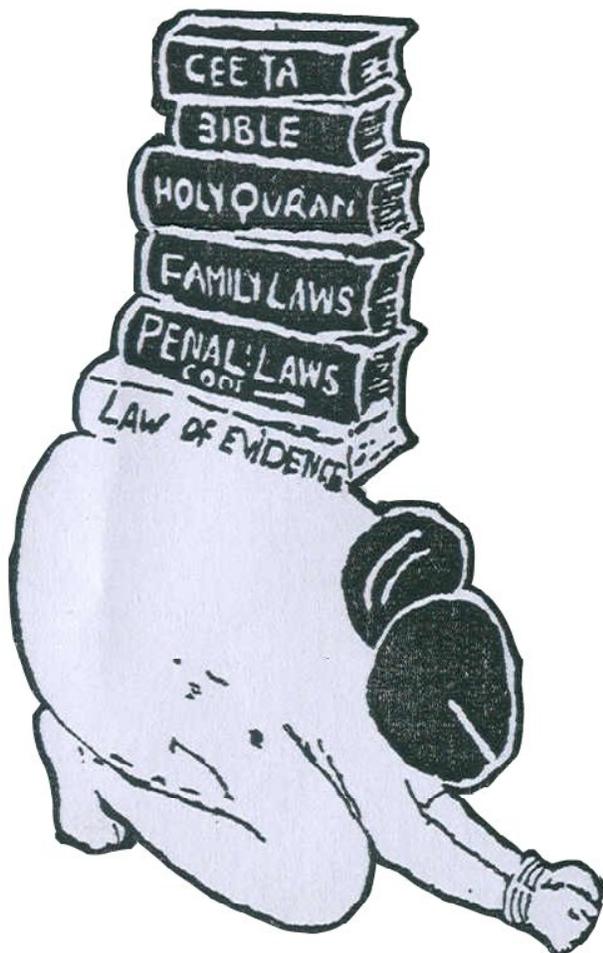
decided these cases. The traditional 'qazi' and other courts were abolished.<sup>3</sup>

In time, however, the Indian Judiciary made several changes within the legal system. (See Box on pg.4) Yet, it resists making the needed changes in the religious personal laws. Where the Constitution grants equal rights to every citizen irrespective of their gender, caste, religion, etc., the law itself follows the tradition of keeping women in a subordinate position. In other words the legal arena commands equality, yet in the social sphere, most Indian women's lives remain unchanged despite clear-cut legal and Constitutional rights. The neutrality of law keeps privileging man while portraying the legal laws as gender neutral.

The subordinate status, women in India stem from the discriminatory rules and laws, inbuilt in the personal laws of all religious communities. Women are silenced by these laws, or restrained and chained by institutionalized religion, symbolized by the place of worship. These discriminatory laws also serve as loopholes for the powerful to conveniently exploit. For stance, the unIslamic practice of triple talaque; female genital mutilation among the Bohra community. Or, the extra-judicial laws of the 'Khap' panchayat or the Caste Panchayat who have passed judgments that are anti-Constitution; human rights are also blatantly violated through so-called honour-killings, and infanticide and child-marriage is common in most parts of the country. The caste panchayat decide on issues on what constitutes transgressions with horrific punishments. These punishment fall heaviest on women of any age, be it a toddler or grandmother.<sup>4</sup>

While criminal law is equally applicable to all Indian citizens, in civil law which govern marriage and family, different religions and Adivasi communities are allowed to continue their traditional, customary practices. The only secular (non-religious) laws governing marriage and child custody were the Special Marriage Act, 1954, and the Indian Succession Act, 1925.

Traditionally, the roles for women are the child, adolescent, wife, daughter-in-law, mother, mother-in-law and widow. At marriage, a women often loses her identity and is referred to by her own parents as the "son-in-law's wife". In other areas of Indian life, women change their first and last names to that of their husband's,



## Sati - Triple Talaq

Today a great deal of discussion is taking place on various aspects of Religious Personal Laws. The most furious one is on the urgency to reform Muslim Personal Law with reference to Triple Talaq vis-a-vis status of 'Poor Muslim Women'. On triple talaq various arguments are being raised to ban it. One 'rationale' that is being asserted is that as Hindus have long since abolished sati therefore it stands to reason that Muslims must likewise terminate triple talaq.

In response to this public assertion, the noted author of "The Vedic People: their History and Geography", maintained that this is not a fact. He presented the following known facts on Sati:

- \* Sati was banned in December 1832.
- \* It was not banned on the demand of the Hindus but rather on the personal initiative of the then British Governor General, Sir William Bentinck with the advocacy and campaign of Christian missionaries;
- \* The colonial administration took 40 years to decide on banning Sati. In 1789 it instructed its officials not to apply their official power to stop Sati on the grounds that Sati was "authorized by the tenets of the religion of the Hindoos";
- \* In 1813, guided by court pundits, the colonial government decided to regulate the practice, thus unwittingly encouraging it;
- \* In 1817, the Chief Pandit of the Supreme Court, Mrityunjaya V. Chattopadhyaya was officially asked to present a 'vyavastha' (ruling) on Sati;
- \* The Chief Pandit consulted 30 texts belonging to various schools of thought. His conclusion was that though burning was termed optional, it was still not recommended;
- \* The Chief Pandit's conclusion became the unacknowledged starting point for Ram Mohan Roy to launch his anti-Sati campaign;
- \* To build his case, Roy had to selectively enlist the support of ancient rishis like Manu and Yajnavalkya while condemning authorities such as Gotama;
- \* Till this time, the anti-Sati campaign was purely an all-European one involving missionaries, government and British public opinion;
- \* With Roy, sati became a topic of debate among Hindus;
- \* The Bengali Hindu leadership did not rally behind Roy and so the colonial administration found it difficult to ban sati with immediate effect;
- \* It was not Hindus vs. Sati but conservative Hindus vs. Roy and his supporters, backed by Christian missionaries;
- \* Roy advised Lord Bentinck against any direct action on the ban;
- \* However, the enactment on banning Sati had been made and Lord Bentinck mobilized the public in its support;
- \* Finally, in 1832 the case came to a close with the Privy Council upholding the ban;
- \* The British colonial court had to defend its decision before their King in the face of objections from the Hindus.

**Source:** Rajesh Kochhar, The History of the Abolition of Sati is instructive for the Triple Talaq Debate, *Indian Express*, June 6, 2017.

**The following markers provide a glimpse of momentous events,  
legal enactments and policies that have a bearing on  
religious laws that effect women**

<b>1829</b>	Abolition of sati.
<b>1856</b>	Widow Remarriage Act.
<b>1891</b>	The Age of Consent Bill impinging on child marriage is the first major nationalist mobilization around the question of family law
<b>1929</b>	Child Marriage Restraint Act outlaws marriage of minors
<b>1937</b>	Muslim Personal Law (Shariat) Application Bill gives women property rights as decreed by Islam. The next year, the Dissolution of Muslim Marriage Bill is passed, with the intent of preventing Muslim women from converting to other religions to gain grounds for divorce, which is otherwise denied to them.
<b>1950s</b>	The Supreme Court upholds a decree of the Bombay High court that Article 14 (equality) of the Constitution could not be invoked to challenge Article 15 of minority rights). This becomes a binding precedent, pitting women's rights against community rights and giving precedence to the latter. After Dr. B.R. Ambedkar's draft Hindu Code Bill (which gives inheritance to daughters and widows, and is more progressive in general) is rejected. four Hindu Code Bills – the Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956) – are instead passed.
<b>1983</b>	The Joint Women's Programme lobbies for changes in the discriminatory aspects of the Indian Christian Marriage Act, 1872, the Indian Divorce Act 1869, and the Indian Succession Act 1925.
<b>1984</b>	Shehnaz Shaikh who was divorced by "triple talaq", files a case in the Supreme Court. Despite death threats, she goes on to found the Awaaz-e-Niswan in Mumbai to work for Muslim women's rights.
<b>1986</b>	The Muslim Women (Protection of Right to Divorce) Bill is passed, taking divorced Muslim women out of the purview of the secular law on maintenance.
<b>1986</b>	In the Mary Roy case, the supreme /court holds that the Travancore-Cochin Christian Succession Act of 1916 violates Syrian Christian women's equal rights to property. Only in October 2010 does the sub-court in Kottayam issue orders implementing the judgment.
<b>1988</b>	The Commission of Sati (Prevention) Act is passed following pressure from women's groups after the "sati" to Roop Kanwar in Deorala, Rajasthan. The Special court in 2004 acquits all the 11 accused of glorification of sati.
<b>1995</b>	In the Sarla Mudgal case, the Supreme Court declares that polygamy after converting to Islam is invalid. The court also invokes the need for a UCC to plug such loopholes.
<b>1999</b>	In the Githa Hariharan case which challenged the Hindu Minority and Guardianship Act, 1956, and Section 19 of the Guardian and Wards Act, 1860, the Supreme Court rules that mothers are equal partners in parenthood. Before this, women could only be caregivers, not decision makers with regard to their children.
<b>2001</b>	Anant Geeta, a Shiv Sena MP, moves a Private Member's Bill named the Prohibition on Religious Conversion Bill, 2001, in the Lok Sabha. The Bill is opposed by the Opposition and the Sangh Parivar fails to muster enough support to get it through.

<b>2001</b>	Indian Divorce Amendment modifying some discriminatory provisions of the Christian Marriage Act, 1872, is passed by Parliament. While loopholes still exist, divorced Christian women become entitled to property.
<b>2004</b>	The All India Muslim Personal Law Board declares that the practice of triple talaq (whereby Muslim men can annul their marriages by uttering the word divorce (talaq) in a single instance) is a “social ill” but stops short of invalidating it.
<b>2005</b>	The DarulUloomDeoband issues a diktat that Imrana, who was raped by her father-in-law in Muzzafarnagar, Uttar Pradesh, could no longer live with her husband as she had become haraam corrupted. The All India Muslim Personal Law Board supports the diktat.
<b>2005</b>	The Hindu Succession (Amendment) Act is passed
<b>2006</b>	The Sachar Committee Report puts forth the idea of setting up a new legal framework for tackling grievances of the Muslim population.
<b>2008</b>	The Menon Committee Report proposes a new framework in the form of an Equal Opportunity Commission (EOC).
<b>2010</b>	The Lawyers Collective moots a secular Anti-Discrimination Law.

obliterating their identity and sealing the husband’s feudal-like ownership of his wife. Divorce carries a huge stigma: there are few financial provisions for divorced women and little legal support.

Today there is recognition of the enduring misogyny in the personal laws of all religion communities. It is acknowledged that irrespective of the length and cause of women’s subordination, there is need to change existing patriarchal structures to bolster the impact of legal and social reforms on the status of women. Among the numerous steps towards this goal one of the primary task is to demystify the age old traditional outlook on the status of women particularly in the context of religious personal laws that harbor a number of myths.

**MYTH:** Muslim personal laws are divine laws, based on the Holy Scripture that cannot be tampered with

**FACT:** Formulations made by theologians, the clergy, jurists, etc – based on values, principles rooted in the Holy Scriptures – cannot be confused or deemed to be the handiwork of god. These formulations are man-made regardless of the source from which it is inspired, etc. Like, for instance the ‘Shari’ah’ of Islam or the laws of other religions on personal and family matters like marriage, divorce, succession and inheritance.

These religious laws have been enunciated in very clearly defined, historical context, within a very specific social milieu. Accordingly, they have governed theologians, etc. in the light of their own experiences. These religious principles, etc., get re-formulated and implement to suit present-day realities. After all, religious laws and doctrines are made more for the people and not the other way around. What is sacred and immutable is principle, not its application. Thus while principle is divine, its application is human.

On this, a number of Islamic scholars like the late Dr. Asghar Ali Engineer and others maintained that the ‘Qur’an’ (sometimes transliterated as “Koran”) as the only source of Islamic law and of a non-human original is incorrect. The ‘sunnah’ or tradition of Prophet Mohammed comprises the second basic important source of law. But the sources which contributed towards its development for centuries, during which times it was formulated – ‘rai’ (opinion), ‘qiyas’ (anlogy), ‘ijma’ (consensus), etc., – are neither accepted by all Muslims alike nor claim to have divine origin. That is, while the “Qur’an” elucidates the essentials of Islam, the details of the code or rule and regulation relating to all legal aspect of a Muslim’s life and cumulatively referred to as ‘figh’, cannot be regarded as divine as the ‘Qur’an’ categorically rules out the possibility of any human person (including Prophet Mohammed,

the Imams of the Shias and the great Islamic scholars) to be divine.

What goes by the name of Muslim Family Law is really an Anglo-Indian Islamic Law and as it developed under British colonial rule; in British courts, administered by British judges rather than by Muslim 'Qazis'. Today, it is administered by Indian judges who adopt this colonial legacy.

The lesson to be learned: The Holy Scriptures are not a monolith. Be it a defensive minority or an intimidating majority.

**MYTH:** A divorced Muslim woman is entitled to a settlement but only within the 'iddat' period of 3 months

**FACT:** On the contrary, the Muslim Women (Protection of Rights on Divorce) Act 1986 (MWA) Section 3 of the Act entitles a divorced Muslim woman to the following from her husband:

- Maintenance during the 'iddat' period
- Fair share and reasonable settlement for her future
- Maintenance for the child till they are adults
- Return of her 'meher' and belongings

Should the husband fail to make such settlement the divorced Muslim women have the right to approach the courts for enforcement of her rights!

**MYTH:** The courts are the only route for a Muslim woman to divorce her husband under the Dissolution of Muslim Marriages Act 1939.

**FACT:** However there are other available options for a Muslim woman to divorce her husband<sup>5</sup>. These are

First,

- Divorce through a court under the Law of 'Faskh' (the annulment of marriage) where the woman approaches the Qazi who annuls the marriage on her behalf. This is carried out on the following grounds, viz., i) the whereabouts of her husband are not known for at least 4 years;
- Non-payment of maintenance to 2 years;
- Imprisonment of her husband for 7 years;
- Non-performance of marital duties and obligations;

- Impotency;
- Insanity or suffering from serious ailment e.g. leprosy or V.D.
- Cruelty which includes the husband taking on a second wife

According to a study, 69.70% of women resort to the out of court option; 90% cases women approached the Muslim arbitration councils ('Darul Kaza) run by the Muslim Personal Law Board for annulment of marriage; in 16 Darul Kaza, 70% used this medium for the purpose.

Second,

- A Muslim woman is entitled to 'Talak-e-Tafweez' i.e. delegated divorce which her identical right to divorce on par with men. The Orissa Mohammedan Marriage and Divorce Registration Act, 1949, do provide the registration of such a divorce. In *Moharam Ali v. Ayesha Khatun (1915)*, the Calcutta High Court upheld this kind of agreement under which wife was authorized to divorce her husband if he married any other woman;

Third,

- 'Khula' is the third type of divorce. This is the unconditional and absolute right of the Muslim wife – on par with the husband's right to 'talaque' and not subject to his consent. (Several State laws – Odisha, Bihar, Assam and W. Bengal – provide for the registration of 'khula'. Once she decides to divorce her husband through 'khula' the husband has no right to oppose it.

Fourth,

- 'Mubaraat' (mutual consent). Unlike 'khula', here both parties agree to dissolve their marriage outside court

Fifth,

- Lian. When the husband indulges in a character assassination, accusing her of adultery without evidence, she is entitled to divorce him. This divorce, by the wife, is called lian;

Sixth,

- 'Khyar-ul-bulugh' (optional puberty). If a Muslim wife was married by her guardian when she was a child, she has the right to divorce on attaining maturity through this doctrine.

**Myth:** The best religious personal laws when

brought under one umbrella i.e. under a Uniform Civil Code, ensures gender justice.

**FACT:** The claim is an over-simplification!

The amalgamation of the very 'best' from all the religious personal laws – that for ages treated women as second-class citizens – begs the question “What will be the outcome of this amalgamation?” The question remains unanswered. Besides, there are no “best” laws as far as women’s rights are concerned. Further, it is altogether an untenable in practice because for instance, ‘mehr’ cannot be introduced into Hindu marriages, nor the Hindu sacramental marriage made into a contract, through both of these are plus-points of Muslim vis-à-vis Hindu laws

**MYTH:** The Islamic Law of Divorce is a rationale and a modern concept

**FACT:** On the face of it is indeed so – in its original, unadulterated form. However, over a period of time it has been very much distorted beyond recognition. “There is nothing in the law of Islam suggesting that the husband is free to exercise the power of talaq in an arbitrary and irrational manner. But this is exactly what Muslim men in our times are doing. While the law on divorce by men is in misuse, that of divorce by women is in disuse”.<sup>6</sup>

The very humanitarian concept of ‘khula’ has been junked. This give the mis-impression that putting an end of a marriage is an exclusive privilege of men.

**MYTH:** The Muslims oppose the Uniform Civil Code (UCC) being imposed on them unlike the Hindu community.

**FACT:** On the contrary, all religious communities do not in favour a uniform civil code – not just the Muslims. For instance:

- The Parsis. On the law of adoption the Parsis feel that this law threatens their religious identity;

- The Christians. On the issue of divorce and property rights they feel the UCC is an interference. For instance, the well known judgment on property rights of a Christian woman, Mary Roy, by a Kerala High Court was strongly opposed by the churches in the State;

- The Sikhs. According to one of their customs, the wife of the deceased brother has to marry another brother in order to save the division of their agricultural land;

- The Adivasis and the indigenous people of the North East. These communities follow their age old traditions and customs and which are very different from one tribal region to another ;

- The section of the Hindus on their part have been viciously opposed to the Hind Code Bill even before Independence. The Congress leaders themselves had opposed the Bill introduced by Dr. Ambedkar and the Parliament was ‘gheraoed’ by Sadhus and religious leaders.

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## GLOSSARY<sup>7</sup>

**Halala:** It is a practice where a woman is made to do a consummated nikaah with another man in order to go back to her former husband.

**Mehr:** It is the Quranic right constituting a consideration for marriage and meant for the financial security of the bride in terms of a sum of money or other property to be delivered to the bride by the bridegroom at the time of the nikah as a condition precedent for solemnization of their marriage, as specified in the Nikaahnama

**Nikah:** Marriage or Nikah is a solemn pact or 'mithaq-e-ghaliz' between a man and a woman, soliciting each other's life companionship, which in law takes the form of a contract or aqd. (Ref:Section 2 of Muslim Women 9 Protection of Rights on Divorce) Act, 1986)

**Nikahnama:** The enforceable written marriage contract wherein the consent of the parties and other terms of conditions of marriage are stipulated and signed by both parties, qazi as well as four witness, two from each party of either sex.

**Talaq:** Divorce effected by the husband's enunciation of the word 'talaq', this constituting a formal repudiation of his wife.

**Panchayatnama:** A document prepared by a group of five influential older men acknowledged by the community as its governing body.

**Qazi:** A qazi is a judge ruling in accordance with Islamic religions Law (Sharia) appointed by the ruler of a Muslim country.

Next Issue:

### Religious Personal Laws - Part II

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