

Gender Equality: Human Rights v. Islam

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Abstract

Feminist human rights advocates often criticise Islam for having a discriminatory attitude towards women especially in matters of family law. In support of this criticism, they refer to various practices of Islam to argue that gender inequality is inbuilt in the Islamic social system. With this criticism in view, the present research paper analytically examines the issue of gender equality in Islam with particular reference to the position of Islamic law on polygamy, endogamy, divorce, inheritance and evidential capacity of women. The paper focuses on the argument that the basic principles of Islamic law are not inconsistent with modern human rights as contained in the UDHR, ICCPR and CEDAW. The paper also makes suitable recommendations for the development of Islamic law to bring it in complete conformity with the needs of modern times without compromising on basic principles of Islam.

Article 3 of the International Covenant on Civil and Political Rights (ICCPR)¹ declares: ‘The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant’.² The underlying aim of the Article is to ensure gender equality or ‘equal rights of men and women’. The reason set forth in the Article for ensuring this equality is to enable both sexes to enjoy their civil and political rights under modern human rights.

A minute study of the Article would make it clear that it lays down two fundamental principles: equality and non-discrimination.

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¹ The ICCPR was adopted by the UN General Assembly through Resolution 2200A (XXI) on 16 December 1966.

² Article 3 of the International Covenant on Civil and Political Rights (ICCPR). Full text of the Covenant may be read at the UN International Human Rights Instruments Website: <http://www.unhchr.ch/html/intlnst.htm>.

Although both these terms are usually used as synonyms, the former refers to a positive right while the latter refers to a negative right. When put together both these rights aim at ensuring impartiality in the treatment of individuals, particularly women, in a state. As such, the rights of equality and non-discrimination are often described as ‘the most fundamental of the rights of man’ and ‘the starting point of all liberties’.³

The principle of equality, as enshrined in the ICCPR, has been derived from Article 1 of the Universal Declaration of Human Rights (UDHR)⁴ which declares that ‘all human beings are born free and equal in dignity and rights’.⁵ Similarly, the principle of non-discrimination has been derived from Article 2 of the UDHR, which states that the enjoyment of human rights shall be ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.⁶

The obligation of equality and non-discrimination as envisaged in Article 3 of the ICCPR requires the member states not only to protect women but also to take appropriate action through legislation for their enlightenment and education so that they are able to enjoy equal rights with men. This aspect has also been highlighted in the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which emphasises upon total elimination of discrimination against women and the achievement of total equality between genders.⁷

While Article 3 generally aims at gender equality, Article 23 of the ICCPR provides specific guarantees for gender equality in connection with the institution of family. The ICCPR does not provide a definition of the word ‘family’. However, the United Nations Human Rights Committee (HRC), which works as the supervisory machinery under the ICCPR and is responsible for the execution of the Covenant, has stated in this regard as follows: ‘In giving effect to recognition of the family in the context of Article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their

³ A.F. Bayefsky, ‘The Principle of Equality or non-Discrimination in International Law’, 11 *Human Rights Law Journal*, 1990, p.1.

⁴ The UDHR was adopted by the UN General Assembly through Resolution 217A (III) on 10 December 1948.

⁵ Article 1 of the Universal Declaration of Human Rights (UDHR).

⁶ *Ibid.*, article 2.

⁷ The Convention on the Elimination of all forms of Discrimination Against Women, 1979, p.13.

children and single parents and their children and to ensure the equal treatment of women in these contexts'.⁸

The importance and recognition of the family as an institution under Islamic law is a well-established fact. However, in Islam, marriage is the legitimate means of founding a family. In this sense, Article 23 is in full agreement with Islamic law. Nonetheless, there are some apparent differences between the thresholds of Islamic law and modern human rights as contained in Article 23 of the ICCPR. These differences are particularly pertinent in connection with the presumed superiority of men over women, polygamy, endogamy, divorce and inheritance which are discussed below under separate heads:

Presumed superiority of men over women

It is a well-established though a sad fact that in Muslim societies men are generally given preferential treatment over women. Although reasons for this preferential treatment are mostly cultural and socioeconomic rather than religious, their continued existence is often justified with the help of Islamic law. In this regard, the following two verses of the Qur'an are often cited to prove that *men have a divine right of superiority over women*.⁹

- a. 'And women have rights similar to the rights against them, according to what is equitable; but men have a degree over them'.¹⁰ (Al-Qur'an 2:228)
- b. 'Men are the protectors and maintainers of women, since Allah has made some of them excel the other, and because they have spent of their wealth'.¹¹ (Al-Qur'an 4:34)

Almost all writers, both classical and modern, have interpreted these two verses variously. For example, Abdullah Yousaf Ali has translated the first verse as 'men have a degree (of advantage) over women';¹² but Muhsin Khan has translated it as 'men have a degree (of responsibility) over them'.¹³ Addition of the words 'of advantage' and

⁸ United Nations Human Rights Committee (HRC), General Comment 22, para 5.

⁹ Emphasis added.

¹⁰ *Al-Quran*, 'Surah Al-Baqarah', 2:228.

¹¹ *Ibid.*, 'Surah An-Nisa', 4:34.

¹² A.Y. Ali, *The Meaning of the Holy Qur'an* (Maryland: Amana Corporation, 1992), p.92.

¹³ M. Muhsin Khan and M. Taqi-ud-Din Al-Hilali, *Interpretation of the Meanings of the Noble Qur'an in the English Language: A Summarized Version of Al-Tabari, Al-Qurtubi and Ibn Kathir with Comments from Sahih-al-Bukhari* (Riyadh: Darussalam Publishers, 1996), p.57.

‘of responsibility’ by the two interpreters makes it manifestly clear that those are not express statements of the Qur’an. Rather, those interpretations are based on the understanding of the content by the interpreters.

Ibn Qadamah, in his famous treatise *al-Mugni*, has argued that both men and women have equal rights in Islam. According to him, the two genders have a complementary role but the husband’s role is greater than the wife’s because God says that ‘men have a degree (of superiority) over them’. He has also referred to a Tradition in which the Prophet is reported to have said that if it was lawful for a human being to prostrate before another, wives would have been ordered to prostrate before husbands due to the rights of husbands over them.¹⁴ Therefore, although he does not attribute more rights to men, he does declare men to be superior to women.

While the first verse (Al-Qur’an 2:228) is often quoted to argue that men have a degree of superiority over women, the second verse (Al-Qur’an 4:34) is usually presented to explain the reason for the presumed superiority. This second verse gives two reasons: firstly, men are the maintainers of their wives; and secondly, they have spent of their wealth to acquire them. Therefore, while the contemporary Muslim jurists tend to agree that men and women have equal rights in Islam they insist that men have a degree of superiority over women in family matters for the two aforesaid economic reasons mentioned in verse 4:34.

If that argument is accepted, it would mean that the sole reason for men’s superiority over women is their economic role in the family and they lose that role they will have no superiority over women. Conversely, women will become superior if men are dependent upon them. What is exactly meant by degree in the first verse quoted above (Al-Qur’an 2:228) is unclear as the Qur’an does not specify anything in this regard. Therefore, one approach would be not to put any meanings in an open ended verse which the Divine Author Himself did not do. That would mean that both sexes have equal rights subject to their inherent strengths and weaknesses.

The other approach would be to interpret the two verses with reference to their context. Both the verses have been revealed in the context of the institution of family. Therefore, even if the two verses are linked together, instead of advocating the superiority of one gender over the other, the two verses must be understood in the context of their different roles in the family. Like all other things in the universe, this

¹⁴ Ibn Qudamah, *al-Mugni* (Arabic) (Riyadh: Maktabah al-Riyadh al-Hadithah, 1981) Vol.7, p.223.

role is also subject to change from time to time. While in the past the women were economically dependent upon men, in the future the position could be quite opposite. Therefore, the degree of difference mentioned in the first verse (Al-Qur'an 2:228) possibly refers to the role of leadership that was traditionally available to men in all societies.

From sociological perspective, authority and power are essential elements of any group structure. Similarly, from psychological perspective, whenever two persons come in contact with each other, there is an ascendance-submission or dominance-compliance relationship between them. In simple words, whenever a team comprising two or more members comes into existence, it inevitably requires one of them to be the leader, especially when there are any targets to be achieved. This explains why Islam emphasises upon leadership in every group activity to ensure smooth functioning of the team and cohesion in the relationship.

It is for this reason that when two or more people get together to perform congregational prayers, the one more suited for the role is designated as *Imam* or leader. In such situations, the leader is not considered as being superior to others but he is assigned the role only to ensure smooth functioning of the team. Likewise, there arises the need to differentiate and identify roles within the family structure in order to enhance the success of the family life. The husband would certainly be more suitable for certain roles while the wife would be more effective in others.

Thus, the degree of responsibility or presumed authority or the leadership role of men over women is a consequence of their structural role in the family. Islamic concept of the man being the leader of the family however does not mean that man is superior to woman or he has more rights than the other. Apart from the leadership role, which too is restricted to the institution of family and in which he is accountable to other team members, both men and women have equal rights against each other and none of them is to be discriminated on the basis of sex alone.

Polygamy

Islam does not promote celibacy and also prohibits sexual relations outside wedlock. As such, marriage and the family are very strong institutions of Islam. There is a famous Tradition reported in *Sahih al-Bukhari* in which the Prophet described marriage as his *Sunnah* and asked his followers not to neglect it.¹⁵ Therefore, Esposito rightly

¹⁵ Al-Asqalani, Ibn Hajar, *Bulugh al-Maram*, 1996, p.342, *Hadith* 825.

reached the following conclusion: 'Islam considers marriage, which is an important safeguard for chastity, to be incumbent on every Muslim man and woman unless they are physically or financially unable to lead conjugal life'.¹⁶

While Islam encourages marriage, it does not grant recognition as a family to unmarried couples living together and to civil partnerships between the same sex and the opposite sex partners, as is recognized in most of the Western countries. Under Islamic law, all sexual relationships outside wedlock, even if freely and fully consented by the parties, fall under the definition of 'zina' and, if the offence is proved according to the evidential requirements prescribed by the *Shariah*, the offenders are liable to the punishment of *hadd*, which in the case of married persons is *rajm* or stoning to death and in the case of unmarried persons is a hundred stripes.¹⁷

Such a punishment from the standpoint of modern human rights is not only a violation of Articles 7 and 23 of the ICCPR but is also against the provisions of the Geneva Convention of 1951. Every year, many people from Muslim states seek asylum in the Western countries on this ground. While in such cases of unmarried relationships and civil partnerships Muslim states are often criticized for their failure to introduce necessary legislation, in case of polygamy and endogamy they are often criticized for their failure not to undo relevant laws.

Article 23(4), as discussed above, stipulates that: 'States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'. In the light of the provisions of this sub-article, the Human Rights Committee observed in its General Comment 28 that polygamy is incompatible with equality of rights under the ICCPR and that 'it should be definitely abolished where it continues to exist'.¹⁸ Since

¹⁶ Esposito, J.L., *Women in Muslim Family Law* (Syracuse: Syracuse University Press, 1982), p.15.

¹⁷ The punishment of *rajm* is based on the *Sunnah*. Otherwise, the *Qur'an* does not make any distinction between the offenders and prescribes the same penalty for *zina* irrespective of the fact whether the offenders are married or unmarried: 'The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment'. *Al-Qur'an, Surah An-Nur*, 24:2.

¹⁸ United Nations Human Rights Committee (HRC), General Comment 28, para 24.

polygamy is generally prevalent in Muslim states, they were the obvious target.

There is no denying the fact that Islam allows polygamy. However, it is not an absolute right but a qualified one which means that it can be exercised only in exceptional circumstances and that too after fulfillment of necessary conditions. The permissibility of polygamy in Islamic law is based on the following Qur'anic verse: 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, Two or three or four; but if you fear that you shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice'.¹⁹

It is clear from the above verse that though, under Islamic law, men are allowed to have a maximum of four wives at a time, subject to the following conditions:

1. The polygamous marriage is allowed only with widows who have orphan children;
2. The main purpose of the marriage is to be able to deal justly with the orphans in question;
3. The marriage will be allowed only if the man is able to deal with all the spouses justly.

Both classical and modern Muslim jurists agree that the ability to treat them justly is a *sine qua non* for the second or the subsequent marriages. However, Imam Shafi'i did not regard the ability to do justice between the wives as a pre-requisite for later marriages. In his view, 'dealing justly' is not a precondition or a legal requirement but only a moral exhortation for the guidance of the husband's moral conscience which he may choose to ignore at his own peril at the cost of wrath by Almighty Allah.

Some modern Muslim jurists and scholars, such as the nineteenth century Egyptian jurist Muhammad Abduh, argue that last part of the above-quoted Qur'anic verse 'that will be more suitable, to prevent you from doing injustice' makes it clear that monogamy is the rule while polygamy is only an exception. According to them, when this part of the verse 4:3 is read with verse 4:129 ('You will never be able to do perfect justice between wives even if it is your ardent desire'.) one comes to the conclusion that polygamy is actually prohibited under Islamic law.

The combined interpretation of verses 4:3 and 4:129 was subsequently relied upon by Tunisia and Morocco. Tunisia banned

¹⁹ *Al-Quran*, 'Surah An-Nisa', 4:3.

polygamy in 1956 through the Tunisian Code of Personal Status which declared: 'Polygamy is forbidden. Any person who, having entered into a bond of marriage, contracts another marriage before the dissolution of the preceding one, is liable to one year's imprisonment or to fine'.²⁰ Moroccan Code of Personal Status of 1958 also contained similar provisions.

Iraq also followed the prohibitive approach adopted by Tunisia and Morocco in the fifties and banned polygamy in 1959. However, due to lack of political will and in view of strong opposition and non-compliance by Muslims who considered it to be contrary to express Qur'anic injunctions, this law was revised in 1963 and the article prohibiting polygamy was consequently removed. The Tunisian and Moroccan Codes are however still operative despite similar opposition faced by Iraq.

Unlike Tunisia, Morocco and Iraq, Syria adopted a restrictive approach and instead of banning it altogether linked the right of polygamy to obtaining approval from the family court. Article 17 of the Syrian Code, which is still in force, declares: 'The Judge is empowered to refuse permission to a married man to marry another woman if it is established that he is not in a position to support two wives'.²¹ Although the only test required in the Syrian law is a man's ability to support two wives, nevertheless it is a right step in the right direction.

In Pakistan, Muslim Family Laws Ordinance was promulgated by President General Muhammad Ayub Khan in 1965 which still continues to be force without any major amendments. Under this Ordinance, a husband is required to seek permission from his existing wife or wives, as the case may be, before entering into marriage with another woman. His failure to do so could make him liable for six months' imprisonment or with fine or both. However, this provision has failed to protect women's scant family rights in Pakistan as most of them are hardly able to confront men in this male dominated society.

In many Muslim states where polygamy is permitted, the prerequisite of being able to do justice between co-wives is seldom given any consideration by men. Due to widespread corruption in most of the Muslim states coupled with their poor record on the rule of law, the permissibility of polygamy is often abused in a way that actually works against the family institution itself. Therefore, its permissibility needs to

²⁰ Article 18 of the Tunisian Code of Personal Status that came into force on 13 August 1956.

²¹ T. Mahmood, *Statutes of Personal Law in Islamic Countries: History, Texts and Analysis* (Delhi: India and Islam Research Council, 1995), pp.246-48.

be controlled under Islamic law for reasons of welfare under the principle of *Maslahah*, which is well-established in Islamic Jurisprudence.

The prohibitive approach as adopted in Tunisia, Morocco and Iraq has been controversial under traditional Islamic law and has been criticized by many scholars as contravening the Qur'an.²² On the contrary, the restrictive approach adopted by Syria, despite being limited, has been more successful as it has been able to redress the root cause of the evil without invoking much criticism. The time has come when the Muslim States, including Pakistan, should introduce similar changes in their family laws with appropriate checks and balances.

In view of inherent loopholes in the judicial systems of some of the Muslim states including Pakistan, it is proposed that, in addition to linking polygamy with permission from the Family Court, the relevant family laws may be amended suitably with a view to give Muslim women an optional right of automatic divorce if they are not satisfied with the permission granted by the Family Court. Such a right can be granted to them under the principles of *tafwid-al-talaq* or delegated divorce and *taliq-al-talaq* or suspended divorce, which should be made a part of every contract of marriage between the parties.

There is consensus among Muslim jurists that polygamy is only a permissible act and it cannot be imposed on a man or a woman compulsorily. Also, most of the schools of Islamic jurisprudence, except Shi'ah, endorse the doctrines of *tafwid-al-talq* and *taliq-al-talaq*. Under the first principle of *tafwid-al-talq* or delegated divorce, the husband gives the right to the wife to divorce herself in stipulated circumstances which may include second marriage. In such a case, the wife can divorce her husband just like the husband can divorce her. Under the second principle of *taliq-al-talaq* or suspended divorce, the husband stipulates at the time of marriage that the marriage will become automatically repudiated if he does certain things which may include entering into another marriage.

It is hoped that by restricting polygamous marriages to widows with orphans, by making prior permission of the Court compulsory and by making *tafwid-al-talq* or delegated divorce and *taliq-al-talaq* or suspended divorce essential of a contract of marriage, Islamic states will be able not only to ensure compliance with Article 23 of the ICCPR but they will also be able to follow the true spirit of the Islamic law allowing polygamous relationships only for good reasons such as demographic

²² A.A. Qadri, *Islamic Jurisprudence in the Modern World* (New Delhi: Taj Company, 1986), pp.341-58.

needs, economic factors, barrenness or chronic illness of the wife, etc. Aspiring for another marriage without any valid reason is contrary to the Qur'anic philosophy of marriage. According to the Qur'an, a believer enters into a bond of marriage 'desiring chastity, not lust'.²³ This theme has been reiterated in Al-Quran 5:5 which has been discussed below in connection with endogamy.

Endogamy

The Qur'an permits Muslim men to marry 'women of the people of the book', i.e. Christian and Jewish women, in the following verse of Surah Al-Ma'idah: 'This day are (all) things good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them. (*Lawful unto you in marriage*) are (*not only*) chaste women who are believers, but (*also*) chaste women among the People of the Book, revealed before your time,- when ye give them their due dowers, and desire chastity, not lewdness, nor secret intrigues if any one rejects faith, fruitless is his work, and in the Hereafter he will be in the ranks of those who have lost (all spiritual good)'. (Al-Quran 5:5)²⁴

Although a Muslim man is permitted to marrying a Christian or Jewish woman, there is consensus among both *Sunni* and *Shi'ah* jurists that a Muslim woman is prohibited from marrying a non-Muslim man. This prohibition is based on the basis of the following two verses of the Qur'an:

- a. 'Do not marry unbelieving women (idolaters), until they believe: A slave woman who believes is better than an unbelieving woman, even though she allures you. *Nor marry (your girls) to unbelievers until they believe: A man slave who believes is better than an unbeliever, even though he allures you*'.²⁵
- b. 'O you who believe! When there come to you believing women refugees, examine (and test) them: Allah knows best as to their Faith: *if you ascertain that they are Believers, then send them not back to the Unbelievers. They are not lawful (wives) for the Unbelievers, nor are the (Unbelievers) lawful (husbands) for them.* But pay the Unbelievers what they have spent (on their dower), and there will be no blame on you if you marry them on payment of their dower to them'.²⁶

²³ Al-Quran, 'Surah An-Nisa', 4:24.

²⁴ *Ibid.*, 'Surah Al-Ma'idah', 5:5.

²⁵ *Ibid.*, 'Surah Al-Baqarah', 2:221.

²⁶ *Ibid.*, 'Surah Al-Mumtahnah', 60:10.

Allowing Muslim men to marry Christian and Jewish women but disallowing Muslim women to marry Christian men and Jewish men is often considered against modern human rights being discriminatory against Muslim women. Therefore, the HRC observed as follows: ‘The right to choose one’s spouse may be restricted by laws or practices that prevent the marriage of a woman of a particular religion with a man who professes no religion or a different religion. States should provide information on these laws and practices and on the measures take to abolish the law and practices’.²⁷

Muslim jurists have tried to defend the female endogamy under Islamic law. Their first and the foremost defence is as follows: ‘While Islam guarantees freedom of belief and practice to the Christian and Jewish wife of a Muslim, safeguarding her rights according to her own faith, other religions, such as Judaism and Christianity, do not guarantee the wife of a different faith freedom of belief and practice, nor do they safeguard her rights’.²⁸

The prohibition under Islamic law may, on some occasions, prevent a Muslim woman from marrying a Christian or a Jewish man she loves. Therefore, this preferential treatment has been found discriminatory under modern human rights. The supporters of Islamic faith may however argue that the non-Muslim man may convert to Islam if he really loves her. Love being one of the most abused words in the world; that does not solve the problem. Besides, it is the question of the Muslim woman’s rights and not vice versa.

The prohibition of Muslim women from marrying non-Muslims therefore is one of the areas where achieving complete equality seems difficult between Islamic law and modern human rights. Perhaps, that is why no non-secular Muslim state has so far enacted any law to abrogate the prohibition on Muslim woman’s right to marry a non-Muslim thereby bringing them at par with their Muslim counterparts.

The juristic view of some contemporary Muslim scholars on the issue is that since Muslim women are prohibited completely from marrying non-Muslims, the Muslim men could also be temporarily prohibited from marrying women of the ‘people of the book’ where there is apprehension of a high number of Muslim women remaining

²⁷ UNHRC, General Comment 28, para 24.

²⁸ Y. Al-Qaradawi, *The Lawful and the Prohibited in Islam* (Kuwait: International Islamic Federation of Students Organizations, 1984), pp.184-86.

unmarried until the situation is remedied. This is based on the doctrine of public welfare or *maslahah* under Islamic law.²⁹

Alternatively, necessary legislation may be made by Muslim states, as discussed above in connection with polygamy, allowing to incorporate a condition in favour of women that the husband shall not marry a Christian or a Jewish woman and if he does so she will be entitled to *tafwid-al-talq* or delegated divorce and *taliq-al-talaq* or suspended divorce, as the case may be. Another solution in the circumstances could be to make such a marriage conditional with obtaining permission from the Family Court as is presently done in Syria in the case of polygamous marriages.

Divorce

Article 23(4) of the ICCPR stipulated: ‘States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution’. Therefore, in its General Comment 28, the HRC observed that in the dissolution of marriages member states must ensure that ‘grounds for divorce and annulment should be the same for men and women’.³⁰ In plain words, in terms of modern human rights, both men and women have equal rights of divorce and the member states are required to amend their laws accordingly in terms of Article 23(4) of the ICCPR.

Under Islamic law, marriage may be dissolved in one of the following ways:

1. Unilateral repudiation by husband, which is commonly known as *talaq*;
2. Discharge at wife’s request called *khula*;
3. Dissolution by mutual agreement of the parties known as *mubara’ah*,
4. Dissolution through judicial order termed as *fasakh*.

The first type, i.e. unilateral repudiation or *talaq*, is a right of the husband while the other three forms *khula*, *mubara’ah* and *fasakh* can be invoked only by the wife. Unilateral repudiation or *talaq* however is the simplest and the most common method of dissolving the marriage. This can be exercised exclusively by the husband at his discretion for any or no reason at all. Although divorce is permitted in Islam, Muslims are strongly advised to follow this action as a last resort because it is one of those permissible acts which do not find favour with Almighty Allah.

²⁹ *Ibid.*

³⁰ UNHRC General Comment 28, para 26.

It may be morally wrong, or even sinful in some circumstances, a husband can divorce his wife under Islamic law by a single pronouncement such as 'I divorce you'. On the contrary, a woman can seek dissolution of marriage only in one of the three ways mentioned above and that too on limited grounds. Therefore, while it may be a misconception to state that men have an exclusive right of dissolving the marriage under Islamic law it will also be equally misleading to suggest that men and women have equal or the same rights of divorce under Islamic law.

The fact is that, under traditional Islamic law, men certainly have an advantage over women in the procedure of marriage dissolution. Therefore, the Qur'an admonishes them to safeguard their wives' welfare.³¹ Yet there is evidence of this right of unilateral repudiation or *talaq* being abused by men at a large scale in the Muslim countries. Furthermore, even though divorced women are free to remarry under Islamic law, men in many Muslim countries consider it a taboo to marry divorced women. As such, they are often subjected to misery and destitution.

Even in the exercise of the right to discharge or *khula* by a wife, some men do in bad faith withhold consent and thus continue to punish the woman and keep her under retention. In this way, the woman is left only with the alternative of seeking a judicial order of dissolution or *fasakh* which she may not be able to obtain if her grounds of dissolution fall outside the traditional legal limits for granting such order. This situation is contrary to the spirit of Islamic law. Therefore, there is dire need to combine the moral content with the procedural aspect of dissolution of marriage under Islamic law.

Some Muslim states have already looked into the problem and introduced new provisions in their Personal Status Laws that modify, in a variety of ways, the traditional rules of dissolution of marriage under Islamic law. The most radical modifications prohibit the husband's right to divorce his wife extra-judicially through unilateral repudiation or *talaq*. For example, Article 30 of the Tunisian Code of Personal Conduct, 1956, provides that: 'Divorce outside a court of law is without legal effect'. Article 49 of the Algerian Family Code of 1988 also has a similar provision.

The above changes were made by the concerned Muslim states placing their reliance on the following verse of the Qur'an: 'If you fear a breach between the two of them (husband and wife), appoint two

³¹ Al-Quran, 'Surah Al-Baqarah', 2:229-32.

arbiters'.³² Although Islamic law requires two arbiters, one from the husband's family and the other from the wife's family, in the above examples the state considered it appropriate to take over that role through its courts on grounds of public interest. In this way, the court is placed in the position of two arbiters to ensure a combination of the moral content and procedural aspect of the divorce bringing the parties on the same procedural footing in matters of dissolution of marriage.

In some other countries such as Morocco, Syria, Algeria and Iran, amendments have been made in the Muslim Family Law empowering the court to order the husband to pay compensation to the wife where the unilateral repudiation (*talaq*) is for no just cause.³³ In Pakistan, unilateral repudiation (*talaq*) by the husband becomes effective only after 90 days after it has been reported to an Arbitration Council, which tries to reunite the couple during this period. This is more like a supervisory role over the traditional waiting period under Islamic law after the *talaq* has been pronounced.

Considering the consensus of Muslim jurists that divorce is recommended only as a last resort when it has become clearly impossible for the spouses to remain together, coupled with evidence that the procedural advantage enjoyed by men over women in the matter of divorce has been abused, the judicial control of marriage dissolution by the state can also be justified under the doctrine of public welfare (*maslahah*).³⁴ The doctrine is used as a 'basis of rationality and extendibility of Islamic law to changing circumstances as a fundamental principle for the universality and certainty of Islamic law'.³⁵

The doctrine of *hisbah* could also be relied upon here so that the state would be seen as encouraging good and preventing evil by such judicial control whereby the dissolution of marriage is restricted to dissolution by judicial order to facilitate the amalgamation of both the moral and legal content of the rules of divorce. Since dissolution by judicial order (*faskh*) is a method already sanctioned by Islamic law, this will not amount to making any new law but the removal of a procedural advantage which has been generally subjected to abuse.

³² *Ibid.*, 'Surah An-Nisa', 4:35.

³³ Article 49 of the Algerian Family Code of 1988 and Article 117 of the Syrian Code of Personal Status of 1953 have such provisions.

³⁴ Lawyers Committee for Human Rights, *Islam and Justice* (New York: LCHR, 1997), pp.122-23.

³⁵ M.K. Masud, *Shatibi's Philosophy of Islamic Law* (Islamabad: Islamic Research Institute, 1995), p.viii.

An alternative approach is giving the right of divorce to women by inserting or deeming a provision in the contract of marriage. Such a right is known in Islamic law as *khiyar al-talaq*, i.e. option of the wife to divorce. Under traditional Islamic law, the wife has a right to stipulate in the marriage contract that the husband delegates to her, absolutely or conditionally, the right of unilateral repudiation (*talaq*) whereby she will have a right to invoke it when necessary. This does not however divest the husband of his own original right to divorce. This will bring the spouses at par as far as right of divorce is concerned.

That means the wife will have a statutory right of divorce in the contract of marriage unless she agrees to exclude it specifically. In the absence of any evidence to the contrary, the courts will presume that such a condition always existed in a contract of marriage. Supplementary to that is the need to create awareness among women of their legal rights under Islamic law.³⁶ There is nothing under the *Shari'ah* that prohibits the state from ensuring that women are adequately informed about their legal rights and duties. In fact, women are encouraged under Islamic law to get education.

Inheritance:

Advocates of Islamic law assert that the 'Islamic inheritance scheme contains one of the most comprehensive and detailed systems of succession known to the world'.³⁷ However, the feminist human rights advocates believe that the females' share in the Islamic law of inheritance is inconsistent with the principle of equality for women under international human rights law. According to the HRC, 'Women should have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses'.³⁸

Under Islamic law, the male heir generally receives double the share of the female heir. This is based on the following verse of the Qur'an: 'God directs you as regards your children's (inheritance): To the male a portion equal to that of two females'.³⁹ Therefore, if a person dies intestate, under Islamic law, his estate will be distributed among his children in the ratio of two portions for a male and one portion for a

³⁶ Tanzil-ru-Rahman, *A Code of Muslim Personal Law* (Karachi: Hamdard Academy, 1978), Vol.I, pp.339-42.

³⁷ Z. Chaudry, 'The Myth of Misogyny: A Re-analysis of Women's Inheritance in Islamic Law' 61 *Albany Law Review*, 1997, 61, p.527.

³⁸ United Nations Human Rights Committee (HRC), General Comment 28, para 26.

³⁹ *Al-Quran*, 'Surah An-Nisa', 4:11.

female. In other words, on the death of their father, two sisters will get the same share which one brother gets from the property of their deceased father.

However, this rule of double share for the male does not apply in all cases under Islamic law. There are some instances where the female gets the same share of inheritance as the male. For example, a father and a mother get equal share (a sixth each) when they survive and inherit from their deceased son in the same capacity as parents; the uterine sister gets equal share (in the same capacity) with her uterine brother; and where the sole inheritors are a husband and a full sister of the deceased each one of them equally gets one-half.⁴⁰

There are also instances where the female can receive double the share of the male. An instance is where the inheritors are a husband, one daughter and full brother. In this case, the husband gets one quarter of the estate, the daughter as the only child gets one-half and the full brother gets the remaining one quarter.⁴¹ The female will also receive the entire estate if she inherits alone.⁴² This contradicts any emphatic allegation of unqualified discrimination on grounds of sex alone in the scheme of Islamic inheritance.

Historically, Islamic law was the first legal system to grant women a fixed portion in the inheritance either as a mother, wife, daughter, or sister at a time when such a right was not available to them in any civilization or under any legal system. This was on the basis of the following verse of the Qur'an which provided that: 'From what is left by parents and those nearest related, there is a share for men and a share for women, whether the property be small or large, a determinate share'.⁴³

The fact is that at the time when the Qur'an gave right of inheritance to women, they were themselves being treated as chattel in some parts of the world and were passed on to the heirs of a deceased person on his death. Therefore, Muslim scholars argue that Islamic law must actually be seen as having removed the pre-Islamic discrimination which the female was subjected to in every society which had denied her any inheritance alongside her male counterpart.

The fact that there are instances when the female obtains equal share in the same capacity with the male, and can also obtain a higher share than the male in some instances, shows that the basic rule of

⁴⁰ *Ibid.*, Verses 11-12.

⁴¹ *Ibid.*

⁴² J.J. Nasir, *The Islamic Law of Personal Status* (London: Graham & Tortman, 2002), 3rd Ed., 2002, p.223.

⁴³ *Al-Quran*, 'Surah An-Nisa', 4:7.

double share for the male is not an indication of superiority of the male above the female nor discrimination on grounds of sex but a recognition of their respective responsibilities. Therefore, under Islamic law, variation in inheritance rights is consistent with the variations in financial responsibilities of the two sexes in a Muslim society.

Under Islamic law, man is fully responsible for the maintenance of his wife, his children, and in some cases of his needy relatives, especially the females. Woman, on the other hand, is far less burdened with any economic responsibilities or claims on her possessions. Her possessions before marriage do not transfer to her husband. She has no obligation to spend on her family out of such properties or out of her income after marriage. She is entitled to '*Mahr*' (dowry) which she takes from her husband at the time of marriage. If she is divorced, she may get alimony from her ex-husband.⁴⁴

This indicates that Islam takes the overall family structure into consideration while prescribing various shares under the law of inheritance. An in-depth study of the Islamic law of inheritance would, therefore, reveal not only justice but also an abundance of compassion for woman. Thus, while the share of the male and the female, where the double share applies, appears arithmetically unequal, Muslim scholars argue that the shares are normally equitable in the final analysis, considering the varied financial responsibilities of each gender.⁴⁵

People usually prefer to distribute their estate as it pleases them. What Islamic law has successfully established through the fixed shares is to ensure that certain close relations are not disinherited by the testator. That does not however prevent testators from exercising their discretion to make a gift of any part of their estate during their lifetime to any of their heirs, male or female, through the doctrine of *hibah* (gift) which is an inbuilt mechanism in Islamic law for legally tilting the balance of the fixed shares as one pleases during one's lifetime.⁴⁶

In 1959, Iraq enacted the Personal Status Act giving equal shares to males and females in all cases. Due to its unpopularity, the provision was abrogated in 1963 and the *Shari'ah* provision was restored.⁴⁷ Today, Islamic inheritance rules continue to apply to Muslims within the

⁴⁴ H. Abd al Ati, *The Family Structure in Islam* (Indianapolis: American Trust Publications, 1977), p.268.

⁴⁵ *Ibid.*, pp.269-70.

⁴⁶ J.J. Nasir, *The Islamic Law of Personal Status* (London: Graham & Tortona, 1990), 3rd Ed., 2002, pp.249-55.

⁴⁷ T. Mahmood, *Statutes of Personal Law in Islamic Countries: History, Texts and Analysis* (Delhi: India and Islam Research Council, 1995), pp.246-48.

personal law codes of many Muslim states. It is the belief in the divine basis of the *Shari'ah* rules on Islamic inheritance that keeps Muslims attached to it. Therefore, instead of reversing these rules altogether, it would be more appropriate to develop the law to plug the loopholes, if any.

Evidential capacity of women:

In its General Comment 28, the HRC directed the member states to ensure that in their legal systems women give evidence as witnesses 'on the same terms as men' under Article 14. This direction brings the evidential capacity of women under Islamic law into issue as a matter concerning the gender equality under human rights. The rules of evidence under Islamic Law require in some cases the evidence of two men or alternatively one man and two women, i.e. two women replacing one man. This is based on the following verse of the Holy Quran:

'O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, Let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her'.⁴⁸

The phrase 'if there are not two men, then a man and two women' is often used to argue that in Islam a woman's evidence is only half evidence as two women's evidence is equal to the evidence given by one man. This certainly raises a question of gender inequality and discrimination on grounds of sex under international human rights law. Although the evidentiary rule contained in this verse is traditionally imposed on all testamentary evidence under Islamic law, it is clear from the above verse that it is applicable only in 'transactions involving future obligations in a fixed period of time. These transactions are generally in the nature of private civil debts. At the most, the meaning can be stretched to include, if at all that can be rightly done, to testimony in business transactions and commercial contracts.

⁴⁸ *Al-Quran*, 'Surah Al-Baqarah', 2:282.

The evidential rule laid down in the above verse, rather than being discriminatory, is only precautionary and is applicable to the transactions between Muslims. The business transactions were seldom dealt with by women in those olden days. As such, they ordinarily did not have enough experience in the intricacies involved in financial matters and were more likely to err while giving evidence at a formal forum. Therefore, the above verse clearly lays down the reason for requiring two women witnesses in place of one man: 'so that if one of them errs, the other can remind her'.

Another factor that supports the above interpretation is that the Holy Qur'an does not differentiate between male and female in any other verse concerning the procurement of evidence. For example, for evidence in divorce cases, the Holy Qur'an requires two persons from amongst 'just' Muslims as witnesses who may be male or female or a mixture of the two:

Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and *take for witness two persons from among you*, endued with justice, and establish the evidence (as) before Allah.⁴⁹ (Emphasis added)

Similarly, the Holy Qur'an requires testimony of two persons in connection with matters relating to inheritance or succession:

O ye who believe! When death approaches any of you, (take) witnesses among yourselves when making bequests,- *two just men of your own* (brotherhood) or others from outside if ye are journeying through the earth, and the chance of death befalls you (thus).⁵⁰ (Emphasis added).

As is evident, the requirement in this case is two 'just' Muslims who may be from either sex. However, the requirement of faith can be dispensed with in appropriate circumstances when Muslim witnesses are not available.

Again, in evidence for cases of 'zina' (fornication or adultery), the Holy Qur'an requires testimony of four witnesses:

If any of your women are guilty of lewdness, *take the evidence of four witnesses from amongst you* against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way'.⁵¹ (Emphasis added).

⁴⁹ *Al-Quran*, 'Surah At-Tal'aaq', 65:2.

⁵⁰ *Ibid.*, 'Surah Al-Ma'ida', 5:106.

⁵¹ *Ibid.*, 'Surah An-Nisa', 4:15.

It is clear that in this case, the evidence required is that of four Muslim witnesses who do not necessarily have to be men or women but all or some of them may be male or female, without any distinction.

It is crystal clear from the verses quoted above that Islam does not discriminate between male and female witnesses in any case except the one involving financial transactions. The practice of requiring two female witnesses in place of one male witness in other cases is contrary to the express provisions of Islam as contained in verse 282 of *Surah Al-Baqarah*. This practice might have arisen from the traditional position of women in society. As for the admissibility of female evidence, there is consensus among the Muslim jurists that female evidence alone is admissible in cases where men lack adequate knowledge or where it is impossible for anyone to have knowledge except women.⁵²

Islamic law generally concedes to the principle of gender equality though it also takes specific social needs into consideration which may arise in certain contexts.⁵³ The underlying aim of Islamic legal system is to do substantive justice. That is why, in order to avoid miscarriage of justice, the requirement of two women witnesses in place of one man occurs only in business transactions in which the women did not have enough knowledge and experience. This may give rise to the question: can the requirement of two female witnesses in place of one male witness be dispensed with in case of women proficient in business matters and vice versa?

This question was answered in affirmative by the Federal Shariat Court of Pakistan in the case of *Ansar Burney v. Federation of Pakistan*.⁵⁴

Conclusion

While it is true that the male gender enjoys a degree of advantage in family matters under Islamic law, this advantage is meant for the cohesion and the success of the family. Conversely, there are inbuilt rights within Islamic law that may be activated for the benefit of the female gender whenever there is apprehension of abuse of the advantage enjoyed by the male. However, the alarming factor is that women are generally ignorant of their rights and men often callously abuse that

⁵² A.A. Qadri, *Islamic Jurisprudence in the Modern World* (New Delhi: Taj Company, 1986), p.505.

⁵³ W.B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), p.184.

⁵⁴ *Ansar Burney v. Federation of Pakistan*, PLD 1983, FSC, p.73.

ignorance. Both these issues need to be addressed through appropriate legislation.

There is also need for complementary understanding of these issues. Muslim jurists need to understand that their religion was the first in the world to grant rights to women. As such, they must allow the development of Islamic law in accordance with the needs of the modern times. Feminist human rights advocates also need to appreciate the importance of the institution of family to Islamic society and the importance of the female gender to its subsistence. Therefore, they must also dispassionately examine the socio-legal justifications put forward by Muslim jurists in good faith focusing on the core issue of gender inequality.

However, it is important not to swing from one extreme to another in a manner that may create a conflict of cultures or portray the arguments as an attack against Islamic institutions rather than against non-justifiable discriminations. At the same time, contemporary Muslim jurists and scholars need to understand that Islam is not a stagnant religion. If they believe that the Qur'an has been revealed for all people and for all times, they must translate their belief into action and allow development of Islamic law so that it can keep pace with modern times. Their failure to do so will not be a service, but a disservice, to Islam.