Constitutional Validity of Muslim Divorce: An Analysis

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Abstract

Indian Constitution provides the right to equality to all its citizens. In the Present Paper researcher has tried to analyse the concept of divorce under the Muslim Law. This paper is a descriptive study, first portion of research work deals with different types of divorces under the Muslim law. It also deals with the rights given to both males and females in relation to divorce under Islamic law. This paper throws a light on both codified and un-codified rules relating to talaq. Specifically this deals with gender inequality faced by both females of the community with respect to divorce and maintenance. Latest judgment of the Apex Court declaring the practice of ‘tripal-talaq’ as unconstitutional has also been included in this work. Latest law in the nature of “The Muslim Women (Protection of Rights on Marriage) Act, 2019” has also been discussed and criticised to the extent of the making the practice of tripal-talaq as an criminal offence.

Introduction

The Constitution of a country sets out the whole framework of the government, its purpose, works of different organs of the government and delimits their powers also, relation between the state and the society, relation between different organs of the government, etc. The limitation imposed upon the government protects the freedom of the individual and is a measure to keep the government to work within specific ambit. If any government exercises the power beyond the prescribed limits, it will lose its authority. Constitutionalism is antithesis of arbitrary powers.i

Indian Constitution empowers the law making body under Entry 5 of Concurrent List to enact laws on matters relating to marriage and divorce. It also directs the government to codify a uniform civil code as to bring uniformity in the personal laws. The customary Hindu rules were codified as to bring uniformity in Hindu law. Also, from time to time various measures have been adopted as to make the Hindu law neutral on the basis of sex and to get rid of the social evils existing in mask of law. It hurried the claim for a codification of uniform law and particularly for positive changes in the Muslim personal law.ii

Ours is a secular nation and does not have any religion of its own. Secularism is a basic feature of the Constitution of India. In India, different personal laws are prevailing and regulate the people belonging to different religions like Hindu, Muslim, Christian, Parsi for matters connected with marriage, divorce, etc. To some extent law provides legal sanction to customs concerned with the religion. These laws were set out in earlier times according to the needs of that time but in present times, these laws seem to be against the provisions of Part III of the Constitution of Indiaiii.

Majority of Islamic law is in the un-codified form. Islam is founded upon the revelations and therefore, it is a complete blend with the religion. Under the Muslim law, Talaq (divorce) has been expressly recognised from the very beginning as compared to other religions. Under Hindu law, divorce got recognition after the enactment of the Hindu Marriage Act, 1955. In Islam, the divorce is easy and of frequent use i.e; frequently pronounced by husband upon the wife. This tendency of frequent divorce was disliked by Prophet. To put restrain on the power to pronounce divorce, dower was introduced under Muslim law. Prophet Mohammad put restrain on power of divorce and gave Muslim women the right to obtain separation on reasonable grounds. Quran permitted divorce to enable men to get rid of an odious union.iv But the power to pronounce divorce has been used by men arbitrarily.
Meaning and Definition of Talaq:

Talaq originally means repudiation and under Muslim law it means immediate and eventual release from the marriage bond.\textsuperscript{v} Duhaime's Law Dictionary defines “talaq as \textit{the right given to a Muslim man to divorce his wife by mere unequivocal statement}”\textsuperscript{vi}.

Classification of Divorce:

Marriage can be dissolved in the following ways under the Muslim Law.

(a) In case of death of either spouse
(b) At the will of husband (without intervention of Court) or
(c) With mutual consent (“Khulla and Mubarat”) or
(d) Divorce by the decision of court under Dissolution of Muslim Marriages Act, 1939.

In Islam, death will put an end to marriage and after the death of wife a Muslim man can remarry immediately without any restriction, due to religious sanctions this privilege is not available to Muslim widow. She is required to undergo the Iddat period\textsuperscript{vii} in event of husband’s death i.e. for 4 months and 10 days and if she is expecting till the delivery of child. In respect to divorce the Muslim male has absolute power to pronounce divorce. His right to divorce the wife is much greater and can dissolve marriage at his will even in her absence. Wife can also dissolve the marriage i.e. by \textit{talaq-e-tafweez} which she has to purchase from her husband.

CAPACITY FOR TALAQ:

Under Shia Law:

To pronounce divorce a Muslim male should be competent to contract i.e. of “sound mind, has attained the age of puberty”\textsuperscript{viii} and in presence of at least two witnesses. Divorce given under compulsion, intoxication, is not valid according to Shia law.\textsuperscript{ix} A major and sound mind Muslim is allowed to divorce his wife not vice-versa. Apart from it the witnesses should be two male Muslim or one male and two females that connotes that two females have logic and common sense that of one man. One male Muslim is substituted by two females.

Under Sunni Law:

A Sunni Muslim male who is not of unsound mind and is not minor can pronounce separation to his wife. Divorce given under “compulsion, intoxication, fraud” etc. is fully effective under Sunni law and there is no need of any witnesses as under Shia law. Apart from it under the Muslim law the guardian of husband of unsound mind who has attained puberty can pronounce talaq on his behalf for his benefit.\textsuperscript{x}

Marz-ul-maut:

A Muslim male is allowed to divorce his wife on the death bed (\textit{marz-ul-maut}) in order to deprive wife of her right to inherit his property after his death. In case the husband pronounces the irrevocable divorce in death illness the wife will undergo Iddat period and if husband dies before the expiry of Iddat, wife will inherit his property and takes her share in his estate but if husband dies after the completion of Iddat, then the wife will not claim any share by way of inheritance. The marriage would automatically terminate when the iddat will come to an end.\textsuperscript{xi}

Here Muslim law defeats right of married woman to succeed the property of her husband and allows Muslim male to deprive her to succeed to his property as a legal heir. Under this law there is not only prejudice on foundation of sex or gender in matters relating to marriage, divorce, etc. rather the inheritance rights of Muslim married women are also defeated.

Different Modes of Talaq: There are different modes of talaq under the Muslim law. Majority of them are at the instance of husband, a few are at the request of wife, by mutual approval and the divorce by court.
(A) "At the instance of husband": Muslim law provides dominance of husband over wife in all the matters and it can be seen here in divorce too.

(i) Talaq-ul-Sunnat: Hanafis recognized the two forms of talaq—talaq-ul-sunnat and talaq-ul-biddat. "Talaq-ul-sunnat is a talaq according to rules laid down in Sunnat (traditions) of Prophet." It is further divided into two forms namely— "Ahsan". "Hasan".

The first one is regarded most proper and second one as proper. In Ahsan form of talaq the divorce must be pronounced in single sentence, in state of purity (tuhr), i.e., a period when a lady is free from her periodical cycle and coupled with sexual relations in the time of Iddat. If from the inception of marriage there is no sexual relations or the couple is living apart from each other for a long duration of time or wife is above the age of menstruation cycle, then, talaq may be pronounced during menstruation period of wife, the state of purity is not necessary. The basic advantage of this form of talaq is that it can be revoked before the completion of Iddat. It can prevent the divorce given in haste, carelessly, thoughtlessly, etc. Such revocation can be in express or implied form. The express words to revoke talaq can prevent the divorce or the cohabitation with wife impliedly prevents the divorce. But once this period expires the talaq will become irrevocable and parties are free to remarry. The second form i.e; Hasan talaq is not as worthy as Ahsan. The divorce or the cohabitation with wife impliedly prevents the divorce. But once this period expires the divorce becomes final and cannot be revoked.

(ii) Talaq-ul-biddat: This form of divorce has been declared as unconstitutional recently by the honourable Apex Court in "Shayara Bano v. Union of India and others". It is a historic judgement of the Supreme Court that has declared the unilateral divorce (talaq-e-biddat) as unconstitutional and evoked the rule of equality as enunciated in the Article 14 of Constitution and of Human Rights. The decision is taken after consulting the laws of certain Muslim countries where the practice of triple talaq has been abolished.

(iii) Ila: When the husband do not use express words to dissolve the marriage but by conduct or expression shows the intention for same, it will have the effect of repudiation of marriage. The husband on attaining majority and of sound mind swears to "God that he will not have sexual intercourse with wife and abstains from it during the Iddat period, divorce will become irrevocable and the marriage get dissolved on completion of Iddat. If the husband resumes cohabitation with wife within the Iddat period, ila does not take place".

(iv) Contingent divorce or Talaq-e-taliq: When the husband pronounces talaq which has to take effect on future event, it will be effective on happening of that event, it is known as Contingent divorce.

(B) At the instance of wife: There are some grounds recognised by Muslim law on which the wife can seek divorce from her husband and they are as under:-

(i) Talaq-e-tafweez: The husband can pass on the control to pronounce divorce to wife or third person either entirely or as an interim measure and either for a limited time or permanently. To whom the powers are given can give divorce. In this form of divorce female divorces herself on behalf of her male counterpart on basis of power delegated to her by her husband. Inspite the power to talaq has been delegated to wife, the husband is not deprived of his power to pronounce divorce. Again indirectly the Muslim law maintains the dominance of male over female.

(ii) Khula: Khula or redemption literally means to lay down or to put off. Legally it means "laying down by the husband of his right and authority over his wife for an exchange". Khula is atype of divorce under which female consents to give a consideration to her husband in lieu of divorce or her release from the marital tie. It is a divorce at the request of wife but with consent of Husband, if he agrees for the consideration only then she can obtain divorce not otherwise. It can also be called purchased divorce, the divorce which she has to buy from her husband by paying him something, i.e., consideration in return. It can be the release of the amount of dower that is mandatory for husband to pay her, or some property, or, any agreement for the benefit of husband. The husband is free to divorce wife anytime at his will but the wife has to purchase her freedom from him. If husband also wants to get out of the marital tie instead of mutual divorce he can claim financial benefit too from wife. It clearly violates equality clause.

(iii) Zihar: In this form of divorce husband shows her dissatisfaction with his wife and compares her to his mother or rest of females within the prohibited degree relationship. Here the wife can refuse to cohabit with him until he makes a penance. If husband do not perform penance, the wife will get
the right of divorce by the way of courts\textsuperscript{xx}. This form of divorce also got recognised under The Shariat Act, 1937 (Section-2).

(C) “Divorce by Mutual Consent” (Mubarat): Mubarat is a form of dissolution of marriage by mutual consent. This word mubaraa means act of freeing each other by mutual consent.\textsuperscript{xxi} As Mubarat involves an element of mutual consent and is therefore mutually releases the spouses from the marital duties and obligations.\textsuperscript{xxii} There is offer to dissolve the marriage from one side (husband or wife) and acceptance by the other. Once the offer is accepted Mubarat cannot be revoked and female has to undergo iddat after that.

(D) Judicial Divorce: Before the formation of Dissolution of Muslim Marriages Act, 1939 divorce to wife was granted only on the grounds mentioned below:-

(i) Lian: When the male falsely accuses his wife of adultery, then, the she can file a suit of divorce on this ground. Such charge made by husband must be false.

(ii) Apostasy: Earlier apostasy from Islam by either spouse immediately dissolved the marriage. It would \textit{ipso facto} dissolve the marriage. But after the enactment of “Dissolution of Muslim Marriages Act, 1939” apostasy from Islam by wife does not make the marriage ineffective itself, she has to file a suit under Section 2 of the Act. But husband’s conversion from Islam \textit{ipso facto} dissolves the marriage.

Termination through Faskh: As earlier there was no such judicial authority under Muslim law and the woman could approach the Qazi to dissolve the marriage. The Qazi after the careful examination of the matter could terminate the marriage, if required. Faskh means the cancellation. This doctrine of Faskh has been wrongly represented in many cases. Many of husbands had sued their wives under Section 494 of the Indian Penal Code, 1860.

Nine grounds of divorce are provided under “The Dissolution of Muslim Marriage Act, 1939\textsuperscript{xxiii}” to the Muslim wife.

“The Muslim Personal Law (Shariat) Application Act, 1937”:

This Act was enacted to make rules for the application of Muslim Personal Law (Shariat) to all Muslims. Section 2 of the Act provides that all matters related to “intestate succession, special property of females (personally inherited or obtained under contract or gift), marriage, divorce, maintenance, dower, gifts, guardianship, trust properties and wakf (not charitable and religious endowments)” shall be governed by the Muslim Personal Law (Shariat). According to Section 3 of the Act, any person who is Muslim, competent to contract according to Section 11 of the Indian Contract Act, 1872 and resident of India may make a declaration for the application of provisions of the Act upon him and all his minor children and their descendants.

“The Special Marriage Act, 1954”:

This is a secular Act. The Act allows inter-religious marriages and even the parties belonging to same religion can also solemnize their marriage under the Act. If either or both parties to marriage are Muslim who has solemnised their marriage under the Act can avail the benefits of the Act accordingly. For matters relating to succession of property the Indian Succession Act, 1925 will be applicable to them.

“The Muslim Women (Protection of Rights on Divorce) Act, 1986”:

This Act was made to dilute the secular decision of the Apex Court in “Mohammad Ahmed Khan v. Shah Bano Begum”\textsuperscript{xxiv} which provided right of maintenance to Muslim female even after the iddiat period. The judgement has been severely criticised by the Muslim community that it is in conflict with the rules of Quran and Islamic Laws. So the present Act was made to guard the civil rights of the divorced Muslim females which in fact does not protect women’s rights rather saves the men. The Act enables the husbands to escape from the liability to pay maintenance to divorced wives after the expiry of iddat period. The provisions of the Act arbitrarily help the Muslim men to evade their basic liability to provide maintenance to divorced wife.
“Danial Latifi v. Union of India” xxv the court adopted a middle path and opined that fair rules means that the provisions of maintenance should extend beyond the period of iddat. The controversy still remains as on one side the court has validated this Act and on another side gave the beneficial interpretation to the rules framed under the Act in the favour of women. Later on in the case of ShabanaBano v. Imran Khanxxxii held that divorced Muslim female can claim maintenance under section 125 of CRP till she remarry. Further in ShamimBano v. Asraf Khanxxxiii the court has explained the rules under the Act. The Court stated that “at the time of divorce a Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and therefore, it was held that the Act would mean that on or before the expiration of iddat period, the husband is bound to make and pay maintenance o the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and beyond it. It would extend to whole life of the divorced wife unless she gets married for a second time”. Also, it has been clearly said that even if the divorced woman files an application under the provisions of the Act, the parameters and the considerations while granting her maintenance under criminal law.

“The Muslim Women (Protection of Rights on Marriage) Act, 2019”:

(iii) Act declares talaq-ul-biddat as void and illegal.
(iv) Section 4 of the Act provides punishment to Muslim husband for pronouncing talaq-ul-biddat i.e., imprisonment “which may extend to three years and shall also be liable to fine”.
(v) This Act provides that provision for maintenance to wife and dependent children as decided by the Magistrate under section 5.
(vi) Section 6 of the Act provides provision for custody of minor children to Muslim woman in case husband pronounces talaq-ul-biddat.
(vii) Section 7 of the Act declares offence to be “cognizable and non-bailable”.
(viii) All offence has been made compoundable at the request of Muslim female upon whom divorce has been given and accused can be given bail only after considering the viewpoint of Muslim female.

As the “triple talaq” (talaq-ul-biddat) has been declared void and illegal, it will have no legal effect even if pronounced by the husband upon his wife. Legally it will not dissolve the marriage. Therefore, there is no need to make it a criminal offence.

Constitutional Provisions and Role of Judiciary:

The authority of male to give divorce to wife is much wider as compared to wife. She is left upon his mercy. If she pleases him, he will continue the marriage not otherwise. The rights of Muslim female in this era, is a highly controversial issue. In spite of equality mandate under Constitution but still so many discriminatory practices based on religion and conservative customs prevail in India with full force. The major part of Muslim law is in un-codified form and due to this women are in much disadvantaged position in various matters.

“Parts III, IV and IV-A of the Constitution of India” are separate units but some way these are closely inter-connected and lay down the common goals of justice, equality, fraternity, liberty and to maintain and protect the “dignity of the individual”, i.e., set out in the Preamble.xxviii The provisions contained in these three parts are the negative and positive obligations imposed upon the State. In the form of the negative obligations it restricts the State not to curtail the freedom of the individuals and in the form of the positive obligations motivates the State to take further initiatives for the welfare of the individuals or society as a whole. The fundamental rights and the directive principles of the state policy are equally important and complementary to each other. None is superior or inferior to other as all focus on the common goals.xxxix

Judiciary is also demanding uniform civil code as in many cases stress has been laid on it. For the first time the need for a uniform civil code had arisen in “Mohammad Ahmed Khan v. Shah Bano Begum”xxxi in which a Muslim female claimed maintenance from her husband under criminal law of 1973 after being given talaq by her husband. Justice Y. V. Chandrachud, the then Chief Justice of India said; “A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting
ideologies.” While pronouncing judgement in Sarla Mudgal v. Union of India, xxxi Justice Kuldip Singh said that Article 44 is based on a concept where the connection between the religious conviction and personal law is of no significance in civilized society. “……no community should oppose the introduction of uniform civil code for all the citizens in the territory of India. We, therefore, request the Government of India through the Prime Minister of our country to have a fresh look at Article 44 of the Constitution of India ……..”. Again in Lily Thomas v. Union of Indiaxxi and John Vallamattom v. Union of Indiaxxxii the court has expressed the need for uniform civil code.

Article 13 of the Constitution of India deals with the laws which are inconsistent with or against the fundamental rights enshrined in Part III of the Constitution. According to Article 13(1) any law which exists before the commencement of the Constitution, if they are against the constitution they should be declared as void. According to 13(2) Article the State is prohibited to enact any law in future that violates or takes away rights given in part III of the constitution. If any such law is enacted it shall be void to the extent of contravention. Article 13(1) deals with the pre-constitutional laws or existing laws and Article 13(2) deals with the post-constitutional laws or future laws.

The acts done before the commencement of the Constitution do not get affected being inconsistent with the fundamental rights because fundamental rights are enforced after the commencement of the Constitution. So, the provisions of the Article 13(1) shall not be applied retrospectivelyxxiv. The government cannot violate fundamental rights through any enactment or administrative action.

Conclusion:

Hence after the discussion of the above aspect, it can be concluded that-  

(ix) Talaq under the Muslim law whether in codified or un-codified form operates as law for Muslims in personal matters- marriage, divorce, inheritance, etc. The concept of talaq is violative of Article 14 (right to equality), Article 15 (freedom from discrimination on sex, religion, etc.) and Article 21 of the Constitution of India. As per provisions of Article 13, talaq is not in agreement with the fundamental rights given in Part III of the Constitution of India and therefore, null and void. The judiciary shall declare it void and a uniform civil code for all which should stand at par with equality.

(x) Recently in the Shayara Bano v. Union of India and othersxxv the Supreme Court of India has declared triple talaq as un-constitutional despite being opposed by the Muslim community. The one form of talaqi.e; talaq-ul-biddat (instant divorce) has been declared as void. The judiciary could declare the triple divorce as unconstitutional including talaq-ul-sunnat. The instant divorce has been declared as void but the talaq by the successive three pronouncements still exists which is violative of Articles 14, 15 and 21 of the Constitution of India.

(xi) Talaq under Muslim law violates Article 14 as Muslim community have different law to regulate their different matters concerning their personal. The citizens of a nation should be treated equally but different privileges or laws for people belonging to different communities are violative of the concept of equality.

(xii) Muslim law confers supreme powers to pronounce divorce to men which render the status of women inferior to men. Muslim male may pronounce divorce to his wife anytime at his will, without assigning any cause, without her consent, even in her absence. It clearly implies that the law of Muslim community not only violates the concept of equality but it is not even gender neutral in its own community. It is violative of Article 15.

(xiii) Talaq under Islamic law also violates Article 21 of the Constitution of India. The position of women under Muslim law is much inferior as compared to other personal laws. She has no equal rights. She has been treated like chattels. She has to obey the commands of her husband and if she will disobey him, she will not get maintenance. It violates her right to live with dignity in the society. Her inferior status does not enable her to live her life freely. She will always remain under the threat of divorce by her husband upon her.

(xiv) Under the Sunni law if a man is drunk and in such situation he pronounces divorce to his wife, the divorce is effective. In such situation a person is not in a capacity to judge between right or wrong. Talaq under such situation is completely unjust to woman.

(xv) The enactment of the uniform civil code by annuling the different personal laws is not a violation of Article 25 of the Constitution of India. The personal laws deal with the personal matters of
an individual. “Under Article 25, a person has freedom of conscience and freedom to profess, practise and propagate any religion”. But in no way it is necessary that the social life of a person is also covered under Article 25. If all persons are regulated by the single or uniform civil law, it does not create any obstacle in the way of a person to mould his relation with the God. Moreover, right to religious freedom is not absolute. “Under clause (2) (b) of Article 25, the state is empowered to make laws for social welfare and social reform and enable state to curb out the evils existing in the society in the name of religion”. For example the Sati system has been abolished by the enactment of the “Commission of Sati (Prevention) Act, 1987”. It was also based on the Hindu religious beliefs, but it was not considered as beneficial for the society by the State.

Thus, in the last but not the least, if we want to implement the Constitution in its true spirit, then the Judiciary and legislature have to take courageous decision, i.e., introduction of uniform civil code.

Bibliography


iii M. P. Jain, Indian Constitutional Law 867 (Lexis Nexis, Gurgaon, Haryana, 7th edn., 2016).

iv Id. at 166.

v Id. at 167.


vii Iddat is the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death of her husband to remain in seclusion and to abstain from marrying another man.

viii Puberty means the age at which a person becomes capable of performing sexual intercourse and procreating children. Puberty and majority is same and one thing under Muslim law.

ix Supra note 6.

x Ibid.

xi Id. at 169.

xii Paras Diwan, Muslim Law in Modern India 83-84 (Allahabad Law Agency, Faridabad, Haryana, 11th edn., 2015).


xiv Supra note 4 at 184.

xv Supra note 23 at 85.

xvi Supra note 15 at 403.

xvii Supra note 4 at 187.

xviii Moonshee-Buzlu-ul-Rahim v. Laleefutoonissa, 8 MIA 395.

xix Siddan v. FaizBaksh (1920) 1 Lah. 402.

xx Supra note 4 at 185.

xxi Supra note 23 at 94.


xxiii Absence of Husband, Failure to Maintain,Imprisonment of husband, Failure to perform marital obligations, Impotency of husband, Insanity, leprosy or venereal disease, Repudiation of marriage by wife, Cruelty of husband.

xxiv AIR 1985 SC 945.

xxv 2001 (7) SCC 740.

xxvi AIR 2010 SC 305.


xxx Supra note 45.

xxxi AIR 1995 SC 1531.

xxxii AIR 2000 SC 1650.

xxxiii AIR 2003 SC 2902.


xxxv Supra note 24.