

An Analytical Study Of Women's Rights In Islam And CEDAW, 1979 With Special Reference To Pakistani Law

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Abstract

Notably, women's rights are the powers and privileges to which women are entitled. Women possess all the rights which the opposite gender does possess based on equity and equality under Islam and CEDAW respectively. Legally all women's rights are protected religiously, nationally, and internationally under Islam, Pakistani Law, and CEDAW respectively. Thus, this work aims to throw light on women's rights from the lenses of Islam, Pakistani Law, and CEDAW. Since, women's rights given by the cited codes are studied comparatively here. Resultantly, the study focuses on the fact that CEDAW is more centred on equality regarding women rights while Islam basis on equity.

Keywords: Pakistani Law, International Law, Gender Rights, Human Rights in Islam

Introduction

Aristotle says, "Man is by nature a social animal; an individual who is unsocial naturally and not accidentally is either beneath our notice or more than human. Society is something that precedes the individual. Anyone who either cannot lead the common life or is so self-sufficient as not to need to and therefore does not partake of society, is either a beast or a god",¹ as being a social being a human cannot live alone and thus dependent upon the society.²

The concept of women's rights is quite unclear in many of the human rights documents, women were treated unfairly and unequally just like subordinates to the men. With the advent of Islam, women were given respect, honor, and rights as a respectable

human being. Their rights are mentioned in the Holy Quran as well as in many Ahadith (sayings of the Prophet Muhammad-peace be upon him) in a very elaborated and clear way.

Factually, Pakistan has approved CEDAW and sustained legal responsibilities to eradicate all forms of discrimination within their jurisdictions. Specifically concerning Pakistan, women rights are provided mostly same to that of Islam as the "Constitution of the Islamic Republic of Pakistan, 1973" (hereinafter the "Constitution of Pakistan") provided that there shall be no law which is inconsistent with the injunctions of the Holy Quran, Sunnah of the Prophet Muhammad (peace be upon him) and Islam is regarded as the state religion of Pakistan. Thus, mostly

women's rights in Pakistan are Islamic; Pakistan has also rectified a number of international treaties, notably the "Convention on the Elimination of Discrimination against Women" (CEDAW), which requires the states to enforce articles promoting gender equality and non-discrimination and to intimate on advancement regularly.

At the International level, when other international documents on human rights were insufficient to safeguard women's rights, CEDAW was aimed to safeguard the rights of women. Therefore, this study attempts to shed light on the women's rights granted by Islam, CEDAW and Pakistani law keeping in view the similarities and differences. Knowingly, that CEDAW entitles women equal rights in inheritance, guardianship, education and divorce while rights are proportionate in Islam. Some special rights such as maintenance and dower are only given by Islam, and CEDAW have not even discussed that. In this regard, this study will be highly fruitful for the international law implantation specifically Modern Muslim World who are following International Human rights bodies. Additionally, this study will also help the Muslim Community in comparing CEDAW and Islamic law regarding the women rights by answering some basic questions regarding the position of women in Islam and International Law.

Looking at the parameters for this study, the research that was done or is being done focuses on a number of resources. In order to have greater accuracy and depth analyses of the research study, this research design was used in light of the given objectives. The investigators' gathers information from a variety of sources, including journals, books, papers, articles, treaties, and the internet. Hence, qualitative research methodology is adopted for this work. In which the data is to be collected from different library resources such as books, Research papers, articles, journals, reports etc.

Literature Review

Shaheen Sardar Ali in his book "Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan" explored some complexities regarding women's rights. It raised awareness of CEDAW's latent as a global human rights tool to promote women's rights in Bangladesh, India, and Pakistan by focusing on these countries. He showed how the confluence of constitutional and statutory laws, the "Convention on the Elimination of Discrimination against Women", cultural traditions, and community areas affect women's human rights in these various countries.

Muhammad Faizul Haque and others in their research study "Women Rights to Inheritance in Muslim Family Law: An Analytical Study" analysed pertinent facts from Islam's two main sources; the Holy Quran and Sunnah of the Prophet Muhammad (peace be upon him), as well as jurisdictional perspectives, and offered answers to concerns relating to Muslim women's inheritance rights in the community. Women's rights, particularly inheritance rights, are hampered by cultural norms, patriarchal social systems, and a practice of religion understanding and application in daily routine.

Certainly, "Women's Rights in Islam Regarding Marriage and Divorce" By Jaafar-Mohammad, Imani, and Charlie Lehmann outlined some concepts of women's rights in Islam regarding marriage and divorce. It distinguished cultural traditions from religious perspectives of marriage and divorce.

Elise Meyer worked on the definition of woman in CEDAW in her work "Designing Women: The Definition of "Woman" in CEDAW". She defined woman from different perspective in order to safeguard her status in society. Despite, many other researchers have worked on women's rights from different perspectives, either from Islamic or International perspective but there was not any concise study conducted which could study women's rights from the comparative lenses of

CEDAW and Islam. So to fill this gap we (the researchers) worked deeply and extensively of the said topic.

Convention on the Elimination of all Forms of Discrimination against Women, 1979 (CEDAW), 1979 (CEDAW)

The cited "Convention on the Elimination of All Forms of Discrimination against Women" is a multilateral international human rights treaty. The reason is obvious, because previous international treaties did not adequately tackle rights of women, the United Nations (hereinafter the "UN") General Assembly approved the Treaty on the "Elimination of All Forms of Discrimination against Women", 1979 (CEDAW) as an international convention in 1979. It entered service on September 3, 1981 and is described as a worldwide bill of rights for women.

Interestingly, the CEDAW has yet to be ratified by US, making it the only rich country that has not done so. The Convention has been ratified by a number of nations, subject to specific disclosures, limitations, and complaints. The Convention has now been accepted or surrendered to by 186 nations, giving it the greatest participation of all of the UN treaties.³ As the title of the treaty indicates, its major objective is to protect women against discrimination. There are four major sets of rights delineated in the treaty: "(1) non-discrimination, (2) disruption of sociocultural patterns of sex and sex trafficking, (3) education, employment, health, and economic/social life, and (4) equality before the law and marriage".⁴

Interpreting the Term "Woman" in CEDAW

The potential ordinary meanings of "woman" can be separated into two broad categories: namely sex and gender.

"Woman" as sex; the word "woman" might be used to refer to a feminine sex. CEDAW defines "discrimination against women" as "any differentiation, omission, or limitation created on the basis of sex," which is the treaties nearest approach to definition of "woman".

"Woman" as gender; another explanation might be that "woman" refers to a certain gender. Gender is described as including the socio - culturally designated roles and stereotypes used to distinguish males and females; hence, removing these duties and stereotypes would lead to the implication of referencing to gender.

"Woman" as all of the above; the term "woman" as used in CEDAW should be construed to include all of the above: biological, morphological, genetic, gender performance, and/or gender identification, in any confluence or by themselves. That is, the term "woman" should encompass all of the above-mentioned prospective interpretations. Whenever the term "woman" is used in everyday speech, it usually refers to a set of some or all descriptors..⁵

Key Terms Interpreted

Before analyzing women's rights in Islam and CEDAW and its comparative study, some terms are needed to be interpreted for a smooth understanding of the work.

Sub Theme: Right or Rights

Huqq is the Quranic word for rights (plural huquq). Huquq here refers to a right to be the receiver of some obligations that form the foundation of the Islamic explanation of basic human connections and socio-political organization, rather than the legalistic rights of Western discourse. It's more akin to the concepts of responsibility and accountability.⁶

Sub Theme: Freedom

The absence of obstructions to the fulfilment of wants can be defined as freedom. Thereby, only the Creator has absolute autonomy; practical freedom is a question of perspective, based on both external factors and the nature of our desires.⁷

Islam makes the men more responsible and assigns more social duties to them for their strength while it keeps the women in an easy zone due to their fragility. Men often expose themselves to challenging situations to protect women. Men are held responsible for women's security and maintenance. As Allah Almighty says in the Holy Quran:

“Upon the father is the mothers’ provision and their clothing according to what is acceptable. No person is charged with more than his capacity”.⁸

Sub Theme: Equality Vs Equity in Islam

Islam regards men and women equal in their creation and rewards while defining their social, political, and public roles according to their potentials and circles keeping their basic needs in view. The concept of gender equality in Islam is stressed by the un-superiority of either sex over the other. ⁹Allah Almighty says in the Holy Quran:

“O mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature, his mate, and from them twain scattered (like seeds) countless men and women; fear Allah, through whom ye demand your mutual (rights), and (reverence) the wombs (that

bore you): for Allah ever watches over you”.¹⁰

So, the term gender equality can be defined in terms of equality under the law, equality of opportunity, rewards, and resources, and equality of voice to influence and contribute to the development process. Hence, gender equality means that women and men have equal conditions for realizing their full human rights and potential to contribute to national, political, economic, social, and cultural development, and to benefit from the results.

“Gender equity means fairness of treatment for men and women according to their respective needs. This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations, and opportunities”.¹¹

Sub Theme: Equality in CEDAW

Gender equality, equality between men and women does not mean women and men have to become the same, but that their rights, responsibilities, and opportunities will not depend on whether they were born male or female.¹²

Equality of Opportunity CEDAW's primary concern is the abolition of all elimination of violence against women, with the goal of achieving gender equality. Although CEDAW does not define equal rights, a deep study of the text reveals interesting concepts of equal rights, including formal equality, substantive equality, and transformative equality.¹³ Genders should be treated equally under the law, according to formal (de jure) equality. This idea of equality is included in a

number of clauses of CEDAW, and it is mainly concerned with "the content of laws and practices, as well as their even-handed implementation."

CEDAW mandates that nations take all necessary steps to establish substantive (de facto) gender equity, in addition to legal equality. Articles 3 and 24 of the CEDAW, for example, demand that actions be made to guarantee the complete growth and progress of women, as well as the full realization of CEDAW rights.

Contradiction between CEDAW and Islam Regarding Women's Rights

Since CEDAW is a transcendental and secular document which has been designed for all states around the globe and Islamic law is an unalterable religious dogma therefore some provisions are contradictory.

Sub Theme: The Issue of Inheritance

Article 2 and 16 1(g) of the CEDAW stated equality between men and women in all spheres of rights. Males and females are not entitled to equal share of inheritance under Sharia jurisprudence. The doctrine of inheritance is explicitly explained in the Holy Quran, and this should be followed. CEDAW clause of equality is incompatible with Islamic inheritance law.

Sub Theme: The Case of Dower

"Dower is a first charge on the property of the husband and it must be paid from the property before inheritance". Similarly in the case of dower the husband is not entitled to dower and thus is not equal to woman in Islam while article 16 1(c) of the CEDAW asserts "The same rights and responsibilities during marriage and at its dissolution" which clear contradiction with Islam.

Sub Theme: The Matter of Maintenance

Article 16 of the CEDAW provisions regarding equality of man and woman are against the Islam. Husbands are required to support their spouses and kids via their own assets in Islam,

regardless of the wife's finances. The husband has no title to the wife's property and cannot use it to support the family. Even if the wife earns her own money, she has no financial duties, and the husband's duty to support his wife and kids remains unchanged. As a result, males have far more parental liability and hardship than mothers, and males should, consequently, have more access to family assets.

Sub Theme: The Question of Guardianship

Article 16 1(f) of the CEDAW is against Islam Even though CEDAW states that parents will have similar rights and responsibilities of custodianship, wardship, trusteeship, and adopting of kids or similar organizations where these notions take place in state legislation, the cases applicable to guardianship and adoption is insufficient and prejudicial. The mother is not recognized as an equal caregiver under any domestic laws, including the Muslim Personal Law. Although, Muslim law providers and jurists aren't using the word "natural guardian," it appears clear that the father is identified as a guardian—a term that in this sense is equal to natural guardian—and the mom is not identified as a guardian, natural or anything else, in all schools of Islamic law, that after the father's death. Because the mother is not the legal guardian of her young children, she has no legal authority to engage into an agreement to alienate the youngster's property.

Sub Theme: The Subject of Divorce

Article 16.1(c) of CEDAW provided relatively similar roles and obligations during marriage and divorce have a direct impact on two Muslim culture: (a) polygamy is claimed to be permissible for men, but monogamy is required for women; and (b) a husband can divorce his wife at any time by simply saying the term "divorce thrice and without justifiable cause; but a wife can only seek divorce through the court and for specific reasons. The faith in the supremacy of the Quranic injunction is intended to be enhanced by the following statements when it comes to the denying of

similar rights to women in divorce: As regards denial of equal rights to women in divorce, the belief in superiority of the Quranic injunction is sought to be strengthened by the following assertions". The Holy Quran describes woman as an object in affairs of marriage, and quick tempered to make decide rationally, that's why they haven't been given right to simply divorce the husband. Moreover they have been given with some privileges like maintenance, dower etc. as well."

Sub Theme: The Case of Delegated Divorce

In marriage and divorce, Article 16.1 (c) of the CEADAW establishes equal rights and obligations for men and women. At any given moment, a man can have up to four wives, while a woman can only have one spouse alive. Without going to court or providing a reason, husbands can divorce their wives just by declaring "I divorce you" three times. Whether the comments were said in rage or on the spur of the moment, divorce happens on the spot. There is little recourse, even if the spouse later repents. On the other side, the woman has no right to a divorce. Only if the husband delegated his divorce authority to her can she divorce in a similar fashion. In this case, delegation is the essential key for such kind of divorce.

Sub Theme: The Issue of Abortion

Article 16 1(e) of CEDAW grants all women the freedom to choose the size and phasing of their kids voluntarily and responsibly, as well as to have access to the information education, and resources necessary to exercise these rights. In Islamic law, the couple, on the other hand, has the opportunity and right to conduct child spacing or family planning. This choice must, however, be made with the couple's joint consent, which appears to be impossible in today's society since, aside from many issues such as poverty, literacy, loss of economic growth, and social values, it is mostly the women who suffer the burden of child rearing. A woman has the right to have an abortion on her own terms.

Sub Theme: The Question of Co-Education

Article 10 (c) of the CEDAW provided "The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation" while Islam does not encourage coeducation.

Analogous Women Rights in Islam, CEDAW and Pakistani Law

Keeping the aforesaid comparison in mind, one might claim that CEDAW, Sharia, and Pakistan's official laws are all in accord to some extent. Many elements of CEDAW are mirrored in Pakistan's Law, such as the definition of discrimination, "equality before the law," equal security under the law and positive action concepts. Conventional practices have been found to lead to powerlessness and brutality and honor murders have consistently challenged the right to safety. All three pairs of laws examined, formal laws, Islamic law, and CEDAW, have one common trait: they are all classified as "protective," "corrective," and "non-discriminatory". Where they differ from one another is in the level to which laws are considered protecting and in the length of time they last. While most CEDAW articles come under the 'nondiscriminatory' heading, most of the constitutional and Islamic come under the 'protective' or corrective category. The lifespan of protective legislation is likewise limited by CEDAW, there is no such restriction in place for local and so-called Islamic laws. The submitting to the committees per 4 years process also implies that relevant parties can utilize that as an "internal reporting tool" to assess the state of rights of women on a frequently.

There is really no contradiction between the rights granted to woman by legislation and the rights granted to woman by religions in respect of female's elections and public rights

Article 3 of CEDAW promotes female's voting rights, and Islam does not

prohibit women from participating in politics. Cultural norms, on the contrary side, have led to powerlessness, and brutality and honor murders have posed a continual danger to the entitlement to safety. Despite the state's failure to act, CEDAW mandates that countries reform not just the legislation, but also the society in which these breaches occur, imposing behavioral modification.

Article 11 of the CEDAW deals female financial rights, emphasizing the importance of maternity coverage, job security, and female's working rights, among other things. Although both CEDAW and Pakistan's legal provisions protect women working in the official sector, there are no current legislation (or CEDAW provisions) that apply to the informal employment.¹⁴

Research Analysis & Discussion

Islam is a divine religion and complete code of conduct that covers all the aspects of human life including the rights and responsibilities of every individual. All women's rights are protected in Islam based on equity and Islamic teachings. On the other hand, CEDAW is a man-made law that discusses women's rights in a general way regardless of any religious, geographical, and cultural factors. It equated women with men in all social, domestic, political, economic, and public circles. The constitution of the Islamic Republic of Pakistan, 1973 also provided that all citizens shall be dealt with by law, there shall be no discrimination based on sex.

The comparative study of CEDAW, Islam and Pakistani law shows that all of them have worked for women's rights, however most of the Islamic rights are of the protective nature and that of the CEDAW are mostly non-discriminatory in nature while Pakistani law gives corrective and protective rights.

Islam does not encourage women's freedom equally with men but protects her rights as a human being along with the privilege

of some special rights like respect, protection, etc, while CEDAW grants complete freedom along with common human rights. Islam entitles women to rights in a restricted manner based on equity while CEDAW protected women's rights based on equality and ensure complete freedom as well. Islam believes in gender equality in terms of creation and Rewards (Ibadat), while Islam applies equity in the social sphere.

“Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them, guard. But those [wives] from whom you fear arrogance [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand”.¹⁵

In simple words, Islam entitles women to rights based on equity while CEDAW pledges equality. Islam considers women a very valuable member of society and entitles them with some special rights as well but her role in all the spheres of life is not identical to that of men. In Islam, the nature of rights and responsibilities of both genders varies as per their physical appearance and social roles. Islam gives rights to women specifically based on its teachings while the rights given by CEDAW are very general as its state parties do not share a common religion or culture. Islam emphasizes women's family rights mostly while CEDAW focuses more on their political, social, economic rights.

Islam gives many such Family rights to women which CEDAW has even left undiscussed for instance inheritance, dower, maintenance, Iddah, etc. Under Article 16 of the CEDAW general family and women's rights have been highlighted. Family rights including marriage, choosing a spouse and the dissolution of marriage are given by all Islam, CEDAW, and Pakistani law although the conditions and procedures may vary. Some of the family rights e.g. Dower and inheritance are discussed in Islam in a detailed way while CEDAW remained silent about these specific rights. For maintenance and dower, the husband is responsible, and he is supposed to take care of all her necessities.

Family rights are secured under the constitution of Pakistan as well such as protection to their marriage, family, and children. Her dower either specified or unspecified shall be payable on demand under section 10 of "The Muslim Family Law Ordinance", 1961. It is a legal requirement in Pakistan, and the law states that it must be fixed at the moment of wedding. The woman's entitlement to demand dower will stay intact by the presence of the contract of marriage, even if it is not established at the time of the wedding and no specific money or other assets are indicated in the Nikah Nama. After Nikah, if the couple is not well settled, they have the option of separation i.e Talaq or Khula. If they are not living well she has the right to be released and remarry whomever she wants. Pakistani Family law provided if the copy of the notice of Talaq is not provided to the wife the husband shall be punishable. Islam and Pakistani law both give the wife the right of delegated powers of Talaq if at the time of Nikah the Husband gives his consent for such delegation. A woman also possesses the right of Khula in case she is unrelaxed with marriage under Islam. Furthermore, women are privileged with the right of maintenance, being a wife it is the responsibility of her husband to

fulfil all her necessities and in case of more than one wife, equally under Islam and Pakistani Law.

Inheritance rights of women in the family are clearly detailed in the Qur'an and Sunnah. Females do not have the same rights as males, but they do have unique rights such as inheritance, respect, and custody of children in the family. This is because Islam protects their economic rights which should be managed by a legitimate custodian (father, brother, spouse, etc.) in all circumstances. For instance, as a daughter, a girl's financial requirements must be met by her father. If she is orphaned, her guardian must give her with funding support from her paternal grandpa or uncles.¹⁶ Inheritance in Pakistan is dealt with through Muslim Personal Law and all the state parties may deal with the inheritance according to their respective personal law.

Furthermore, Islam ensures each wife's equal rights in the case of polygamy, the permission of polygamy is conditioned with an endowment of equal rights to all of the wives. Consequently, any of the wives must not be deprived of their rights to be a wife. CEDAW has not mentioned the concept of polygamy. Pakistani law has made the consent of the first wife mandatory for the legitimation of the second marriage which is an anti-Islamic provision in its nature. Prostitution is forbidden both in CEDAW and Islam. Islam forces marriage for the fulfilment of one's sexual desires.

Both Islam and CEDAW secures the economic rights of women and entitles them to ownership, contracts, and business. If a woman has her wealth and property she is still privileged to be under the maintenance of her husband as her husband is responsible for all of her necessities.

Concerning education CEDAW provides equal rights to both gender in access, acquiring any kind of education including

family education and Islam also encourages women education. CEDAW gives women equal political rights as men in all political spheres while Islam has not discussed the political rights of women. Islam does not encourage co-education as it favours the woman to be in Parda and home. Article 25A of the Constitution of Pakistan also provided that the State shall provide free and compulsory education to all children.

Conclusion and Findings

Human rights are the rights to which all human beings are entitled simply by the virtue of being humans regardless of any religious, gender, cultural, social, or political discrimination. Far in history, there have been many attempts to document these rights at various stages in different parts of the globe. Some of these conventions and documents are either country or religion-specific while some are International as well. Women and women's rights have been an unsettled matter synchronically as well as diachronically. Before the advent of Islam, women were buried alive as their very existence was regarded as a matter of shame. Islam blessed her with infinite respect and honor, and not only ranked her as a respectable human being rather protected not only her fundamental rights but also granted some special rights as well.

As earlier mentioned, internationally there have been attempts to design some transcendental conventions for Human rights which could be applicable throughout the globe such as UDHR, etc; however, the issue of women was not resolved satisfactorily. Therefore in 1979 a "Convention on the Elimination of Discrimination against Women" (CEDAW), was adopted, which addresses women's rights specifically.

This work attempted to look comparatively upon the women's rights guaranteed by CEDAW, Islam, and Pakistani Law. The detailed analysis infers that women's rights given by Pakistani laws are almost the same as that of Islam except in some instances. Islam is highly protective regarding the rights

of women based both on equality and equity while CEDAW pledges complete equality for women with men in every aspect of human life. Islam has discussed women's rights deeply and in a very detailed way while CEDAW has taken them in a very general manner. The rights of women under Islam are binding only upon Muslims other communities may also adopt upon their will – while those of CEDAW are transcendental and applicable regardless of any religion.

The Constitution of Pakistan, 1973 provides for the equality of women in its various articles. Article 3 notes that the state is committed to eliminating all sorts of exploitations. Article 25(1): guarantees that "all citizens are equal under the law and are entitled to equal protection of the law". Article 25 (2) further states that "there shall be no discrimination based on sex alone." Article 27 prohibits discrimination based on sex, race, religion, or caste for government employment. Article 34 contemplates that "steps shall be taken to ensure full participation of Women in all spheres of national life." And Article 38 (a) requires the state to "secure the well-Being of the people, irrespective of sex, caste, creed or race, by raising their standard of living".

Women's rights in Pakistan are adequately protected by the aforementioned clauses, which are based on other basic rights provided by the Constitution. In general, the Constitution grants every person the right to be dealt lawfully, guarantees their equality before the law and equal treatment under the law, protects them from alleged crimes that endanger their life, human dignity, body, notoriety, or real estate, allows them to do everything that is legal, and prevents them from being forced to do anything that the law does not require.

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