

THE MUSLIM FAMILY ACT – 3rd Amendment prepared by Bharatiya Muslim Mahila Andolan

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1. <http://bit.ly/2uuehwp>
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THE MUSLIM FAMILY ACT

Draft prepared by Bharatiya Muslim Mahila Andolan Statement of Objects and Reasons

The Muslim Personal Law (Shariat) Application Act, 1937 was passed to ensure that customary law does not take the place of Muslim Personal Law. However in the absence of a codified law, customary practices which are divergent from the values and principles of the Quran have emerged. New codes have been introduced globally with the hope that they will introduce the rule of law in family matters and end arbitrariness and variances in judicial decisions. In India there is a need to have a comprehensive codified family law to ensure justice within the family.

This Act, based on the values and principles of the Quran as prescribed in the Quranic verses [Schedule 1], is to consolidate, clarify and codify the provisions of Muslim law and related procedure regarding Muslim marriage, divorce, maintenance during marriage, maintenance after divorce and widowhood, custody and maintenance of children.

I – PRELIMINARY

1. Short title and extent

- a) This Act may be called The Muslim Family Act.
- b) It extends to the whole of India except the States of Jammu and Kashmir and applies to all Muslim citizens of India.
- c) It shall come in to force on such date as the Central Government may appoint by notification in the Official Gazette.

2. Application of the Act

- a) This act applies to all Muslims as per the definition given u/s 1(3)h of the Act.
- b) A marriage solemnized between Muslims before the commencement of this Act, which was otherwise valid, shall not be deemed to be void by reasons rendering the marriage void under this Act. This Act shall have a prospective effect only.
- c) Nothing contained in this Act shall be deemed to effect the provisions contained in the Special Marriage Act, 1954 with respect to marriages between Muslims solemnized under that Act, whether before or after the commencement of this Act.

3. Definitions

a) Arbitrators:

Welfare agencies registered under the relevant government Act as well as registered under this Act according to the Rules.

b) Court:

In any area where there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act.

c) 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.

d) Iddat:

It is a period of waiting for a woman who has been divorced or whose husband has died, upon the expiry of which a remarriage is permissible. In this period no other restrictions are enforceable except marriage and the woman is free to continue with all her activities.

- i.** This period is three menstrual courses after the date of divorce, if she is subject to menstruation
- ii.** It is three lunar months after her divorce, if she is not subject to menstruation
- iii.** This period of waiting is 4 months and ten days after the date of death of the husband
- iv.** If she is pregnant at the time of the death of her husband, the period extends between the death of the husband and the delivery of her child.

e) Marriage:

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 (Protection of Rights on Divorce) Act, 1986]

f) Maintenance:

Maintenance includes an entitlement to food, clothing, residence, educational and medical expenses and all other personal expenses of woman according to the lifestyle the parties have enjoyed during their marriage and the economic status of the husband.

g) Mehr [Ajar]:

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 nikaah as a condition precedent for solemnization of their marriage as specified in the Nikaahnama.

h) Muslim:

Any person by birth or by conversion who professes the religion of Islam, in other words accepts the unity of God and the prophetic character of Mohammed. [Ref: Amir Ali]

i) Nikaahnama [Mithaq]:

The enforceable written marriage contract wherein the consent of the parties and other terms and conditions of marriage are stipulated and signed by both parties, qazi as well as four witnesses, two from each party of either sex. [Nikaahnama annexed in Schedule 2 of this Act]

j) Prohibited Degrees:

Degrees of prohibited relationship as specified within which marriage is not permissible. [List of prohibited relationships annexed in Schedule 3 of this Act]

k) Registered Qazi:

Qazi of either sex undergone training in Islamic law by a registered organization and registered under this Act as per the Rules.

l) Unsound Mind:

A person of unsound mind is an adult who from infirmity of mind is incapable of managing himself or his affairs. [Ref: Black's Law Dictionary]

m) Witness:

Adults of either sex with address and identity proof.

4. Overriding effect of Act

The Shariat Application Act, 1937, The Dissolution of Muslim Marriage Act, 1939 and Muslim Women's Protection Act, 1986 continue to apply to the Muslim community except those provisions which are in contravention of the provisions of this Act. The same have been incorporated in this Act in Schedule 4. Any other provision of uncodified shariah law which is in contravention to the provisions of this law hereby stands cancelled.

The Muslim women will continue to take advantage of the other laws of the land like the Dowry Prohibition Act of 1961, Protection of Women from Domestic Violence Act of 2005, Juvenile Justice [Care and Protection of Children] Act of 2000, Prohibit of Child Marriage Act of 2006 and other laws as deemed fit.

II – SOLEMNIZATION AND REGISTRATION OF MUSLIM MARRIAGES

1. Conditions relating to solemnization of Muslim marriage

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two Muslims as defined u/s 1(3)h of this Act, may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:

- a) Every marriage solemnized under this Act shall include payment of Mehr as defined u/s I(3)g) and as specified u/s II(4) of this Act.
- b) Express and unambiguous consent of both parties is necessary before a marriage contract becomes valid. This consent must have been obtained without undue influence, coercion and fraud.
- c) The bridegroom has completed the age of twenty-one years and the bride has completed the age of eighteen years authenticated from reliable proofs or records of the date of birth.

- d) The parties are not within the degrees of prohibited relationship as mentioned in Schedule 3 of this Act
- e) In the subsistence of one marriage a man cannot marry another woman.

2. Procedure for solemnization of Muslim marriage

- a) For the solemnization of the marriage, the parties have to approach a qazi as defined u/s I(3)k) of the Act.
- b) The parties have to send a letter of application to a qazi 30 days before the date of solemnization where either bride or groom is residing for the last 30 days.
- c) The procedure of solemnization would include ijaab [proposal of the marriage] and qubool [acceptance of the proposal]. Both the proceedings of ijaab and qubool must happen in the same sitting in the presence of witnesses as defined u/s I(3)m) of this Act and the qazi as defined u/s I(3)k) of this Act.
- e) Nikaahnama as specified u/s I(3)i) of this Act must be filled up and original, true copies of the same is to be provided to the parties.

3. Responsibilities of the Qazi

- a) The said qazi shall ensure that both parties have fulfilled the conditions specified u/s II (1) a) to e) of this Act.
- b) The said qazi shall demand from both parties' authentic proofs pertaining to dates of birth and their place of residence and retain copies of the same after having them personally authenticated.
- c) The Qazi must ensure that the bride knows and consents to marry the bridegroom if his previous wife has been divorced or deceased and has children from the said marriage.
- d) The qazi solemnizes the said marriage by filling up the nikaahnama as annexed in Schedule 2 of this Act. The Nikaah-nama shall be signed by the said Qazi, the contracting parties and two witnesses present at the time of marriage.
- e) A copy of the certified nikaahnama shall be a conclusive proof of the solemnization of that marriage.
- f) The qazi shall maintain a proper record of the marriage and give duly certified true copies of the nikahnama to both the parties.

- g)** A qazi as defined u/s I(3)k) can act as an Arbitrator if it is also registered under this Act as an Arbitrator
- h)** The qazi must ensure that the parties submit the divorce papers of previous marriage if divorced and death certificate in case of the death of the previous spouse. In case where the party is marrying for the first time, it must submit to the qazi affidavit stating that it is his/her first marriage.

4. Mehr

- a)** The minimum amount of mehr shall not be less than his one full annual income which could be his income from property, business, agricultural or commercial land and salary. It can be given either in cash/gold/kind.
- b)** If income/salary cannot be determined then the mehr can be fixed based on the minimum wages of his occupation where he is residing.
- c)** The mehr must be prompt and must be paid to the bride at the time of the marriage.
- d)** The mehr is the wife's exclusive property to be used by her at her absolute discretion without any manner of interference from parents and relatives of both parties.
- e)** The wife cannot be forced or compelled or emotionally pressurized to forego/return the mehr anytime during the subsistence of marriage or after divorce or widowhood.
- f)** The groom/husband and his family cannot demand dowry nor can they casually and innocently express their desire for dowry before or during the subsistence of marriage.

5. Registration of Muslim Marriages

- a)** Immediately on solemnization of the marriage as specified in Section II (2) a – d of the Act, the signed nikaahnama should be registered by the parties at the local state bodies like the Panchayat, Block Office, District office, Ward Office or Marriage Registrar Office under the relevant marriage registration Act.
- b)** The parties must ensure that they each have true, original copies of the registration certificate.

6. Responsibility of the Witness

The witnesses must sign the relevant documents and ensure that the party to which they are supporting as witness must have the relevant documents, which is;

- a) Death certificate if the spouse of the party has died.
- b) Divorce papers if the party has been divorced.
- c) Whether the party they are supporting is previously married.

III – TEMPORARY PROHIBITIONS IN MARRIAGE

1. Irregular Marriage (Fasid Nikaah)

Any marriage solemnized shall be considered irregular:

- a) If two adult witnesses as defined u/s I(3)m are not present at the time of nikaah.
- b) If the marriage has been solemnized during the period of iddat.
- c) If the marriage has been solemnized without the qazi as defined u/s I(3)k) of this Act.
- d) If the marriage is not registered as mentioned u/s II(5) a) and b) of this Act.
- e) If the amount of Mehr as specified u/s II(4) of this Act is not paid.

2. Regularization of Irregular marriage

- a) All marriages termed irregular u/s III(1) of this Act can be regularized within one year of the solemnization of marriage. The rights of women and children accruing from the said marriage are not affected if the marriage is not regularized. The regularization process would include:
 - i. Approaching a qazi as defined u/s I(3)k along with witnesses as defined u/s I(3)m) and attaching affidavits from all witnesses affirming the said marriage.

- ii. Approaching a qazi as defined u/s I(3)k) after which the parties will give an affidavit stating that the period of iddat is over deeming their marital status legal under this act.
- iii. Approaching a qazi as defined u/s I(3)k) and resolumnise the marriage with a fresh nikhanama
- iv. The parties themselves should take their filled up nikhanama along with an affidavit and register it with the authority specified u/s II(5).
- v. The marriage can be regularized by paying the promised amount of mehr as u/s II (4) of this Act.

IV. INVALID MARRIAGE

- 1) Any marriage solemnized under this Act shall be an invalid marriage:
- a) If the consent of either party to the marriage contract has been obtained by force, coercion, undue influence or fraud.
 - b) If the bride and groom are within the prohibited degrees as specified in Schedule 3 of the Act.
 - c) If the bride and groom have not completed 18 and 21 years of age respectively.
 - d) If the husband has entered into another marital contract in the subsistence of a marriage contract, the second marriage will be an invalid marriage.

V. GROUNDS FOR DIVORCE

1. Grounds for decree for dissolution of marriage. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

- (i) That the whereabouts of the husband have not been known for a period of four years;
- (ii) That the husband has neglected or has failed to provide for her maintenance for a period of two years;

- (iii) That the husband has been sentenced to imprisonment for a period of seven years or upwards;
- (iv) That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- (v) That the husband was impotent at the time of the marriage and continues to be so;
- (vi) That the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- (vii) That the husband treats her with cruelty, that is to say,
 - a. Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
 - b. Associates with women of evil repute or leads an infamous life, or
 - c. Attempts to force her to lead an immoral life, or
 - d. Disposes of her property or prevents her exercising her legal rights over it, or
 - e. Obstructs her in the observance of her religious profession or practice, or

VI. DIVORCE

- 1) The Act recognizes 3 forms of separation between husband and wife:
 - a) Demand for divorce by wife [Khula]
 - b) Demand for divorce by husband [Talaak]
 - c) Divorce by mutual consent [Mubarah]

- 2) In the event mentioned in VI (1) a and b, the party demanding divorce will follow the Talaak-e-Ahsan method of divorce as annexed in Schedule 5 of the Act. In the event of Khula the wife has the right of divorce if she is certain that she cannot stay with her husband for fear of physical and/or emotional harm. The demand of khula by wife is not dependent on the consent of the husband. The Arbitrators can terminate the marriage in the absence of consent of the husband in case of khula [faskh-e-nikaah].

The four steps thus mentioned also signify restitution of conjugal rights.

- 3) In the event of divorce by mutual consent i.e. mubarah;
 - a) Both the parties to the marriage present a joint application to the Arbitrators as defined u/s 1(3)a) for the dissolution of their marriage on the ground that they have mutually agreed that the marriage should be dissolved.
 - b) After the joint application is submitted, the period of iddah follows. After 3 months or 3 monthly courses the divorce is finalized before the Arbitrators. Since this Iddat period is required to ensure absence of pregnancy, Arbitrators may consider allowing medical test for verification or absence of pregnancy.
 - c) The Arbitrators have to ensure that the rights of women are ensured in the event of mubarah.
 - d) Original copies of the divorce document must be provided to both the parties.
- 4) Divorce given by any other method other than those given above, is an invalid method of divorce.
- 5) The practice of halala as defined u/s 1(3)c) is an offence.
- 6) The practice of muta marriage [temporary marriage] is an offence.
- 7) Notwithstanding that a marriage is invalid or irregular any child of such marriage shall be deemed to be legitimate under this Act.

VII – MAINTENANCE

1) Maintenance during Marriage and Widowhood

Maintenance as per u/s I(3)f) of this Act, includes an entitlement to food, clothing, residence, educational and medical expenses and all other personal expenses of wife.

- a) The responsibility of maintaining the wife and children, even if she has an independent source of income is with the husband.
- b) During the process of arbitration, the maintenance of the wife and children will be the responsibility of the husband.
- c) During the subsistence of the marriage, if the custody of the child is with the mother then the responsibility of maintenance of the child is with the husband.
- d) Procedure for obtaining maintenance from the husband during the subsistence of marriage is the same as enlisted in Section 126 of the Code of Criminal Procedure, 1908.
- e) The widow has a right to maintenance and right to stay in matrimonial home.
- f) Maintenance during iddat period is the same as that provided during the subsistence of the marriage.

2) Maintenance after divorce

The provisions of maintenance after divorce are to be governed by the Muslim Women (Protection of Rights on Divorce) Act, 1986.

VIII – CUSTODY OF CHILDREN

1) Natural Guardians

Both mother and father are considered natural guardians of the child.

2) Custody of children after divorce

- a) In the event of a divorce, regardless of who amongst the spouse initiates the divorce, the decision regarding the custody of all children (male and female) will reside with the mother until they reach the age of 14 when the child can decide for himself/herself.

- b) After reaching the age of 14 the parent not having the custody can apply for custody of the child to an Arbitrator as given in u/s I(3)a) of the Act. The consent of the child will be sought by the Arbitrators.
- c) The parent who has lost the custody of the child will get fair visitation rights.
- d) Only if the child is not able to take a decision the Arbitrators shall take the decision based on the principle of the best interest of the child which includes the child's physical, emotional and economic security.
- e) In the event when the custody of the child is with the mother, it is the responsibility of the father to financially maintain the child.

3) Custody of the children of widows

- a) The mother continues to be the natural guardian of the children after she becomes a widow.
- 4)** In the event that the child is not able to take a decision the Arbitrators while making a decision should keep the following guidelines in mind:
- a) Consider the quality of the upbringing of the child till date.
 - b) The health, education, physical and emotional safety of the child.

5) Custody of the child is not necessarily lost if:

- a) Either parent change their respective religion
- b) Either of the parent remarries

IX. ARBITRATION

The parties can choose to go for Arbitration in the event of a dispute.

1) Nature of Arbitrators

- a) Arbitrators could be registered welfare agency which is:
 - I. Also registered under this Act as per the Rules.
 - II. Having at least 50% women members, preferable Muslim women
 - III. Has an impeccable record of social justice

2) Duties and Responsibilities of the Arbitrators

- a) The Arbitrators can arbitrate on all matters mentioned in this Act.
- b) The Arbitrators must follow the rule of giving both the sides a chance to be heard.
- c) The Arbitrators are mandated to keep a record of all proceedings during this process as well as a record of all decisions taken.
- d) In case of a divorce, the Arbitrators should safeguard the rights of the women by listing them out on the divorce document and give true, original copy of the same to both the parties.
- e) This decree is then binding on both parties to the dispute.
- f) After following the principles of natural justice, a just and fair decision should be made by the Arbitrators on all matters mentioned in the Act.

X. INHERITANCE

Notes on Inheritance

- a) A person must make a will for its family and relatives. There is no restriction that the will has to be only 1/3rd of the value of the property. There is no mention of 1/3rd division in the Quran.
- b) The distribution of Quranic parts comes after making of the will and clearing of debts and in case the property owners die without making a will.
- c) Quranic verses 4:11, 4:12 which gives division after making wills and clearing debts.

- d) Son gets more than the daughter only from residual left over and above the will and debt. This division where daughter gets half than son is relationship based and not gender based. In other divisions there is no difference in the share between man and woman. In order to make the daughter get equal share in the parent's property the parents can make a gift-will to their daughter.
- e) The logic of wills in Islam is that the owner of the property decides what he/she wants to do with his/her property.
- f) The grandson or granddaughter must inherit from the grandfather/grandmother in case of the death of the intervening son.
- g) The wife has right to receive part of husband's property (the Qur'an 2: 240), and an additional specified share in lieu of her housework contributing to the conjugal home and property creation.

The portions mentioned below are to be allotted only after making a will and clearing debts.

- a. The brother will have that share which two sisters would get. If there are only sisters and more than two then they will have two thirds of what is inherited. If there is only one sister, then she will have one half. To equalize the daughters share with the son, the parents must make a gift-deed or HIBA for their daughters so that all off-springs get equal share of the parents' property.
- b. If a man has children then his each parent inherits one sixth of his property. If he has no children and his parents are the heirs, then to his mother is one third.
- c. If he has siblings then to his mother is one sixth.
- d. For a man it is half of what his wife leaves if they have no children.
- e. If they have a child then to the husband is one quarter of what his wife leaves behind.
- f. To the wife is one quarter of what the husband leaves behind if they have no child.
- g. If they have child then the wife gets one eighth of what husband leaves behind.
- h. If a man or a woman has no one, but has a brother or sister, then to each one of them is one sixth, but if they are more than this then they are to share in one third.

- i. These shares are applicable only after a will is carried through or after clearing debts if any.

Schedule 1: Quranic Verses

Schedule 2: Nikaahnama

Schedule 3: Prohibited Degrees

Schedule 4: 1937, 1939 and 1986 Acts [can be obtained from the web]

Schedule 5: Talaak-e-Ahsan method